

PART 170

EMPIRE STATE FILM PRODUCTION TAX CREDIT
PROGRAM

Section 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, chapter 59 of the laws of 2013 and 2014 and as amended by chapters 60 and 420 of the laws of 2016, chapter 59 of the laws of 2017, chapters 39 and 59 of the laws of 2019 and chapter 59 of the laws of 2021-202[3]5. 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 a qualified independent film production company 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]9-A or [twenty-two]22 of [this chapter]the Tax Law 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 or qualified independent film production company that is scheduled to begin principal and ongoing photography within 180 days on a qualified film after submitting a complete initial application to the department and intends to shoot a minimum of one day of principal and ongoing photography on a stage at a qualified film production facility on a set or sets. For the purposes of this definition a day of shooting principal photography shall mean a minimum of eight hours from first

unit crew call to wrap during which time the director, first unit crew and principal performer(s) are engaged in the production of principal photography on a stage on a set or sets built specifically for the production. A level two applicant must shoot 10 percent of all principal photography days at a qualified film production facility on a set or sets built specifically for the production as outlined above.

(b) Allocation year means the particular tax year for which tax credits are allocated pursuant to section 24(e) of the Tax Law, which year shall be determined by the amount of funds available as of the date of issuance of the tax credit certificate.

(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 [f]Film [p]Production [t]Tax [c]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)(1-1[2]3) 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 [f]Film [p]Production [t]Tax [c]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, for applicants who applied to the program prior to April 1, 2023, 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. Note that for applicants who applied to the program after April 1, 2023 such certificate shall contain, in addition to the parameters listed above, a disclaimer stating that the tax credit shall not be claimed before the later of the taxable year the production of the qualified film is complete or the taxable year that includes the last day of the allocation year for which the film has been allocated credit by the department.

(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 DCP or other final locked form of the qualified film is ready for delivery to the primary venue. An applicant may qualify deliverables for up to two primary venues. All expenses related to any additional venue deliverables, archiving, publicity, marketing and distribution, including, but not limited to, the making of copies and promotional materials are considered to occur after the production of a qualified film is completed and therefore are not qualified costs. The department may deem a qualified independent film production complete if such production has completed principal and ongoing photography but elects to submit its final application prior to completion of post-production, forgoing any qualified post-production costs incurred after the last day of principal photography.

(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) Digital Cinema Package (DCP) means a collection of digital files used to store and convey digital cinema (DC) audio, image, and data streams.

(j) Diversity impact data means information submitted by an authorized applicant that describes the gender and race/ethnicity of all individuals working on a production seeking the tax credit under this Part. In order for the department to aggregate the data, this includes the legal gender of all individuals and, to the extent disclosed, the race/ethnicity/gender identity of all individuals. This shall include information on the diverse business ownership of vendors working on a production, to the extent the information is known and verifiable to the production, in addition to job creation numbers for production and post- production staff and crew at entry, middle and management level positions; and talent positions (cast and extras). Productions may utilize self-reporting and identification by the individual members of the production workforce and vendors, employment, payroll, and human resources data, and other sources in order to collect and aggregate this information.

(k) Diversity plan means that information contained in the initial application's project summary and supporting documentation as necessary which includes, but is not limited to:

(1) an authorized applicant's specific goals for hiring a diverse workforce on a production such as numerical goals for each category of employment identified by the State, or a detailed narrative explaining the actions the authorized applicant intends to take in order to achieve its specific goals for hiring a diverse workforce on a production that applies for the tax credit under this Part;

(2) whether and how such authorized applicant intends to participate

in training, education, and recruitment programs that are designed to promote and encourage the training and hiring in the film and television industry of New York residents who represent the diversity of the State's population; and

(3) an authorized applicant's plan for hiring vendors with diverse ownership. [The diversity plan shall detail the manner in which the applicant proposes to achieve its goals to ensure employment of a diverse workforce on the production.]

(1) Diversity report means written information provided in the final production summary, reports and supporting documentation that includes, but is not limited to:

(1) diversity impact data;

(2) illustrates how the authorized applicant has met or made good faith efforts to meet the specific goals for hiring a diverse workforce outlined in their diversity plan;

(3) whether and how the authorized applicant has participated in or intends to participate in training, education, and recruitment programs that are designed to promote and encourage the training and hiring in the film and television industry of New York residents who represent the diversity of the State's population; and

(4) how the authorized applicant has executed its plan for hiring vendors of diverse ownership.

(m)(1) Relocated television series eligible for relocation costs pursuant to section 190.2(ai) of this Part shall mean the first two years of 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.

(2) The series must have filmed a minimum of six episodes of the television series outside New York State, with a total minimum budget of at least one million dollars per episode immediately prior to relocating to the State.

(3) For a television series produced by and/or for network/cable television, each episode must have a running time of at least 30 minutes in length (inclusive of commercial advertisement and interstitial programming).

(4) For a television series produced by and/or media services providers described as streaming services and/or digital platforms (and excluding network/cable) the aggregate length of episodes must be at least 75 minutes, although the episodes themselves may vary in duration from the 30 minutes specified for network/cable production.

(5) For the purposes of this definition only, first two years of a regularly occurring production shall include only the first two seasons of such production.

(6) Relocated television series which do not produce a minimum of two seasons in New York State are ineligible to receive film tax credit on qualified relocation

costs pursuant to section 190.2(ai) of this Part but may still receive the film tax credit on qualified costs for the first season of the series.

(n) 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 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 department.

(o) 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.

(p) 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 (af) 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.

(q) Final application means information concerning actual expenditures regarding a qualified film that could make it eligible for the Empire State [f]Film [p]Production [t]Tax [c]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, and the total number of shooting days in and outside of New York and any other information the department determines is necessary.

(r) Initial application means information concerning projected expenditures regarding a qualified film that could make it eligible for the Empire State [f]Film [p]Production [t]Tax [c]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.

(s) Level one qualified production means a qualified production that has a maximum production budget of \$15,000,000 and is being produced by a qualified independent production company.

(t) Level two qualified production means a qualified production that has a production budget over \$15,000,000, 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.

(u) Other compensation means payments by the applicant to qualified production personnel which constitute taxable income to the individual; said payment may be in the form of goods, services or monetary compensation and is directly and predominantly related to the labor provided by the qualified personnel to the production.

(v) 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] a locked budget and has begun, for example, opening [the establishment of] a [dedicated] production office, [the] hiring [of] key crew members such as a [unit production manager] line producer, [and] location manager, and department heads and includes, but is not limited to, activities such as location scouting[, hiring of crew], and execution of contracts with equipment vendors [of equipment] and stage space.

(w) Principally engaged in the production of a qualified film and controls the qualified film during production means that the legal entity is ultimately 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 qualified production facility operators].

(x) Post-production means the final [stage] phase 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, soundtrack production, the addition of [sound/]visual effects[, and dubbing]. Advertising, publicity, and marketing activities and expenses are not included in post-production.

(y) Premature application means an initial application [in] from 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.

(z) Principal and ongoing photography means the period of time during which the majority of the film is shot with the participation of actors, director and first unit

crew. Re-shoot days with actors, director and crew are considered principal photography. Second unit shoots, and pickup shots without director and actor(s) are not considered principal photography.

(aa) 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; or

(2) licensing or rights associated with the production of a qualified film; [or

(3) wages or salaries or other compensation for writers, directors, composers, and performers (other than background actors with no scripted lines) to the extent those wages or salaries or other compensation exceed \$500,000 per individual.] Production costs generally include the wages or salaries or other compensation for writers, directors, composers and performers, 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 and shall include the wages, salaries or other compensation of no more than two individual producers per qualified film.[, not to exceed \$500,000 per producer, where only one of whom is the principal individual responsible for overseeing the creative and managerial process of the production of the qualified film and only one of whom is the principal individual responsible for the day to day operational management of the production of the qualified film; provided, also, that such producers are not compensated for any other position on the qualified film by a qualified film production company or a qualified independent film production company for services performed.] Productions [with producers eligible for this program who] which hire individuals whose wages and salaries are eligible for this program and who are also compensated for another qualified position on the qualified film must elect to choose only one of the position's costs for inclusion in their final application's qualified costs. For a series, an individual can have qualified wages or salaries for one qualified position per episode. In a qualified film which is a series or a relocated television production, only one qualified position per individual per episode is eligible for the credit; the qualified position for the individual can change from episode to episode.

(ab) Production Plus qualified film means a feature-length film, television film, relocated television series which are narrative or thematically related episodes, or television series, regardless of the medium by means of which the film or series is created or conveyed. Production Plus qualified film shall not include:

(1) a pilot, relocated talk, sketch, or variety show, grandfathered talk, sketch, or variety show, including a relocated television production, commonly known as variety entertainment, variety sketch and variety talk, i.e., a program with components of improvisational or scripted content (monologues, sketches, interviews), either exclusively or in combination with other entertainment elements such as musical performances, dancing, cooking, crafts, pranks, stunts, and games, a documentary film, news or current affairs program, interview or talk program (unless such talk program meets the requirements of subdivision (aj) 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, fundraising film or program, daytime drama (i.e., daytime soap opera), commercials, music videos or reality program; except a pilot, relocated talk, sketch, or variety show, or a grandfathered talk, sketch or variety show can be an application which is included in the threshold requirement to qualify for the additional credit; 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.

(ac) Production Plus majority owner means an entity that owns, directly or indirectly, 51 percent or more of the authorized applicant or has itself, or via a subsidiary, a contractual agreement with a production service company, as long as the authorized applicant is ultimately responsible for the production and provides a letter of attestation that it is ultimately responsible for all production costs and expenses.

(a[b]d) Program means the Empire State [f]Film [p]Production [t]Tax [c]Credit [p]Program.

(a[c]e) Qualified certified public accountant means a New York State certified public accountant approved by the Department to conduct a third party verification.

(a[d]f) Qualified film means a feature-length film, television film, relocated television production, television pilot or television series, regardless of the medium

by means of which the film, pilot or series is created or conveyed. For the purposes of the credit provided by these regulations only, a qualified film for which the majority of principal photography shooting days in the production of the qualified film are shot in Westchester, Rockland, Nassau, and/or Suffolk counties and/or any of the five New York City boroughs shall have a minimum gross budget of \$1,000,000. A qualified film whose majority of principal photography shooting days in the production of the qualified film are shot in any other county or counties of the State than those listed in the preceding sentence shall have a minimum budget of \$250,000. 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 (aj) 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, fundraising 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; or

(4) other than a relocated television production, a television series commonly known as variety entertainment, variety sketch and variety talk, i.e., a program with components of improvisational or scripted content (monologues, sketches, interviews), either exclusively or in combination with other entertainment elements such as musical performances, dancing, cooking, crafts, pranks, stunts, and games.

However, a qualified film shall include a television series as described in subparagraph (4) of this paragraph only if an application for such series has been deemed conditionally eligible for the tax credit under this section prior to April 1, 2020, such series remains in continuous production for each season, and an annual application for each season of such series is continually submitted for such series after April 1, 2020. 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. A series that changes either or both the title of the series or the principal cast prior to March 31, 2023, shall be considered to remain in continuous production for each season, provided the series films at the same location as prior seasons, is produced by the same entity, and retains at least 80 percent of the staff from the prior season.

(a[e]g) 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 and, as a condition of receiving the tax credit, agrees to indemnify the department and New York State for any and all claims brought by a third party in connection with the production of the qualified film and/or associated with the claiming, processing and issuing of the tax credit.

(a[f]h) 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 open unimpeded production space; provided, however, that except with respect to a qualified film production facility being used by a [qualified independent] level one 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 open unimpeded 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 for facilities constructed on or after January 1, 2019, and at least 12 feet under the permanent grid for facilities constructed before and which have otherwise met the requirements of this section by January 1, 2019; 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.

(a[g]i) 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 \$15,000,000]; [and] (2) [controls the qualified film during production] is not publicly traded; 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] is not majority owned, 51 percent or more, by a company publicly traded on a United States stock exchange and, as a condition of receiving the tax credit, agrees to indemnify the department and New York State for any and all claims brought by a third party in connection with the production of the qualified film and/or associated with the claiming, processing and issuing of the tax credit.

(a[h]j) 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 and which are incurred and paid during the credit period. 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. In the case of an eligible relocated television series, the term qualified production costs shall include, in the first season that the eligible relocated television series is produced in New York after relocation, qualified relocation costs. Provided, however, that the aggregate total eligible qualified production costs for producers, directors, writers, performers (other than background actors with no scripted lines) and composers shall not exceed 40 percent of the aggregate sum total of all other qualified production costs.

(a[i]k) Qualified relocation costs means the costs incurred, excluding wages, salaries and other compensation, in the first season that an eligible relocated television series relocated to New York including such costs incurred to transport sets, props and wardrobe to New York and other costs as determined by the Department of Economic Development to the extent such qualified costs do not exceed \$6,000,000.

(a[j]l) 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 two 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 \$30,000,000 in annual production costs in the State, or at least \$10,000,000 in capital expenditures at a qualified film production facility in the State.

(a[k]m) 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.

(a[l]n) 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.

(a[m]o) Television pilot means the initial episode produced for a proposed television series of at least 30 minutes in length (inclusive of provision for commercial advertisement and interstitial programming).

(a[n]p) 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). For the purposes of this definition only, a television series produced by and for media services providers described as streaming services and/or digital platforms (and excluding network/cable) shall mean a regularly occurring production intended to run in its initial release in a series of narrative and/or thematically related episodes, the aggregate length of which is at least 75 minutes, although the episodes themselves may vary in duration from the 30 minutes specified for network/cable production.

(a[o]q) Third party verification means [a review conducted] a report issued by a qualified certified public accountant [of] on 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.

§ 170.3 Eligibility.

For the purposes of this Part, only an authorized applicant shall be eligible to apply for the Empire State [f]Film [p]Production [t]Tax [c]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. An authorized applicant must [also] submit a diversity plan [with] as part of its initial application.

(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.] During its application review, the department may request additional documentation of the viability of the

prospective project, such as a finance plan, pre-sales information, casting director engagement, actor commitments, advanced or locked script, verifiable track record of key personnel, evidence of location scouting. Such information should demonstrate credible substantive efforts by the applicant to enable the production to begin principal and ongoing photography within 180 days from the effective date of the application.

(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 including eligibility for Production Plus and may issue a certificate of conditional eligibility to the authorized applicant.

(5) If an authorized applicant has not begun principal and ongoing photography within 180 days of the initial application submission date, the Department, in its sole discretion, may disqualify the initial application.

(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 [f]Film [p]Production [t]Tax [c]Credit. An authorized applicant must submit a diversity report [with] as part of its final application. The department shall approve or disapprove the final application based upon criteria set forth in

section 170.6(b) 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 [f]Film [p]Production [t]Tax [c]Credit.

The amount of the credits given for each allocation year shall be allocated in order of priority based upon issuance of tax credit certificates. In the event that an approved applicant's Empire State [f]Film [p]Production [t]Tax [c]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 allocation 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, a qualified independent film production company or a sole proprietor of a qualified film production company;
- (4) the authorized applicant intends to shoot the required portion of principal and ongoing photography on a stage at a qualified film production facility on a set or sets and the proposed principal and ongoing shooting schedule satisfies the requirements of the program;
- (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] or is a level [two] one 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(n) 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 \$3,000,000, 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; and

(13) the authorized applicant has submitted a diversity plan.

(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 authorized applicant began principal and ongoing photography within 180 days from the initial application submission date; failure to do so will result in a rejection of the final application unless the authorized applicant notified the department in advance of exigent circumstances causing the delay; the final determination of the acceptance of the application lies in the sole discretion of the department;

([2]3) the applicant shot the required portion of principal and ongoing photography on a stage at a qualified film production facility on a set or sets and the principal and ongoing shooting schedule meets the requirements of the program;

([3]4) 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]5) if the qualified film that was produced was a television pilot [and] or was a level [two] one production, then the applicant shot at least one full day of principal photography at a qualified film production facility;

([5] 6) a qualified film was produced and completed or if an applicant which is a qualified independent production company chooses to submit its final application after completing principal and ongoing photography, the credit period ends on the last day of principal photography and the applicant forgoes any post production costs incurred after the principal photography completion date;

([6] 7) 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] 8) the authorized applicant did not knowingly submit false or misleading information to the department;

([8] 9) 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 \$3,000,000, 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 [f]Film [p]Production [t]Tax [c]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;

([9]10) the applicant has supplied documentation (e.g. still shot, frame grab, [finished] DVD of film or other documentation such as the department may require) that the end credit requirements set forth in section 170.2(n) of this Part have been met; [and]

([10]11) the applicant has completed a diversity report and the extent to which the applicant has met or made good faith efforts to meet the specific goals outlined in their diversity plan; including how the applicant has participated in training, education and recruitment programs that are designed to promote and encourage the training and hiring of New York State residents who represent the diversity of the State's population. With respect to this subdivision, the department may issue guidelines to delineate its process for analyzing good faith efforts to meet goals on a diversity plan[.] ; and

(12) the final application was received within twenty-four (24) months of the post-production end date. Extensions may be considered if the department is notified prior to expiration.

§ 170.7 Third party verifications.

(a) 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.

(b) The department shall maintain a list of certified public accountants which may be utilized by approved applicants to provide the third party verification services pursuant to paragraph (a) above. The department may also develop procedures and performance standards for such certified public accountants to follow. Any certified public accountants failing to meet the requirements of the department's procedures and performance standards for certified public accountants may be removed from the list immediately.

§ 170.8 Record Retention.

All authorized and approved applicants must maintain records, in paper or electronic form, of any qualified production 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 [D]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 [D]department, or if the approved applicant disagrees with the amount of the tax credit granted by the [D]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 [D]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 [C]commissioner. The [C]commissioner or [his or her]their 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 [C]commissioner or [his or her]their designee renders the final order.

§ 170.10 Exchange of Information with Department of Taxation and Finance.

Notwithstanding any provision of this [c]Chapter, employees and officers of the [D]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 [D]department and applications for credit submitted to the [D]department.

§ 170.11 Quarterly Report.

The [D]department shall file a report on a quarterly basis with the director of the Division of the Budget and the chair 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 [D]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.

§ 170.13 Production Plus. (a) A qualified independent film production company or a qualified film production company, or a company that is a majority owner of one

or more qualified film production companies or qualified independent film production companies, may apply to participate in the Production Plus program after it, or qualified film production companies or qualified independent film production companies of which it is the majority owner, has submitted two or more initial applications to the Empire State Film Production Tax Credit Program after January 1, 2025.

(b) Production Plus Threshold 2 is met when an authorized applicant or a majority owner meets or exceeds \$100 million in qualified costs in total with a minimum of two initial applications for any qualified film for the Empire State Film Production Tax Credit Program. After reaching the threshold requirement, an applicant or Production Plus majority owner may be eligible for an additional 10 percent on subsequent qualified film applications for the Production Plus additional credit. The threshold requirement must be met in order of the submission of the initial applications. Evidence of meeting the Production Plus threshold may be submitted by the applicant prior to the completion of the final applications for the two or more qualifying productions. The department shall, in its sole discretion, determine if the threshold requirement has been met.

(c) Production Plus Threshold 1 is met when a qualified independent production company applicant or Production Plus majority owner meets or exceeds \$20 million in qualified costs in total with a minimum of two initial applications for any qualified film for the Empire State Film Production Tax Credit Program or the Empire State Independent Film Production Tax Credit Program. After reaching the threshold requirement, an application or majority owner may be eligible for an additional five percent on subsequent qualified film applications for the Production Plus additional credit. The threshold requirement must be met in order of the submission of the initial applications. Evidence of meeting the Production Plus threshold may be requested by the department and submitted by the applicant prior to the completion of the final applications for the two or more qualifying productions. The department shall, in its sole discretion, determine if the threshold requirements have been met.

(d) If a qualified independent film production company or a company that is a majority owner of a qualified independent film production company, meets the Production Plus Threshold 1, subsequent applications may be eligible to receive an additional five percent credit. If additional applications are submitted which reach the Production Plus Threshold 2, subsequent applications may be eligible to

receive an additional 10 percent credit. The department shall, in its sole discretion, determine if the threshold requirement has been met.

(e) Initial applications for feature length films and new television series submitted after December 31, 2028 shall not be eligible for the program; provided, however, a season of a television series that enters the program or is used to meet a threshold of the program before January 1, 2029 shall continue to be eligible. Pilots which are subsequently picked up for a series in New York State are eligible to receive the additional 5 percent or 10 percent Production Plus additional credit even if the television series' is not submitted before December 31, 2028.