

Part 170 of the Regulations of the Commissioner of the Department of Economic Development

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. 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.

(b) A taxpayer that is a qualified film production company or that is a sole proprietor of or a member of a partnership that is a qualified film production company and which is subject to tax under articles nine-A or twenty-two of this chapter shall be allowed a credit against such tax, pursuant to the provisions referenced in section 24(c) of the Tax Law, to be computed as hereinafter provided.

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 portion of principal and ongoing photography on a stage at a qualified film production facility on a set or sets.

(b) *Allocation year* means the particular tax year for which tax credits allocated pursuant to section 24(e) of the Tax Law, which year shall be determined based upon receipt of a complete final application.

(c) *Certificate of conditional eligibility* means a notification by the department to the authorized applicant indicating that the applicant appears to meet the criteria set forth in section 170.6(a) of this Part and is being considered for the Empire State film production tax credit, pending successful completion and approval of the final application. Such notification may include, but not be limited to, the following information: name and address of the authorized applicant, taxpayer identification number, a statement that the initial application meets the criteria for conditional eligibility under section 170.6(a)(1)-(12) of this Part and a disclaimer stating that actual receipt of the tax credit is subject to completion and approval of the final application.

(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, 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.

(e) *Complete application* means that all required information is provided in the form and manner prescribed 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 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. All activities and expenses related to marketing and distribution, including, but not limited to, the making of release prints, video dupes or other forms of copies, promotional images, and poster art are considered to occur after the production of a qualified film is completed.

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

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

(i) *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 either:

(1) 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; or

(2) for each qualified film distributed by DVD, or other media for the secondary market, a New York promotional video approved by the Governor's Office of Motion Picture and Television Development.

(j) *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.

(k) *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 (z) 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 Department.

(l) *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 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, the total number of shooting days in and outside of New York and any other information the department determines is necessary.

(m) *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 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.

(n) *Level one qualified production* means a qualified production that has a maximum production budget of \$15 million 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.

(o) *Level two qualified production* means a qualified production that has a production budget over \$15 million, 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.

(p) *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.

(q) *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.

(r) *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, negative cutting, soundtrack production, the addition of sound/visual effects, and dubbing. Advertising and marketing activities and expenses are not included in post-production.

(s) *Premature application* means an initial application in which the 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.

(t) *Principal and ongoing photography* means the filming of the major and significant portions of a qualified film that involves the principal actors/actresses.

(u) *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, producers, including, but not limited to, line producers, performers (other than background actors with no scripted lines) and qualified certified public accountants.

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.

(v) *Program* means the Empire State film production tax credit program.

(w) *Qualified certified public accountant* means a New York State certified public accountant approved by the department to conduct a third party verification.

(x) *Qualified film* means a feature-length film, television film, relocated television production, television pilot and/or each episode of a television series, regardless of the

medium by means of which the film, pilot or episode is created or conveyed. 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 (ac) 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, fund-raising 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. 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.

(y) *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.

(z) *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 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 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; 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.

(aa) *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 million; 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.

(ab) *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.

(ac) *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 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 million in annual production costs in the State, or at least \$10 million in capital expenditures at a qualified film production facility in the State.

(ad) *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.

(ae) *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.

(af) *Television pilot* means the initial episode produced for a proposed television series. This category will include shorter formats which are known as television presentation, a production of at least 15 minutes in length, produced for the purpose of selling a proposed television series, but not intended for broadcast.

(ag) *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).

(ah) *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. Such agreed upon procedures shall be posted online.

170.3 Eligibility.

For the purposes of this Part, only an authorized applicant shall be eligible to apply for the Empire State film production tax credit.

170.4 Application process.

(a) Initial application.

(1) An authorized applicant shall submit an initial application to the department prior to the start of principal photography.

(2) After submission of the initial application, the department may, in its sole discretion, require the authorized applicant to have an interview with the department to discuss the details of the initial application. A producer, the line producer or unit production manager, and production accountant or their designee, approved by the department, shall attend such meeting.

(3) The department shall review the initial application and determine whether the applicant meets the eligibility criteria set forth in section 170.6(a) of this Part.

(4) After review of the initial application, the department will notify the authorized applicant of its eligibility and may issue a certificate of conditional eligibility to the authorized applicant.

(b) Final application.

Upon receipt of the final application, the department may request additional documentation, including copies of receipts of qualified production costs, to help determine if the production is a qualified film and qualifies for the Empire State film production tax credit. The department shall approve or disapprove the final application based upon criteria set forth in section 170.6(b)(1)-(9) of this Part. If the final application is approved, the department shall issue a certificate of tax credit to the approved applicant. The department shall provide a copy of such certificate of tax credit to the Department of Taxation and Finance. If the final application is disapproved, the department shall provide the applicant with a notice of disapproval which shall state the

reasons therefor. Such disapproval shall be a rejection of the applicant's final application. A disapproved applicant may appeal such decision pursuant to section 170.8 of this Part or reapply pursuant to the provisions of this Part.

170.5 Allocation of Empire State film production tax credit.

The amount of the credits given for each calendar year shall be allocated in order of priority based upon receipt of a complete final application. In the event that an approved applicant's Empire State film production tax credit would exceed the maximum amount of credits allowed for that given year, the approved applicant's credit will be allocated on a priority basis in the immediately succeeding calendar year.

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 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 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) 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 million, 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.

(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 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 million, 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) of this Part have been met.

170.7 Third party verifications.

The department may accept from an applicant a third party verification as part of an applicant's final application. Submission of a third party verification shall be voluntary and shall be subject to review and approval by the department pursuant to section 170.6(b) of this Part. The voluntary submission of a third party verification by an approved applicant as part of its final application shall in no way or manner affect the review and approval by the department of a final application submitted by an approved applicant that elects not to submit a third party verification. Such final application shall be subject to review and approval by the department pursuant to section 170.6(b) of this Part.

170.8 Record retention.

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

170.9 Appeal process.

If the applicant's final application is disapproved by the department, or if the approved applicant disagrees with the amount of the tax credit granted by the department, the applicant shall have a right to appeal. In the case of an appeal from a disapproval of a final application, such appeal shall be made by sending a letter to the New York State

Department of Economic Development, Attn: Counsel's Office, 625 Broadway, 8th Floor, Albany, NY 12245, within 30 days from the date of the denial letter issued by the department. In the case of an appeal from a disagreement of the amount of the tax credit issued, such appeal shall be made by sending a letter to the same address as listed above within 30 days from the date of issuance of the certificate of tax credit. Failure to request an appeal within 30 days will be deemed a waiver of applicant's right to appeal.

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

170.10 Exchange of information with Department of Taxation and Finance.

Notwithstanding any provision of this chapter, employees and officers of the department and the Department of Taxation and Finance shall be allowed and are directed to share and exchange information regarding the credits applied for, allowed, or claimed pursuant to this Part and taxpayers who are applying for credits or who are claiming credits, including information contained in or derived from credit claim forms submitted to the department and applications for credit submitted to the department.

170.11 Quarterly report.

The department shall file a report on a quarterly basis with the director of the Division of the Budget and the chairmen of the Assembly Ways and Means Committee and Senate Finance Committee. The report shall be filed within 15 days after the close of the calendar quarter. The report must contain the following information for the calendar quarter:

- (a) the total dollar amount of certificates of tax credits issued during each month of the calendar quarter, broken down by month;
- (b) the number of film projects which have been issued certificates of tax credits of less than \$1 million per project and the total dollar amount of credits issued to those projects;
- (c) the number of film projects which have been issued certificates of tax credits of \$1 million or more but less than \$5 million per project and the total dollar amount of credits issued to those projects;
- (d) the number of film projects which have been issued certificates of tax credits of \$5 million or more per project and the total dollar amount of credits issued to those projects;

(e) a list of each film project which has been issued a certificate of tax credit and for each of those projects:

- (1) the number of employees associated with the project;
- (2) the qualified costs for the project;
- (3) the total expenditures on goods and services in New York State for the project;
- (4) the credit-eligible man hours for each project; and
- (5) the total wages for such credit-eligible man hours for each project;

(f)

(1) the name of each taxpayer issued a certificate of tax credit for each project and the county of residence or incorporation of such taxpayer; or if the taxpayer does not reside or is not incorporated in New York, then the state of residence or incorporation; provided, however, if the taxpayer claims a tax credit because the taxpayer is a member of a limited liability company, a partner in a partnership, or a shareholder in a subchapter S corporation, the name of each limited liability company, partnership, or subchapter S corporation earning any of those tax credits must be included in the report instead of information about the taxpayer claiming the tax credit;

(2) the amount of the tax credit issued to each taxpayer; provided, however, if the taxpayer claims a tax credit because the taxpayer is a member of a limited liability company, a partner in a partnership or a shareholder in a subchapter S corporation, the amount of tax credit earned by each entity must be included in the report instead of information about the taxpayer claiming the tax credit; and

(3) information identifying the project associated with each taxpayer for which a tax credit was claimed under section 24 or section 31, as added by chapter 57 of the Laws of 2010, of the Tax Law, including the name of the film and county in which the project is located.

170.12 Biennial report.

The department shall file a report on a biennial basis with the director of the Division of the Budget and the chairs of the Assembly Ways and Means Committee and Senate Finance Committee. The report shall be filed within 15 days after the close of the calendar year. The first report shall cover a two year period that begins on January 1, 2013. The report must be prepared by an independent third party auditor and include:

- (a) information regarding the Empire State film production credit and post production credit programs including the efficiency of operations, reliability of financial reporting, compliance with laws and regulations, and distribution of assets and funds;
- (b) an economic impact study prepared by an independent third party of the film credit programs; and
- (c) any other information and/or other statistical information that the commissioner deems to be useful in analyzing the effects of the program.