

Part 270. New York City Musical and Theatrical Production Tax Credit Program

§ 270.1 Purpose and general description

The purpose of these regulations is to set forth the application process by which a qualified musical and theatrical production company may apply for benefits under the New York City Musical and Theatrical Production Tax Credit Program established by Chapter 59 of the Laws of 2021. These regulations include provisions describing the application process, the timing of such applications, the standards that will be used to evaluate the applications, the documentation that will be provided by applicants to substantiate the amount of qualified production expenditures of such applicants, and such other provisions as deemed necessary and appropriate. The New York State Department of Economic Development shall administer the program.

§ 270.2 Definitions

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

(a) *Applicant* means a taxpayer that is a qualified New York City musical and theatrical production company that is engaged in the production of a qualified musical and theatrical production. For the purposes of this definition, only one qualified New York City musical and theatrical company may receive this credit per production.

(b) *Certificate of conditional eligibility* means a notification by the Department to the applicant indicating that the applicant appears to be a qualified New York City musical and theatrical production company scheduled to produce a qualified musical and theatrical production. Such notification may include, but need not be limited to, the following information: name and address of the applicant, taxpayer identification number, a statement that the applicant appears to be scheduled to produce a qualified musical and theatrical production, and a disclaimer stating that actual receipt of the tax credit is subject to completion and approval of the final application and the availability of state funds.

(c) *Certificate of tax credit* means a certificate issued by the Department which states the amount of the New York City Musical and Theatrical Production Tax

Credit that the applicant has qualified for based on the Department's analysis under section 24-c of the Tax Law and the provisions of this Part. Such certificate shall include, but need not be limited to, the following information: name and address of the applicant, name of the qualified musical or theatrical production to which the credit applies, the amount of the tax credit to be received by the applicant, the allocation year of the tax 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 and the availability of state funds.

(d) *Commissioner* means the Commissioner or Acting Commissioner of the New York State Department of Economic Development.

(e) *Completeness of the application* means that all questions on the application were fully addressed by the applicant and that any additional substantiating documents that were requested by the Department were provided.

(f) *Credit period of a qualified New York city musical and theatrical production company* is the period starting on the production start date and ending on: 1) the date the production has expended sufficient qualified production expenditures to reach its credit cap; 2) [March 31] September 30, 2023; or 3) the date the qualified musical and theatrical production closes, whichever comes first.

(g) *Date the qualified musical and theatrical production closes* is the date after the production's final public performance on which the move of all physical production assets (i.e. sets, costumes, lighting and audio equipment) from the qualified New York City production facility to their subsequent facilities (such as lessor vendor facilities and storage facilities) is complete.

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

(i) *Diversity and arts job training program plan* means a description of the programmatic, operational and/or financial ways applicants will participate in New York State diversity and arts job training programs in the theater industry. A list of options, as well as criteria for additional opportunities to satisfy this requirement, shall be outlined in the initial application and its instructions.

(j) *Final application* means a document created by the Department and submitted by an applicant which contains information concerning actual production expenditures regarding a New York City qualified musical or theatrical production that could make it eligible for the New York City Musical and Theatrical

Production Tax Credit under the provisions of this Part. Such application shall include but need not be limited to: actual data with regard to the qualified musical or theatrical production's total production budget, its production schedule and any other information the Department determines is necessary.

(k) *First performance* means the first public performance of a qualified musical and theatrical production after April 19, 2021 at which tickets are available to the public for purchase, including a preview or opening performance but not a dress rehearsal.

(l) *Initial application* means a document created by the Department which an applicant must complete in order to prove its eligibility for the program and contains information concerning estimated production expenditures regarding a New York City qualified musical or theatrical production. Such application shall include, but need not be limited to: the qualified musical or theatrical production's total production budget, schedule and their diversity and arts job training program plan, their public access and availability plan, and their New York State Council on the Arts contribution attestation and any other information the Department determines is necessary.

(m) *Net operating profits* shall be defined, for the purposes of section 270.3(3), as all ongoing revenue minus all ongoing production costs including marketing and advertising costs and shall be calculated on a quarterly basis.

(n) *New York State Council on the Arts contribution attestation* is a document an applicant shall complete as part of their initial application affirming they shall make the necessary contributions required under paragraph (3) of subdivision (g) of section 24-c of the tax law.

(o) *Ongoing production costs* shall be defined, for the purposes of section 270.3(3) as weekly operating expenses associated with the production after the end of the credit period, not including marketing and advertising as reflected on a quarterly basis.

(p) *Ongoing revenue prospectively after the end of the credit period* shall be defined, for the purposes of section 270.3(3), as all gross weekly box office revenues after the end of the credit period as reflected on a quarterly basis.

(q) *Production start date* is the date that is up to twelve (12) weeks prior to the first performance of the qualified musical and theatrical production.

(r) *Program* means the New York City Musical and Theatrical Production Tax Credit Program.

(s) *Public access and availability plan* means a plan as part of the applicant's initial application for how the production will be available for low or no-cost to low income New Yorkers. The Department in its initial application and instructions shall outline criteria and minimum standards for this plan.

(t) *Qualified musical and theatrical production* means a for-profit, live, scripted, dramatic performance by one or more performers of a narrative presentation with or without musical performances and/or accompaniment that, in its original or adaptive version, is performed in a qualified New York City production facility. A qualified musical and theatrical production shall not include ballet, opera, musical solo, group, band, or orchestra performance; solo, duo or several performers' standup comedy performance. For the purposes of this Program, the Department shall make final determinations on which productions meet these criteria.

Whether or not such production was first performed in a qualified New York City production facility prior to the state disaster emergency pursuant to executive order 202 of 2020 as amended, it shall still be treated as a qualified musical and theatrical production.

(u) *Qualified New York City musical and theatrical production company* is a corporation, partnership, limited partnership, or other entity or individual which or who is principally engaged in the production of a qualified musical or theatrical production that is to be performed in a qualified New York city production facility.

(v) *Qualified production expenditure* means any costs paid by the applicant for tangible property used and services performed directly and predominantly in the production of a qualified musical and theatrical production within the state including:

- (1) expenditures for design, construction and operation, including sets, special and visual effects, costumes, wardrobes, make-up, accessories and costs associated with sound, lighting, and staging;
- (2) all salaries, wages, fees, [per diems,] payroll tax expenditures, fees for workers' compensation insurance, and other compensation including related benefits for

services performed of which the total allowable expense shall not exceed \$200,000 per week;

(3) technical and crew production costs, such as expenditures for qualified production facilities, or any part thereof, props, make-up, wardrobe, costumes, equipment used for special and visual effects, sound recording, set construction, and lighting; and

(4) up to 50% of marketing and advertising costs as calculated on a monthly basis.

For the purposes of this definition, expenses may only be counted once on a single qualified production.

(w) *Qualified New York City production facility* means a facility located within the city of New York (i) in which live theatrical productions are or are intended to be primarily presented, (ii) that contains at least one stage with a seating capacity of five hundred or more seats, and dressing rooms, storage areas, and other ancillary amenities necessary for the qualified musical and theatrical production, and (iii) for which receipts attributable to ticket sales constitute seventy-five percent or more of gross receipts of the facility.

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

(y) *Third party verification* means an evaluation conducted by a qualified certified public accountant of an applicant's application using agreed upon procedures as prescribed by the Department to verify that all criteria pursuant to section 270.5 of this Part have been met. Such agreed upon procedures shall be posted online.

§ 270.3 Eligibility requirements

An applicant whose qualified musical and theatrical production is held in a qualified New York city production facility and applies to receive a credit under this section shall be required to complete an initial application, which shall include:

(1) an attestation that they will participate in a New York State diversity and arts job training program and complete a diversity and arts training program plan outlining their proposed methods of execution of such plan;

(2) an attestation that they will ensure that their production is available and accessible for low-or no-cost to low income New Yorkers and outline their proposed methods of doing so in a public accessibility and availability plan; and

(3) an attestation that they intend to comply with the legal requirement to contribute to the New York State council on the arts cultural program fund an amount up to fifty percent of the total credits received if its production earns ongoing revenue prospectively after the end of the credit period that is at least equal to two hundred percent of its ongoing production costs, with such amount payable from twenty-five percent of net operating profits, such amounts payable on a monthly basis, up until such fifty percent of the total credit amount is reached.

(4) In addition, an applicant who has filed an initial application for this program shall be required to file a final application within ninety (90) days of the end of the Credit Period of a qualified New York city musical and theatrical production company to claim the tax credit. As part of their final application, applicants shall submit proof of the execution of their plans listed in paragraphs 1-2 above. In order to receive the tax credit under this Part, an applicant must actually carry out and implement all of the requirements they have attested to pursuant to paragraphs 1-3 above.

For the purposes of this Part, an applicant who: 1) meets the requirements as set forth in this Part; 2) completes both an initial and final application as required in section 270.4 of this part; and 3) meets the evaluation requirements of section 270.5 of this Part shall be eligible to receive the New York City Musical and Theatrical Production Tax Credit.

§ 270.4 Application Process

(a) Initial application. (1) An applicant shall submit an initial application to the Department prior to the scheduled first performance of the production for which it seeks a tax credit under this article. The purpose of the initial application is to notify the Department of its intent to produce a qualified New York City musical and theatrical production in a qualified New York City production facility and to submit a final application for the New York City Musical and Theatrical Production Tax Credit Program.

(2) The Department shall evaluate the initial application based upon the completeness of the application and whether it complies with section 270.3 herein and is submitted in accordance with paragraph one of this subdivision.

(3) After review of the initial application, the Department shall notify the applicant of its eligibility and, if deemed eligible, shall issue a certificate of conditional eligibility to the applicant.

(4) In no event may a qualified New York City musical and theatrical production submit an initial application for this program after [December 31, 2022] June 30, 2023.

(b) Final application. (1) An applicant shall submit a final application to the Department within ninety (90) days of the end of the Credit Period of a qualified New York city musical and theatrical production company.

(2) Upon receipt of a final application, the Department may request additional documentation, including copies of receipts of qualified musical and theatrical production expenditures, to determine if the production qualifies for the New York City musical and theatrical production tax credit. The Department shall approve or disapprove the final application based upon criteria set forth in section 270.5 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 270.9 of this Part or reapply pursuant to the provisions of this Part.

§ 270.5 Criteria for evaluation of final applications

A final application shall not be approved by the Department unless the Department determines, in its discretion, that the following criteria are met:

(a) the application is complete;

- (b) the applicant did not knowingly provide false or misleading information to the Department;
- (c) the applicant produced a qualified New York City musical and theatrical production that was performed in a qualified New York city production facility;
- (d) the applicant [met] has provided evidence that they have implemented the specific requirements attested to [of] in section 270.3 herein in a form and manner as prescribed by the department.

§ 270.6 Allocation of New York City Musical and Theatrical Production Tax Credit

(a) Amount of credit

The amount of the credit shall be the product (or pro rata share of the product, in the case of a member of a partnership) of 25 percent and the sum of the qualified production expenditures paid for during the qualified New York city musical and theatrical production's credit period. The amount of the credit shall not exceed \$3 million dollars per qualified New York city musical and theatrical production for productions whose first performance is [during the first year in which applications are accepted] prior to January 1, 2023.

For productions who first performance is [during the second year in which applications are accepted] on or after January 1, 2023, such per production cap shall decrease to \$1.5 million per qualified New York city musical and theatrical production unless the Department, in consultation with the Division of the Budget, determines that the New York City tourism economy has not sufficiently recovered based on analysis of key New York city economic indicators which shall include, but not be limited to, hotel occupancy rates, leisure and hospitality job rates, Metropolitan Transit Authority travel data, aviation data and other economic and travel metrics. Such analysis shall be informed by the status of any COVID-19 regulations affecting New York city musical and theatrical productions.

In no event may a New York city musical and theatrical production be eligible for more than one credit under this program. In no event may expenses claimed under this credit program also be claimed under the musical and theatrical production tax credit program pursuant to section 24-a of the tax law.

(b) Maximum amount of tax credits

The aggregate amount of tax credits allowed under this Program shall be [one hundred (\$100)] two hundred (\$200) million dollars. Such aggregate amount of credits shall be allocated by the Department among taxpayers based on the date of first performance of the qualified New York city musical and theatrical production.

The credit shall be allowed for the taxable year beginning on or after January 1, 2021 but before January 1, 2024.

§ 270.7 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. The voluntary submission of a third party verification by an 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 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 270.4(b)(2) of this Part.

§ 270.8 Record retention/cultural fund reporting

(a) All applicants must maintain records, in paper or electronic form, of any qualified musical and theatrical production costs used to calculate their potential or actual benefit(s) under the program for a minimum of three years from the date the applicant claims a New York city musical and theatrical production tax credit. The Department shall have access to the records during normal business hours at an office of the applicant within the State or, if no such office is available, at a mutually agreeable and reasonable venue within the State, for the term specified above for the purposes of inspection, auditing and copying.

(b) With respect to the contribution requirement set forth in section 270.3(3) herein, an applicant that claims and receives a tax credit under this program shall complete its contributions no later than Dec 31, 2025 and shall submit an annual report to the Department detailing their contributions, as applicable, to the New York state council on the arts cultural program fund. Such requirement shall expire on the earlier of: 1) December 31, 2025; or 2) upon repayment of 50% of the total

credit received by the applicant; provided, however, if a production closes and the applicant demonstrates that the production is not subject to the requirements of section 270.3(3) of this part, then the applicant no longer needs to submit an annual report.

§ 270.9 Appeal process

(a) If an applicant's final application is disapproved by the Department, or if an applicant disagrees with the amount of a New York city musical and theatrical production 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 shall be deemed a waiver of an applicant's right to appeal.

(b) Upon receipt of a timely letter of appeal, an independent hearing officer will be appointed by the commissioner to handle the appeal.

(c) An appeal may be conducted via written submission, or, with the approval of both parties, via administrative hearing.

(d) The independent hearing officer shall render a recommended order on the appeal to the commissioner within 60 days of the conclusion of a hearing or receipt of the written submission of both parties. The commissioner or his or her designee shall issue a final order within 60 days of receipt of the report of the independent hearing officer. 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.

§ 270.10 Exchange of Information with Department of Taxation and Finance

(a) 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 under the program, as well as information regarding 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 of Taxation and Finance and applications for certification submitted to the Department.

(b) The commissioner and the commissioner of the Department of Taxation and Finance may release the names and addresses of any taxpayer claiming a credit under the program and the amount of the credit issued to the taxpayer. Provided, however, if a taxpayer claims this 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.