

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

Chapter XX Economic Transformation and Facility Redevelopment Program

Part 200 Purpose and Definitions

§200.1 Purpose and general description.

(a) Chapter 61 of the Laws of 2011 establishes the Economic Transformation and Facility Redevelopment Program (the “Program”). The purpose of these regulations is to set forth the administrative process governing the certification of participants in the program and specifically to establish an application process, eligibility criteria and requirements for participants to remain certified in the program. The program enables participants to claim the Economic Transformation and Facility Redevelopment Program Tax Credit, as defined in section 35 of the tax law, which consists of four components: the Economic Transformation and Facility Redevelopment Program Jobs Tax Credit Component, the Economic Transformation and Facility Redevelopment Program Investment Tax Credit Component, the Economic Transformation and Facility Redevelopment Program Job Training Tax Credit Component, and the Economic Transformation and Facility Redevelopment Program Real Property Tax Credit Component. In addition, participants may be eligible for a sales tax refund pursuant to section 35 of the tax law and a real property tax exemption pursuant to section 485-p of the real property tax law.

§200.2 Definitions.

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

(a) "Benefit-cost ratio" means the following calculation: the numerator is the sum of (i) the value of all remuneration projected to be paid for all net new jobs during the period of participation in the program, and (ii) the cost of qualified investments to be made by the business entity during the period of participation in the program, and the denominator is the amount of total tax benefits under this article that is projected to be used and refunded.

(b) "Certificate of eligibility" means the document issued by the department to an applicant that demonstrates that the applicant has been admitted as a participant into the economic transformation and facility redevelopment program by the department. Possession of a certificate of eligibility does not by itself guarantee the eligibility of the participant to claim the tax credits allowed pursuant to section thirty-five of the tax law.

(c) "Net new jobs" means jobs created in the economic transformation area that:

1. are new to the area;
2. have not been transferred from employment in this state with the participant or with a related person in this state, and are not replacing jobs with similar titles or job responsibilities;
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 in a taxable year;
5. are not general executive officers of the participant; and

6. may not be filled with individuals having the familial relationship defined in section 267(c)(4) of the internal revenue code with any owner of the participant.

(d) "Notice of removal" means the notification given by the Commissioner to a participant that has failed to meet any of the requirements set forth in section 201.1(b) of this Title, or failed to meet the eligibility criteria set forth in section 201.2 of this Title.

(e) "Department" shall mean the Department of Economic Development.

(f) "Participant" means a business entity that:

1. is a new business as defined in subdivision k of this Part.
2. has completed an application prescribed by the department to be admitted into the program;
3. has demonstrated how it plans to meet the eligibility criteria in section 201.2 of this regulation and section four hundred one of economic development law; and
4. has been issued a certificate of eligibility by the department.

(g) "Preliminary schedule of benefits" means the estimated aggregate amount of the tax credits that a participant in the economic transformation and facility redevelopment program is eligible to receive pursuant to section thirty-five of the tax law. The preliminary schedule of benefits shall indicate the annual amount of each credit a participant expects to claim in each of its five years of eligibility.

(h) "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 one hundred sixty-seven of the internal revenue code;
2. has a useful life of four years or more;
3. is acquired by purchase as defined in section one hundred seventy-nine (d) of the internal revenue code;
4. (d) has a situs in an economic transformation area in this state in which it is certified; and
5. (e) is placed in service in an economic transformation area in the state on or after the date the certificate of eligibility is issued to the business entity.

(i) "Related person" means a "related person" pursuant to subparagraph (c) of paragraph three of subsection (b) of section four hundred sixty-five of the internal revenue code.

(j) "Remuneration" means wages paid to and benefits received by an employee of a participant in the economic transformation and facility redevelopment program.

(k) "New business" means a business entity that satisfies all of the following tests:

1. the business entity must not be currently operating or located within the economic transformation area in which it is applying for certification;

2. the business entity must not be moving existing jobs into the economic transformation area in which it is applying for certification from another area of the state;
3. the business entity must not be substantially similar in ownership and operation to another taxpayer taxable or previously taxable under section one hundred eighty-three, one hundred eighty-four or one hundred eighty-five of article nine, former section one hundred eighty-six or article nine-A, twenty-two, thirty-two or thirty-three of the tax law or the income or losses of which is or was includable under article twenty-two of the tax law;
4. the business entity must not have caused individuals to transfer from existing employment with a related person and located in New York state to similar employment with the business entity;
5. the business entity must not have acquired, purchased, leased, or had transferred to it real property located in the economic transformation area in which it is applying for certification if that real property was previously owned by an entity with similar ownership, regardless of form of incorporation or organization; and
6. the business entity must not be substantially similar in operation to a business entity from which it has acquired real or tangible personal property that is located in the economic transformation area in which it is applying for certification.

(l) "Economic transformation area" means:

1. An area within a five mile radius of the following facilities: Buffalo Correctional Facility in Alden, New York; Allen Residential Center in South Kortright, New York, Mid-Orange Correctional Facility in Warwick, New York, and Harriet Tubman Residential Center in Auburn, New York;
2. An area within a ten mile radius of the following facilities: Camp Georgetown, Georgetown, New York and Industry Secure Facility in Rush, New York;
3. An area within a fifteen mile radius of the following facilities: Oneida Correctional Facility in Rome, New York, Summit Shock Facility in Summit, New York, and Tryon Girls Center in Johnstown, New York;
4. An area limited to the site of the following facilities: Fulton Correctional Facility in Bronx, New York and Arthur Kill Correctional Facility in Staten Island, New York.

(m)"Closed facility" means:

1. the following correctional facilities, as defined in paragraph (a) of subdivision four of section two of the correction law, that were selected by the governor of the state of New York for closure after April first, two thousand eleven but no later than March thirty-first, two thousand twelve, Arthur Kill Correctional in Staten Island, New York, Buffalo Correctional in Alden, New York, Camp Georgetown in Georgetown, New York, Fulton Correctional in Bronx, New York, Mid-Orange Correctional in Warwick, New York, Oneida Correctional in Rome, New York and Summit Shock Incarceration Correctional in Summit, New York;
or
2. the following facilities operated by the office of children and family services under article nineteen-G of the executive law that is closed pursuant to authority

granted to such office in a chapter of the laws of two thousand eleven, Allen Residential Center in South Kortright, New York, Harriet Tubman Residential Center in Auburn, New York, Industry Secure Facility in Rush, New York and Tryon Girls Center in Johnstown, New York; and

3. which has been closed provided that the commissioner of correctional services or the commissioner of the office of children and family services has notified the commissioner of such closure.

Part 201 Application and Review Process

§201.1 Application and review process.

(a) A business entity must submit a completed application as prescribed by the commissioner by the later of (1) the date that is three years after the date of the closure of the closed facility located in the economic transformation area in which the business entity would operate or (2) January first, two thousand fifteen.

(b) As part of such application, each business entity must:

(1) Agree to allow the department of taxation and finance to share its tax information with the department. 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.

(2) Agree to allow the department of labor to share its tax and employer information with the department. 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.

(3) Agree to not participate in the excelsior jobs program, the New York state empire zones program, or claim any tax credits under the brownfield cleanup program if admitted into the economic transformation and facility redevelopment program with regard to the facility (or facilities) located in the economic transformation area.

(4) Provide the following information to the department upon request:

(i) a plan outlining the schedule for meeting the job and investment requirements set forth in section four hundred one of the economic development law, including 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 economic transformation and facility redevelopment investment tax credit;

(iv) the employer identification numbers 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;

(5) 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;

(6) Certify, under penalty of perjury, that it is in substantial compliance with all environmental, worker protection, and local, state, and federal tax laws;

(7) Agree, to the extent practicable, to consider for employment persons displaced by a facility closure.

(c) After reviewing a business entity's completed application and determining that the business entity satisfies the requirements in subdivision four of section four hundred of the economic development law and will meet eligibility requirements set forth in section four hundred one of the economic development law and Part 201.2 of this regulation, the department may, at the discretion of the commissioner, admit the applicant into the program and provide the applicant with a certificate of eligibility. When considering an application, the commissioner shall consider whether the project is consistent with the intent of the program, the overall cost and effectiveness of the project, and other factors including, but not limited to the total amount of investment tax credit allowed for all eligible participants at each closed facility pursuant to subdivision h of section thirty-five of the tax law. The commissioner shall consult with the Department of Taxation and Finance to determine whether the maximum investment tax credit at a closed facility has been reached or would be exceeded if an applicant were to be certified. An applicant will only be eligible to be certified if the applicant agrees to claim the amount of the investment tax credit indicated by the Department in the preliminary schedule of benefits provided with the certificate of eligibility. If a participant does not start construction on or acquire a qualified investment or create at least one net new job within one year of the issuance of its certificate of eligibility, the participant will not be eligible for any of the economic transformation and facility redevelopment program tax credits.

(d). A participant may claim tax credits pursuant to section thirty-five of the tax law commencing in the first taxable year in which the participant creates five net new jobs. A participant may

claim such benefits for the next four consecutive taxable years, provided that the participant demonstrates to the commissioner of taxation and finance that it continues to maintain five net new jobs. However, in no event may that benefit period start later than two years after the certificate of eligibility is issued. The participant may also be eligible for the economic transformation and facility redevelopment sales tax refund pursuant to section 35 (a)(2) of the tax law. and the real property tax exemption pursuant to section 485-p of the real property tax law.

§ 201.2 Eligibility criteria.

(a) In order to be eligible for benefits in the economic transformation and facility redevelopment program, a participant must satisfy the following criteria:

(1) must create and maintain at least five net new jobs in an economic transformation area, and must demonstrate that its benefit-cost ratio is at least ten to one; and

(2) must be in compliance with all worker protection and environmental laws and regulations; and

(3) must not owe past due federal or state taxes or local property taxes, unless those taxes are being paid pursuant to an executed payment plan; and

(4) the location of the participant's operations for which it seeks tax benefits must be wholly located within the economic transformation area.

(b) A business entity that is primarily operated as a retail business is not eligible to participate in the economic transformation and facility redevelopment program if their application is for any facility or business location that will be primarily used in making retail sales to customers who personally visit such facilities. A business entity that is engaged in offering professional services

licensed by the state or by the courts of this state is not eligible to participate in the economic transformation and facility redevelopment program. In addition, a business entity that is or will be principally operated as a real estate holding company or landlord for retail businesses shall not be eligible to participate in the economic transformation and facility redevelopment program. For purposes of this paragraph, professional services licensed by the courts of this state shall include lawyers registered with the NYS Office of Court Administration. Provided however that the commissioner may determine that such a business entity described in the preceding three sentences may be eligible to participate at the site of a closed facility if it is pursuant to an adaptive reuse plan for a substantial portion of such facility and that the adaptive reuse plan is consistent with the strategic plan of the Regional Economic Development Council and has been recommended by the Regional Economic Development Council to the commissioner.

(c) A business entity must continue to satisfy the employment requirements in subdivision one of this section in each year in which it claims the economic transformation and facility redevelopment tax credits. Prior to claiming the economic transformation and facility redevelopment tax credits in the final year of its five year benefit period, a business entity must demonstrate to the commissioner that it has created the jobs and made the qualified investments necessary to meet a benefit-cost ratio of at least ten to one.

(d) A business entity seeking certification at the site of a closed facility must agree to limit its claim for the economic transformation and facility redevelopment investment tax credit to the amount indicated in the preliminary schedule of benefits.

§ 201.3 Evaluation standards.

(a) The evaluation standards which may be used by the commissioner to determine whether to admit an applicant to the program include:

(1) the number of net new jobs to be created in New York State; or

(2) the amount of capital investment to be made; or

(3) whether the applicant is proposing to substantially renovate and reuse closed facilities; or

(4) 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

(5) whether the application has been recommended by the Regional Economic Development Council representing the region where the project will be located;

(6) the degree to which the project is consistent with the Regional Economic Development Council strategic plan and priorities for the region; or

(7) the degree of economic distress in the area where the applicant will locate the project identified in its application; or

- (8) the degree of applicant's financial viability, strength of financials, readiness and likelihood of completion of the project identified in the application; or
- (9) the degree to which the project identified in the application supports New York State's minority and women business enterprises; or
- (10) the degree to which the project identified in the application supports the principles of Smart Growth; or
- (11) the estimated return on investment that the project identified in the application will provide to the State; or
- (12) 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
- (13) the degree to which other state or local incentive programs are available to the applicant; or
- (14) 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.

Part 202 Reporting requirements.

§ 202.1 Reporting.

(a) 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 thirtieth, two thousand twelve, and every three months thereafter. Such report shall include, but not be limited to, the following: number of applicants; number of participants approved; names of participants; total amount of projected benefits certified by type of benefit; total number of projected new jobs to be created; number of projected net new jobs created per participant; aggregate projected new investment in the state; projected new investment per participant; and such other information as the commissioner determines.

Part 203 Removal from Program.

(a) The commissioner may remove any participant from the program for failing to meet any of the requirements set forth in section 201.1(b) of this Title, or for failing to meet the eligibility criteria set forth in section 201.2 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 204 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.

Part 204 Appeal Procedures

§204.1 Applicability.

(a) This part shall apply to all appeals taken as a result of a participant being removed from the program pursuant to Part 203 of this Title.

§ 204.2 Designation of Appeal Officers.

(a) The commissioner may designate any impartial person or persons to act as an appeal officer.

§ 204.3 Notice of Appeal.

(a) A participant that received a notice of removal pursuant to paragraph (b) of section 203 of this Title may send a written notice (“Notice of Appeal”) to the commissioner appealing the removal postmarked by no later than thirty (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 thirty (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, (along with documentation establishing that information), 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 should be sent to the participant, or to the attorney representing the participant.

§ 204.4 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.

(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 fact-finding hearing, and the level of formality of any hearing conducted.

§ 204.5 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.

§ 204.6 Appeal Decision.

(a) After receipt of the appeal officer's report, the commissioner will issue a final decision and serve a copy on the participant or its representative. If the commissioner issues a final decision that includes findings of fact or conclusions of law that conflict with the recommendations of the appeal officer, the decision shall set forth the reasons therefore.