

CHAPTER XXI OF THE REGULATIONS OF THE COMMISSIONER OF ECONOMIC DEVELOPMENT IS HEREBY ADDED AS FOLLOWS:

Chapter XXI LIFE SCIENCES RESEARCH AND DEVELOPMENT TAX CREDIT PROGRAM

Part 260 Life Sciences Research and Development Tax Credit Program

§260.1 Purpose and general description.

(a) The purpose of these regulations is to set forth the administrative process governing the life sciences research and development tax credit program (the “Program”) and specifically to establish an application process, due dates for such applications, eligibility standards for qualified life sciences companies, standards for application evaluation and the documentation that will be provided to taxpayers to substantiate to the Department of Taxation and Finance the amount of credits allocated to such taxpayers. Chapter 59 of the Laws of 2017 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 tax credits under the Program.

§260.2 Definitions.

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

- (a) "Certificate of tax credit" means the document issued to a qualified life sciences company by the Department of Economic Development, after the Department of Economic Development has verified that such life sciences company has met all applicable criteria in this part to be eligible for the life sciences research and development tax credit, including but not limited to verifying that the life sciences company is a new business. The certificate shall be issued annually if such criteria are satisfied and shall specify the exact amount of the life sciences research and development tax credit that may be claimed by such qualified life sciences company, pursuant to section 43 of the Tax Law, and shall specify the taxable year in which such credit may be claimed and the allocation year from which such credit has been awarded.
- (b) "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.
- (c) "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.
- (d) "New business" means any business that qualifies as a new business under either paragraph (f) of subdivision one of section two hundred ten-B or paragraph ten of subsection one of section six hundred six of the Tax Law.

(e) "Qualified life sciences company" means a life sciences company, as defined in subdivision (c) of this section, that has been certified by the Department of Economic Development as a life sciences company and is a new business. Provided however, for purposes of the credit authorized under section 43 of the Tax Law, the Department of Economic Development shall not certify as a life sciences company any corporation, partnership, limited partnership, or other entity that has been within the immediately preceding sixty months a related person to an entity that is a life sciences company or an entity that is engaged in scientific research and development as defined in subdivision twenty-two of section three hundred fifty-two of the Economic Development Law.

(f) "Research and development expenditures" means qualified research expenses as defined in subsection (b) of section 41 of the internal revenue code, provided, however, that such qualified research expenses shall not include amounts under subparagraph (B) of paragraph 1 of subsection (b) of section 41 of the internal revenue code and as further described in paragraph 3 of subsection (b) of section 41 of the internal revenue code. If section 41 of the internal revenue code has expired, then the research and development expenses shall be calculated as if the federal research and development credit structure and definition in effect in section 41 in federal tax year two thousand nine were still in effect. Section 41 of title 26 of the 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.

(g) "Related person" means a related person as defined in subparagraph (c) of paragraph three of subsection (b) of section 465 of the internal revenue code. For this purpose, a "related

person" shall include an entity that would have qualified as a "related person" if it had not been dissolved, liquidated, merged with another entity or otherwise ceased to exist or operate. Section 465 of title 26 of the 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.

§ 260.3 Eligibility criteria.

- (a) To be eligible for this program, an applicant must be: (1) a qualified life sciences company as defined in section 260.2(e) of this Part; and (2) a new business as defined in section 260.2(d) of this Part.
- (b) An applicant must be in substantial compliance with all worker protection and environmental laws and regulations.
- (c) An applicant 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.

§ 260.4 Application process.

- (a) An applicant must submit a complete application as prescribed by the Commissioner.
- (b) The Commissioner, upon receipt of a complete application from an applicant, shall determine whether the applicant meets the eligibility criteria set forth in section 260.3 of this Part based upon the application review procedure set forth in section 260.5 of this Part. An applicant

that does not meet the eligibility criteria set forth in section 260.3 shall not be accepted into the Program.

(c) Having determined that an application is complete and that the applicant meets the eligibility criteria set forth in section 260.3 of this Part, the Department shall admit the applicant to the Program and issue a certificate of tax credit as defined in subdivision (a) of section 260.2 of this Part in an amount as determined based upon the review and calculation of the credit set forth in section 260.5 and 260.6 of this Part.

#### § 260.5 Application Review.

(a) A life sciences research and development company must submit evidence that it meets the eligibility requirements stated herein and has made research and development expenditures in New York in order to receive benefits under the program.

(b) The Department of Economic Development may require evidence that includes, but is not necessarily limited to, the articles of incorporation of the company, relevant tax returns, financial statements, job descriptions and salaries of employees, quarterly combined withholding, wage reporting, and unemployment insurance returns filed with the NYS Department of Taxation and Finance, and any other information the Commissioner deems necessary to determine eligibility of the company.

(c) If a life sciences research and development company fails to demonstrate that it has satisfied the eligibility requirements set forth in section 260.3 of this Part, the Department of Economic Development shall deny its application by issuing a Notice of Denial stating the reasons therefor

and not issue such life sciences research and development company a certificate of tax credit. Such company may appeal this denial pursuant to section 260.11 of this Part.

(d) 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 the tax credit that a life sciences research and development company may claim and shall specify the allocation year and taxable year in which such credit may be claimed. If the life sciences research and development company 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 and allocation year indicated on the certificate issued to the life sciences research and development company. In order to receive a certificate of tax credit for subsequent taxable years, the life sciences research and development company must reapply to the program and meet the eligibility criteria set forth in this Part.

#### § 260.6 Calculation of the tax credit

(a) A taxpayer that is a qualified life sciences company, or that is a sole proprietor of or a partner in a partnership that is a qualified life sciences company or a shareholder of a New York S corporation that is a qualified life sciences company, and is subject to tax under article nine-A or twenty-two of the Tax Law shall be allowed a credit against such tax, pursuant to the provisions referred to in subdivision 52 of section 210-B and subsection (hhh) of section 606 of the Tax Law, for a period of three years, as provided in subparagraph (ii) of paragraph two

of subsection (a) of section 43 of the Tax Law, to be computed as provided in this section, provided that no credit shall be allowed for taxable years beginning on or after January first, two thousand twenty-eight. Such credit may be claimed in the taxable year that corresponds to the allocation year specified on the certificate of tax credit issued to the qualified life sciences company.

(b)(1) For a qualified life sciences company that employs ten or more persons during the taxable year, the amount of the credit shall be equal to fifteen (15%) percent of such qualified life sciences company's research and development expenditures in this state for the taxable year. For a qualified life sciences company that employs less than ten persons during the taxable year, the amount of the credit shall be equal to twenty (20%) percent of such qualified life sciences company's research and development expenditures in this state for the taxable year.

(2) The credit shall be allowed only with respect to the first taxable year during which the criteria set forth in subdivision (a) of section 43 of the Tax Law are satisfied, and with respect to each of the two taxable years next following (but only, with respect to each of such years, if such criteria are satisfied). Subsequent certifications of the life sciences company by the Department of Economic Development pursuant to this section shall not extend the three taxable year time limitation on the allowance of the credit set forth in the preceding sentence.

(c) For purposes of the credit allowed under this section, the number of persons employed by a qualified life sciences company during the taxable year shall be determined by ascertaining the number of such individuals employed full-time by such company, excluding general executive officers, on the thirty-first day of March, the thirtieth day of June, the thirtieth day of September and the thirty-first day of December during each taxable year, by adding together

the number of such individuals ascertained on each of such dates and dividing the sum so obtained by the number of such dates occurring within such taxable year. An individual employed full-time means an employee in a job consisting of at least thirty-five hours per week, or two or more employees who are in jobs that together constitute the equivalent of a job of at least thirty-five hours per week (full-time equivalent).

(d) The total amount of credit allowable to a qualified life sciences company, or, if the life sciences company is properly included or required to be included in a combined report, to the combined group, taken in the aggregate, shall not exceed five hundred thousand dollars in any taxable year. If the life sciences company is a partner in a partnership or shareholder of a New York S corporation, then the total amount of credit allowable shall be applied at the entity level, so that the total amount of credit allowable to all the partners or shareholders of each such entity, taken in the aggregate, does not exceed five hundred thousand dollars in any taxable year.

(e) No research and development expenditures made by the life sciences company and used either as the basis for the allowance of the credit provided for pursuant to section 43 of the Tax Law or used in the calculation of the credit provided pursuant to section 43 of the Tax Law shall be used to claim any other credit allowed pursuant to the Tax Law or be used in the calculation of any other credit allowed pursuant to the Tax Law.

#### §260.7 Maximum amount of credits

(a) Maximum amount of credits. The aggregate amount of tax credits allowed under section 43 of the Tax Law to taxpayers subject to tax under articles nine-A and twenty-two of the Tax



Law in any taxable year shall be ten million dollars, and shall be allotted from the funds available for tax credits under article seventeen of the Economic Development Law.

#### §260.8 Allocation of the credit

(a) The aggregate amount of credits shall be allocated by the Department of Economic Development among taxpayers in order of priority based upon the date of filing a complete application for allocation of life sciences research and development tax credit with such Department. If the total amount of allocated credits applied for in any particular year exceeds the aggregate amount of tax credits allowed for such year under this section, such excess shall be treated as having been applied for on the first day of the subsequent year. In such instances, the credit may not be claimed until the return is filed for the taxpayer's tax year that begins in the same year from which the credit allocation was issued.

#### §260.9 Refundability of credits.

(a) The tax credit established in this Part shall be refundable as provided in Article nine-A or 22 of the Tax Law. If a life sciences research and development company fails to satisfy the eligibility criteria it will lose the ability to claim credit for that year.

#### § 260.10 Record retention.

(a) Each life sciences research and development company 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 life sciences research and development company.

#### §260.11 Appeal Process

(a) This section shall apply to all appeals taken as a result of a life sciences research and development company's application being denied by the Department pursuant to section 260.5(c) of this Title.

(b) A life sciences research and development company that received a denial of their application pursuant to section 260.5(c) of this Title may send a written notice ("Notice of Appeal") to the Commissioner appealing the denial by no later than thirty (30) days from the date of the mailing of the Notice. Failure by a company to appeal the Commissioner's denial of certification within the aforementioned thirty (30) day period will be deemed a waiver of the life sciences research and development company's right to an appeal.

(c) 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 life sciences research and development company's challenge to the denial.

(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 life sciences research and development company, or to the attorney representing the life sciences research and development company.

(e) The Commissioner may designate any impartial person or persons to act as an appeal officer. 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 life sciences research and development company 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 life sciences research and development company or counsel to the Department, both parties shall receive copies of all submissions. Nothing herein shall preclude the appeal officer from obtaining information from any outside source, as he or she deems appropriate. 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.

(f) 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.

(g) After receipt of the appeal officer's report, the Commissioner will issue a final determination within sixty (60) days and serve a copy on the life sciences research and development company or its representative. If the Commissioner issues a final determination that includes findings of fact or conclusions of law that conflict with the recommendations of the appeal officer, the determination shall set forth the reasons therefore.

§260.12 Information sharing.

Notwithstanding any provision of the Tax Law, (i) employees and officers of the Department of Economic Development 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 section 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 certification submitted to the Department of Economic Development, and (ii) the Commissioner of the Department of Taxation and Finance and the Commissioner of the Department of Economic Development may release the names and addresses of any taxpayer claiming the credit allowed under this section and the amount of the credit earned by the taxpayer. Provided, however, if a taxpayer claims such credit because it is a member of a limited liability company or a partner in a partnership, only the amount of credit earned by the entity and not the amount of credit claimed by the taxpayer may be released.