

PART 170 OF THE REGULATIONS OF THE COMMISSIONER OF THE DEPARTMENT OF ECONOMIC DEVELOPMENT ARE ADDED TO READ AS FOLLOWS:

PART 170

EMPIRE STATE FILM PRODUCTION TAX CREDIT PROGRAM

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. Pursuant to Chapter 60, 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's Governor's Office for Motion Picture and Television Development shall administer the program, including, the issuance of tax credit certificates. These regulations do not govern the New York City film production tax credit program. Eligibility in and receipt of a tax credit in the New York City program does not guarantee eligibility in or receipt of a tax credit in the empire State film production tax credit program. In addition, eligibility in and receipt of a tax credit in the empire State film production tax credit program does not guarantee eligibility in or receipt of a tax credit in the New York City program.

(b) A taxpayer which has been issued a certificate of tax credit or is a partner in a partnership or member in a limited liability company or a shareholder of an S corporation which has been issued a certificate of tax credit shall be allowed to claim an empire State film production tax credit pursuant to section 24 and section 210.36 or 606(gg), whichever is applicable, of the tax law.

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 a sole proprietor of a qualified film production company that is scheduled to begin principal and ongoing photography on the qualified film no more than one hundred eighty (180) days after submitting an initial application to the Office and intends to shoot a portion of principal and ongoing photography on a stage at a qualified film production facility on a set or sets.

(b) "Approved applicant" means an authorized applicant that has been issued a certificate of conditional eligibility by the Office.

(c) "Certificate of conditional eligibility" means a certificate issued by the Office which States that the authorized applicant has met the criteria set forth in §170.6(a) of this part and is being considered for the empire State film production tax credit, pending successful completion of the final application. Such certificate shall include, but not be limited to, the following information: name and address of the authorized applicant, effective date, priority number, taxpayer identification number, a Statement that the initial application meets the

appropriate criteria for conditional eligibility under this regulation and a disclaimer stating that actual receipt of the tax credit is subject to availability of State funds for the program.

(d) “Certificate of tax credit” means a certificate issued by the Office which States the amount of the empire State film production tax credit that the approved applicant has qualified for, based on the Office’s analysis under section 24 of the tax law and the provisions of this part. Such certificate shall 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, a disclaimer stating that the tax credit the applicant is entitled to may not necessarily be claimed in the same calendar year as the film was completed, depending on the amount of credits available for allocation on the effective date and a disclaimer stating that actual receipt of the tax credit is subject to the maximum amount of credits that are allocated for the program.

(e) “Completeness of the application” means that all questions on the application itself were fully addressed by either the authorized or approved applicant and that any additional substantiating documents that were requested by the Office were provided in a manner sufficient to allow the Office to properly evaluate the application.

(f) “Completion of production of a qualified film” means that the process of post production of a qualified film has been finished and a cut negative, video master or other final locked form of the qualified film is ready for the striking of prints or electronic copies, and/or ready for broadcast or delivery to a distributor. All activities and expenses related to marketing and distribution, including the making of release prints, video dupes or other forms of copies, promotional images, and poster art are considered to occur after the production of a qualified film is completed.

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

(h) “Effective date” means the date the certificate of conditional eligibility becomes effective. Such date is determined by the date the initial application is received by the Office. In the event that applicant’s principal and ongoing photography on a qualified film does not actually begin within one hundred eighty (180) days of the submission of the initial application, the applicant’s effective date will be recalculated to correspond to the date one hundred eighty days prior to the date that the approved applicant submits a notification of actual commencement of principal and ongoing photography to the Office.

(i) “Feature-length film” means a production intended for commercial distribution to a motion picture theater or directly to the home video market that has a running time of at least seventy-five (75) minutes in length.

(j) “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.

(k) “Final application” means a document created by the Office and submitted by an approved applicant after it has completed production of a qualified film which contains information concerning actual expenditures regarding a qualified film that could make it eligible for the empire State film production tax credit under section 24 of the tax law and the provisions of this part. Such application shall 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 Office determines is necessary to properly evaluate the application.

(l) "Initial application" means a document created by the Office and submitted by an authorized applicant which contains information concerning projected expenditures regarding a qualified film that could make it eligible for the empire State film production tax credit under section 24 of the tax law and the provisions of this part. Such application shall 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 Office determines is necessary to properly evaluate the application.

(m) "Notification of actual commencement of principal and ongoing photography" means the approved applicant's notification to the Office, in writing, on the date actual production on a qualified film commences.

(n) "Office" means the Governor's Office of Motion Picture and Television Development.

(o) "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 ("greenlit") with, for example, 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 includes, but is not limited to, activities such as location scouting, hiring of crew, and execution of contracts with vendors of equipment and stage space.

(p) "Principally engaged in the production of a qualified film and controls the qualified film during production" means that the legal entity is responsible for payment of the direct production expenses (including pre and post production) and is a signatory to the qualified film's contracts with its payroll company and facility operators.

(q) "Priority number" means the number used by the Office to determine allocation of the empire State film production tax credit. Priority number shall be based on the applicant's effective date; provided, however, that in the event that there is more than one initial application with the same effective date, priority shall be given to the authorized applicant with the earliest anticipated date of commencement of principal and ongoing photography. Provided further that if the principal and ongoing photography does not begin on the anticipated date, such priority number shall be recalculated based upon the date that the Office receives notification of actual commencement of principal and ongoing photography from the approved applicant.

(r) "Post-production" means the final stage in a qualified film's production after principal and ongoing photography is completed, including, but not limited to, editing, Foley recording, Automatic Dialogue Replacement, sound editing, special effects, scoring and music editing, beginning and end credits, negative cutting, soundtrack production, the addition of sound/visual effects, dubbing, and subtitling. Advertising and marketing activities and expenses are not included in post-production.

(s) "Premature application" means an initial application in which the Office reasonably determines that the applicant cannot commence principal and ongoing photography within one hundred eighty days of the date the

initial application was submitted. Such determination shall be based on, among other things, vagueness of the applicant's answers on the initial application and during the initial interview and lack of documentation supporting an applicant's initial application.

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

(u) "Production costs" means any costs for tangible property used and services performed directly and predominantly (including pre-production and post production) in the production of a qualified film. Production costs shall not include (i) costs for a story, script or scenario to be used for a qualified film and (ii) wages or salaries or other compensation for writers, directors, including music directors, producers and performers (other than background actors with no scripted lines). Production costs generally include technical and crew production costs, such as expenditures for film production facilities, or any part thereof, props, makeup, wardrobe, film processing, camera, sound recording, set construction, lighting, shooting, editing and meals.

(v) "Qualified film" means a feature-length film, television film, television pilot and/or each episode of a television series, regardless of the medium by means of which the film, pilot or episode is created or conveyed. Qualified film shall not include (i) a documentary film, news or current affairs program, interview or talk program, "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 (ii) 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).

(w) "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.

(x) "Qualified film production facility" means a film production facility in New York State, which contains at least one sound stage having a minimum of seven thousand square feet of contiguous production space.

(y) "Qualified production costs" means production costs only to the extent such costs are attributable to the use of tangible property or the performance of services within New York State directly and predominantly in the production (including pre-production and post production) of a qualified film. For the purpose of this definition, "attributable to the use of tangible property or the performance of services within New York State" shall only include costs and their pro rata portions which are incurred directly in New York State.

(z) "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.

(aa) "Television film", which may also be known as "movie-of-the-week," "mow," "made for television movie," or "mini-series," means a production intended for broadcast on television, whether free or via a

subscription-based service, that has a running time of at least ninety (90) minutes in length (inclusive of commercial advertisement and interstitial programming).

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

(cc) “Television series”, which may also be known as “episodic television,” means a regularly occurring production intended in its initial run for broadcast no more than once weekly, on television, whether free or via subscription-based service, that has a running time of at least thirty (30) minutes in length (inclusive of commercial advertisement and interstitial programming).

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

170.4 Application Process.

(a) Initial application.

(1) An authorized applicant shall submit an initial application to the Office.

(2) The authorized applicant shall have an interview with the Office to discuss the details of the initial application. A producer and either the line producer, unit production manager, production accountant or their designee, approved by the Office, shall attend such meeting.

(3) The Office shall approve or disapprove the initial application based upon criteria set forth in §170.6(a) of this part.

(4) If the initial application is approved, the Office shall issue a certificate of conditional eligibility to the authorized applicant. The Office shall provide a copy of such certificate of conditional eligibility to the Department of Taxation and Finance. If the initial application is disapproved, the Office shall provide the authorized applicant with a notice of disapproval which shall State the reasons therefor. Such disapproval shall be a rejection of the authorized applicant’s initial application. An authorized applicant may reapply pursuant to the process as set forth in this section.

(5) Applications shall be reviewed by the Office in the order they are received.

(b) Notification. The approved applicant shall notify the Office, in writing, on the date principal and ongoing photography begins on the qualified film. In addition, the approved applicant shall provide a sign off budget or its equivalent and other supporting documents requested by the Office on this date.

(c) Final application.

(1) Within sixty (60) days after the completion of the production of a qualified film, the approved applicant shall submit a final application to the Office.

(2) The Office shall approve or disapprove the final application based upon criteria set forth in §170.6(b) of this part. The Office may request additional documentation, including copies of receipts of qualified production costs, to help determine if the production is a qualified film and qualifies for the empire State film production tax credit. If the final application is approved, the Office shall issue a certificate of tax credit to the approved applicant. The Office shall provide a copy of such certificate of tax credit to the Department of Taxation and Finance. If the final application is disapproved, the Office 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 reapply pursuant to the provisions of this part.

170.5 Allocation of empire State film production tax credit

(a) The Office shall allocate the amount of the credits given for each calendar year in order of priority based upon an applicant's effective date. In the event that an approved applicant's empire State film production tax credit would exceed the maximum amount of credits allowed for that given year, the approved applicant's credit will be allocated on a priority basis in the immediately succeeding calendar year. A maximum of \$25 million of credits may be allocated to each calendar year.

170.6 Criteria for evaluation of applications.

(a) Initial application. In the event that any of the following criteria are not met, the Office shall disapprove the initial application. The Office shall determine whether:

(1) the application is substantially complete;

(2) the application is not premature;

(3) the authorized applicant is a qualified film production company or a sole proprietor of a qualified film production company;

(4) the authorized applicant intends to shoot a portion of principal and ongoing photography on a stage at a qualified film production facility on a set or sets;

(5) the authorized applicant is planning to produce a qualified film;

(6) the authorized applicant's projected qualified production costs (excluding post-production credits) paid or incurred which are attributable to the use of tangible property or the performance of services at a qualified film production facility in the production of a qualified film is likely to equal or exceed seventy-five 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) the authorized applicant did not knowingly submit false or misleading information to the Office; and

(8) in the event that 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 three million dollars, whether the shooting days spent in New York outside of a film production facility in the production of a qualified film plan to equal or exceed seventy-five percent of the total shooting days spent within and without New York outside of a film production facility in the production of such qualified film.

(b) Final application. In the event that any of the following criteria are not met, the Office shall disapprove the final application. The Office shall determine whether:

(1) the application is substantially complete;

(2) the approved applicant shot a portion of principal and ongoing photography on a stage at a qualified film production facility on a set or sets;

(3) a qualified film was produced and completed;

(4) the approved applicant's actual date of completion of the qualified film was within one year of its projected completion date;

(5) the final application was submitted within 60 days after the completion of the production of a qualified film;

(6) the approved 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 seventy-five percent of the production costs (excluding post production costs) paid or incurred which are attributable to the use of tangible property or the performance of services at any film production facility within and without the State in the production of the qualified film;

(7) the authorized applicant did not knowingly submit false or misleading information to the Office; and

(8) in the event that the actual qualified production costs (excluding post-production costs) paid or incurred which are attributable to the use of tangible property or the performance of services at a qualified film production facility in the production of a qualified film are less than three million dollars, whether the shooting days spent in New York outside of a film production facility in the production of a qualified film equaled or exceeded seventy five 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 seventy five percent threshold, the Office shall include in their calculation of the empire State film production tax credit the portion of qualified production costs attributable to the use of tangible property or the performance of services in the production of a qualified film outside of a qualified film production facility.

170.7 Record retention. All authorized and approved applicants must maintain records, in paper or electronic form, of any qualified productions costs used to calculate their potential or actual benefit(s) under this program for a

minimum of three years from the date of the applicant claims the tax credit. The Office shall have the right to request such records upon reasonable notice.

170.8 Appeal process. If the authorized applicant's initial application or an approved applicant's final application is disapproved by the Office, or if the approved applicant disagrees with the amount of the tax credit granted by the Office, the applicant shall have a right to appeal. In the case of an appeal from a disapproval of an initial or final application, such appeal shall be made by sending a letter to the New York State Department of Economic Development, Attn: Counsel's Office, 30 South Pearl Street, Albany NY 12245, within thirty (30) days from the date of the denial letter issued by the Office. 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 thirty (30) days from the date of issuance of the certificate of tax credit. Failure to request an appeal within thirty (30) days will finalize the denial decision and/or the amount of the tax credit

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