

CHAPTER XIX OF THE REGULATIONS OF THE COMMISSIONER OF ECONOMIC DEVELOPMENT IS HEREBY AMENDED AS FOLLOWS:

Chapter XIX EXCELSIOR JOBS PROGRAM

§ 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, 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 may be issued 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) “Commissioner” means Commissioner of the Department of Economic Development.

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

(k) “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 one hundred six of the laws of two thousand nineteen” 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.

(l) "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.

(m) "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.

(n) "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.

(o) "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.

(p) "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 one hundred six of the laws of two thousand nineteen. "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 sixty-six-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 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.

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

(r) "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.

(s) "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) four thousand 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) five hundred 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

(t) "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 twenty-nine thousand-and-ten.

(u) "Life sciences" means agricultural biotechnology, biogenerics, 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.

(v) "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.

(w) "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.

(x) "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.

(y) "Net new jobs" means jobs created in this state that: (1) are new to the state, (2) 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, (3) are either full-time wage-paying jobs or equivalent to a full-time wage-paying job requiring at least thirty-five hours per week, (4) are filled for more than six months and (5) 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 a 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.

(z) "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.

(aa) "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.

(ab) "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 ten 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.

(ac) "Program" means the Excelsior Jobs Program.

(ad) "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.

(ae) "Regionally significant project" means (1) a manufacturer creating at least ten net new jobs in the state and making a significant capital investment in the state; (2) a business creating at least ten 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 one hundred net new jobs in the state and making a significant capital investment in the state; (4) a distribution center creating at least one hundred net new jobs in the state and making a significant capital investment in the state; (5) a scientific research and development firm creating at least ten net new jobs in the state and making a significant capital investment in the

state; (6) an entertainment company creating or obtaining at least two hundred net new jobs in the state and making significant capital investment in the state; (7) a life sciences company creating at least twenty net new jobs in the state and making significant capital investment in the state. Other businesses creating one hundred fifty 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.

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

(ag) "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.

(ah) "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 two thousand nine were still in effect.

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

(aj) "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 one hundred sixty-seven of the internal revenue code, have a useful life of four years or more, are acquired by purchase as defined in section one hundred seventy-nine (d) of the internal revenue code, and that is equal to or exceeds (a) one million dollars for a manufacturer; (b) two hundred fifty thousand dollars for an agriculture business; (c) three million dollars for a financial services firm or back office operation; (d) fifteen million dollars for a distribution center; (e) three million dollars for a scientific research and development firm; or (f) three million dollars for other businesses.

(ak) "Software development" means the creation of coded computer instructions or production or post production of video games, as defined in subdivision one-a of section six hundred eleven of the general business law, other than those embedded and used exclusively in

advertising, promotional websites or microsites, and also includes new media.

(al) “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.

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.

(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, 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 10 years of eligibility. 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.

§ 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;
- (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; or
- (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 above.

(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 twenty-five 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 t w e n t y - f i v e net new jobs or a business entity operating predominantly as a distribution center in the state must create at least fifty net new jobs; a business entity operating predominantly as an entertainment company must create or

obtain at least one hundred 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.

(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 twenty-five 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 ten 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 regulation. A business entity certified as a regionally significant project must demonstrate that it is a regionally significant project as defined in section 190.2(ae) of this regulation and satisfies the job and investment requirements therein.

§ 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(ai) 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.

§ 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) 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 and form the basis for the tax credit components.

(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 job creation projections in the preliminary schedule of benefits, the commissioner shall reduce the tax credits 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, 10 full-time job equivalents or fails to demonstrate that it has a benefit-cost ratio of at least 10 to 1, 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.

§ 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, the amount of such credit per job shall be equal to the product of the gross wages paid and up to 7.5 percent.

(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. 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 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, 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.

(e) Excelsior Real Property Tax Credit Component.

(1) A participant in the program who either qualified as a regionally significant project 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.

§ 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.

§ 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) 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.

§ 195.1 Removal from program.

(a) The commissioner shall 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.

(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.

§ 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 factfinding 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.

§ 196.6 Appeal decision.

(a) After receipt of the appeal officer's report, the commissioner will issue a final determination and serve a copy on the participant 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 therefor.