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

Chapter XIX EXCELSIOR JOBS PROGRAM

Part 190 Purpose and Definitions

§ 190.1 Purpose and general description.

(a) The purpose of these regulations is to set forth the administrative process governing the Excelsior Jobs Program ("Program") and specifically to establish an application process, standards for application evaluation and procedures for businesses claiming the tax credit under this program. Chapter 59 of the Laws of 2010 establishes the program and grants the Commissioner of the Department of Economic Development the authority to promulgate regulations to establish procedures for the allocation of the Excelsior Jobs Program Credit, which consists of four components: the Excelsior Jobs Tax Credit Component, the Excelsior Investment Tax Credit Component, the Excelsior Research and Development Tax Credit Component, and the Excelsior Real Property Tax Credit Component.

§ 190.2 Definitions.

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

(a) "Agriculture" means both agricultural production (establishments performing the complete farm or ranch operation, such as farm owner-operators, tenant farm operators, and sharecroppers) and agricultural support (establishments that perform one or more activities associated with farm

operation, such as soil preparation, planting, harvesting, and management, on a contract or fee basis).

(b) "Applicant" means a business enterprise that is operating in New York State or is planning to operate in the State.

(c) “Application” means the form that the Department determines must be submitted by an applicant in order to be considered for acceptance into the Program.

(d) "Back office operations" means a business function that may include one or more of the following activities: customer service, information technology and data processing, human resources, accounting and related administrative functions.

(e) "Benefit-cost ratio" means the following calculation: the numerator is the sum of (1) the value of all remuneration projected to be paid for all net new jobs during the period of participation in the program and (2) the value of capital investments to be made by the business enterprise during the period of anticipated participation in the Program, and the denominator is the amount of total tax credits that will be used and refunded pursuant to Article 17 of the Economic Development Law.

(f) "Certificate of eligibility" means the document issued by the Department to an applicant that has completed an application to be admitted into the Excelsior Jobs Program and has been accepted into the Program by the Department. Possession of a certificate of eligibility does not by itself guarantee eligibility to claim the tax credit.

(g) "Certificate of tax credit" means the document issued to a participant by the Department that entitles a participant to claim the tax credit pursuant to section 355 of the Economic Development Law. The certificate specifies the exact amount of each of the tax credit components and the taxable year in which such credit may be claimed. The certificate of tax credit shall be issued annually only after the Department has verified that the participant has met all applicable eligibility criteria. The certificate may also include such information as the Commissioner deems necessary.

(h) “Commissioner” means Commissioner of the Department of Economic Development.

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

(j) "Distribution center" means a large scale facility involving processing, repackaging and/or movement of finished or semi-finished goods to retail locations across a multi-state area.

(k) “Eligible real property taxes” has the same meaning as in section 15(e) of the Tax Law, provided that the definition in subdivision (e) shall be read as if it specifically referenced the Excelsior Jobs Program and participants in that program.

(l) "Financial services data centers” or “financial services customer back office operations" means operations that manage the data or accounts of existing customers, or provide product or service information and support to customers of financial services companies, including banks, other lenders, securities and commodities brokers and dealers, investment banks, portfolio managers, trust offices, and insurance companies.

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

(n) "Industry with significant potential for private sector growth and economic development in the State" means any industry where it can be demonstrated that employment in the industry could grow to any of the following: (1) four thousand or more in a metropolitan statistical area or to one-half of one percent of the employed population in the metropolitan statistical area; or (2) five hundred or more in a labor market area, or to one percent of the employed population in the labor market area; or (3) to a level that exceeds the percentage level that the industry employs on a national basis. Such demonstrated potential shall be on the basis of one or more key attributes of the metropolitan statistical area or labor market area that a business enterprise in the industry would consider essential in any decision to locate or expand within such metropolitan statistical area or labor market area. For a business in an industry that meets the criteria indicated above to be eligible as an applicant to the Program, the business enterprise must create at least three hundred net new jobs and make significant capital investments of at least $30 million. Nothing in this section shall allow any business entity excluded under section 191.2(g) of this Title to become a participant in this Program.

(o) "Investment zone" shall mean an area within the state that had been designated under section 958(a)(i) and (d) of the General Municipal Law that was wholly contained within up to four distinct and separate contiguous areas as of the date immediately preceding the date the designation of such area expired pursuant to section 969 of the General Municipal Law. Investment zones are the designated distinct and separate contiguous areas of the municipality

that qualified for investment zone status as those areas existed on June twenty-nine two-thousand-and-ten.

(p) "Manufacturing" means the process of working raw materials into products suitable for use or which gives new shapes, new quality or new combinations to matter which has already gone through some artificial process by the use of machinery, tools, appliances, or other similar equipment. "Manufacturing" does not include an operation that involves only the assembly of components, provided, however, the assembly of motor vehicles or other high value-added products shall be considered manufacturing.

(q) "Net new jobs" means jobs created in this state that: (1) are new to the state; (2) have not been transferred from employment with another business located in this state including from a related person in this state; (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; and (4) are filled for more than six months during the year for which credits are being granted.

(r) “New media” means the application of information technology to traditional communications outlets, particularly through interactive modes such as the Internet, including video games, web search portals, interactive web-based content, and interactive advertising.

(s) "Participant" means a business entity that: (1) has completed an application prescribed by the Department to be admitted into the program; (2) has been issued a certificate of eligibility by the Department; (3) has demonstrated that it meets the eligibility criteria in section 353 and section

354(2) of the Economic Development Law as further defined in sections 191.1 and 191.2 of this Title; and (4) has been certified as a participant by the Commissioner.

(t) "Preliminary schedule of benefits" means the maximum aggregate amount of each component of the tax credit that a participant in the Program is eligible to receive pursuant to this regulation. The schedule shall indicate the annual amount of each component of the credit a participant may claim in each of its five years of eligibility. The preliminary schedule of benefits shall be issued by the Department when the Department approves the application for admission into the Program. The Commissioner may amend that schedule, provided that the Commissioner complies with the credit caps in section 359 of the Economic Development Law.

(u) “Program” means the Excelsior Jobs Program.

(v) "Qualified investment" means an investment in tangible property (including**,** a building or a structural component of a building) owned by a business entity which: (1) is depreciable pursuant to section 167 of the Internal Revenue Code; (2) has a useful life of four years or more; (3) is acquired by purchase as defined in section 179(d) of the Internal Revenue Code; (4) has a situs in this state; and (5) is placed in service in the state on or after the date the certificate of eligibility is issued to the business entity.

(w) "Regionally significant project" means (1) a manufacturer creating at least fifty net new jobs in the state and making a significant capital investment in the state of at least five million dollars; (2) a business creating at least twenty net new jobs in agriculture in the state and making a significant capital investment in the state of at least five hundred thousand dollars; (3) a financial

services firm or back office operation creating at least three hundred net new jobs in the state and making a significant capital investment in the state of at least six million dollars; (4) a distribution center creating at least three hundred net new jobs in the state and making a significant capital investment in the state of thirty million dollars; or (5) a scientific research and development firm creating at least twenty net new jobs in the state and making a significant capital investment in the state of at least six million dollars. Other businesses creating three hundred or more net new jobs in the state and making a significant capital investment in the state of at least six million dollars also may be considered eligible as a regionally significant project by the Commissioner. In order to be a regionally significant project under this subdivision a business must export a substantial portion of its products or services outside of the state or, if located within a metropolitan statistical area, export a substantial portion of its products or services outside of that metropolitan statistical area, or for applicants locating in a county that is not part of a metropolitan statistical area, outside the county.

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

(y) "Remuneration" means wages and benefits paid to an employee by a participant in the program. Under no circumstances shall remuneration include mandated benefits including, but not limited to, Federal Insurance Contributions Act (FICA), Medicare tax, unemployment insurance or workers’ compensation insurance.

(z) "Research and development expenditures" mean the expenses of the business entity that are qualified research expenses under the federal research and development credit under section 41

of the Internal Revenue Code and are attributable to activities conducted in the state. If the federal research and development credit has expired, then the research and development expenditures shall be calculated as if the federal research and development credit structure and definition in effect in federal tax year two thousand nine were still in effect

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

(ab) “Significant capital investment” means generally the addition of a new facility. It may also be evidenced by: (1) a new capital investment whose basis for federal income tax purposes at the time of completion exceeds the sum of the applicant’s total New York State capital investments over the past three tax years; or (2) a major expansion or upgrade of an existing facility resulting in additional production capacity or increased energy or production efficiency increasing the applicant’s profitability, long-term viability, and commitment to operations in New York State.

(ac) "Software development" means the creation of coded computer instructions and includes new media.

(ad) “Smart growth” means the sensible, planned, efficient growth that integrates economic development and job creation with community quality-of-life by preserving and enhancing the

built and natural environments. Smart growth encourages growth in developed areas with existing infrastructure to sustain it, particularly municipal centers, downtowns, urban cores, historic districts and older first-tier suburbs.

Part 191 Application and Review Process

§ 191.1 Application and review process.

(a) An applicant must submit a complete application as prescribed by the Commissioner.

(b) As part of such application, an applicant must:

(1) agree to allow the Department of Taxation and Finance to share its tax information with the Department. Note that the form created by the Department to effectuate this information transfer may only be executed by a person with authority to act on the business entity's behalf in this regard. However, any information shared as a result of this agreement shall not be available for disclosure or inspection under the state freedom of information law; and

(2) agree to allow the Department of Labor to share its tax and employer information with the Department. Note that the form created by the Department to effectuate this information transfer may only be executed by a person with authority to act on the business entity's behalf in this regard. However, any information shared as a result of this agreement shall not be available for disclosure or inspection under the state freedom of information law; and

(3) allow the Department and its agents access to any and all books and records deemed relevant by the Department to monitor compliance with the provisions of Article 17 of the Economic Development Law; and

(4) agree to be permanently decertified from the Empire Zones Program if admitted into the Excelsior Jobs Program, effective for the first taxable year that the business enterprise may claim the Excelsior Jobs Program credit and for all subsequent taxable years; and

(5) provide, upon request by the Department, all of the following information:

(i) a plan outlining the schedule for meeting the job and investment requirements (such plan must include details on job titles and expected salaries);

(ii) the prior three years of federal and state income or franchise tax returns, unemployment insurance quarterly returns, real property tax bills and audited financial statements;

(iii) the amount and description of projected qualified investments for which it plans to claim the Excelsior Investment Tax Credit;

(iv) an estimate of the portion of any federal research and development tax credits, attributable to research and development activities conducted in New York State, that it anticipates claiming for the years it expects to claim the Excelsior Research and Development Credit;

(v) the employer identification or social security numbers for all related persons to the applicant, including those of any members of a limited liability company or partners in a partnership; and

(6) provide a clear and detailed presentation of all related persons to the applicant to assure the Department that jobs are not being shifted within the state; and

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

(c) The Commissioner, upon receipt of a complete application from an applicant, shall determine whether the applicant meets the eligibility criteria set forth in section 191.2 of this part. An applicant that does not meet the eligibility criteria set forth in section 191.2 of this part shall not be accepted into the Program.

(d) Having determined that an application is complete and that the applicant meets the eligibility criteria set forth in section 191.2 of this part, the Department may accept the applicant as a participant and issue a certificate of eligibility as defined in section 190.2(f) of this Title and a preliminary schedule of benefits that indicates the annual amount of each component of the credit a participant may be entitled to in each of its five years of eligibility. The Commissioner may amend a preliminary schedule of benefits provided that the Commissioner complies with the credit caps in section 359 of the Economic Development Law.

§ 191.2 Eligibility criteria.

(a) To be a participant in the program, an applicant must be operating predominantly in a strategic industry and meet the respective job requirements for strategic industries or be a regionally significant project. When determining whether an applicant is operating predominantly in a strategic industry, or as a regionally significant project, the Commissioner will examine the nature of the business activity at the location for the proposed project and will make eligibility determinations based on such activity.

(b) Strategic industries shall consist of the following: (1) financial services data center or a financial services back office operation; (2) manufacturing; (3) software development; (4) scientific research and development; (5) agriculture; (6) the creation or expansion of back office

operations in the state; (7) distribution center; or (8) an industry with significant potential for private-sector economic growth and development in this state.

(c) Job requirements for strategic industries. Notwithstanding subdivision (g) of this section, a business entity operating predominantly in manufacturing must create at least twenty-five net new jobs; a business entity operating predominately in agriculture must create at least ten net new jobs; a business entity operating predominantly as a financial service data center or financial services customer back office operation must create at least one hundred net new jobs; a business entity operating predominantly in scientific research and development must create at least ten net new jobs; a business entity operating predominantly in software development must create at least ten net new jobs; a business entity creating or expanding back office operations or a distribution center in the state must create at least one hundred fifty net new jobs.

(d) A business entity operating predominantly in one of the strategic industries referenced in subdivision (b) of this section but which does not meet the job requirements of subdivision (c) of this section must have at least fifty full-time job equivalents, and must demonstrate that its benefit-cost ratio is at least ten to one.

(e) A business entity must be in substantial compliance with all worker protection and environmental laws and regulations.

(f) A business entity may not owe past due state or local taxes; provided, however, in the case of a tax certiorari proceeding a business entity would not be considered in arrears until a final decision is made with respect to such proceeding.

(g) A not-for-profit business entity, a business entity whose primary function is the provision of services including personal services, business services, or the provision of utilities, a business entity engaged predominantly in the retail or entertainment industry, and a business entity engaged in the generation or distribution of electricity, the distribution of natural gas, or the production of steam associated with the generation of electricity are not eligible to participate in the program.

(h) A business entity must demonstrate that it has satisfied the job creation projected in its preliminary schedule of benefits. A business entity certified as a regionally significant project must demonstrate that it has satisfied the job creation and investment projections in its preliminary schedule of benefits.

§ 191.3 Evaluation standards

(a) The evaluation standards which may be utilized by the Commissioner when determining whether to admit an applicant to the program include the following:

(1) whether the applicant is proposing to substantially renovate contaminated, abandoned or underutilized facilities; or

(2) whether the applicant will use energy-efficient measures, including, but not limited to, the reduction of greenhouse gas and emissions and the Leadership in Energy and Environmental Design (LEED) green building rating system for the project identified in its application; or

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

(4) the degree of applicant's financial viability, strength of financials, readiness and likelihood of completion of the project identified in the application; or

(5) the degree to which the project identified in the application supports New York State's minority and women business enterprises; or

(6) the degree to which the project identified in the application supports the principles of Smart Growth as defined in section 190.2(ad) of this Title; or

(7) the estimated return on investment that the project identified in the application will provide to the State; or

(8) the overall economic impact that the project identified in the application will have on a region, including, but not limited to, the impact of any direct and indirect jobs that will be created; or

(9) the degree to which other state or local incentive programs are available to the applicant; or

(10) the likelihood that the project identified in the application would be located outside of New York State or would not occur but for the availability of state or local incentives.

(b) In addition, the Commissioner shall make all reasonable efforts to allocate tax credits in a geographically proportionate manner throughout the state.

Part 192 Claiming credits

§ 192.1 Claiming credits.

(a) A participant must submit evidence of achieving the applicable job and investment requirements to the Department in order to receive benefits under the program.

(b) Such evidence may include, but not be limited to, submission of the NYS-45 form and, where applicable, submission of receipts specifically documenting research and development expenditures and/or qualified investments as such terms are defined in section 352 of the Economic Development Law. This evidence will serve to demonstrate that the participant has satisfied all applicable eligibility requirements and form the basis for the tax credit components.

(c) If a participant fails to demonstrate that it has satisfied the eligibility requirements set forth in section 191.2(h) of this Title, the Department shall not issue such participant a certificate of tax credit. If a participant certified as a regionally significant project fails to demonstrate that it has satisfied the eligibility requirements set forth in section 191.2(h) of this Title, the Department shall not issue such participant a certificate of tax credit. Provided however, if the participant can demonstrate to the Commissioner's satisfaction that failure to satisfy the job creation or investment projections in the preliminary schedule of benefits was due to extraordinary economic circumstances beyond the control of the participant, the Commissioner may issue a certificate of tax credit.

(d) If a participant certified pursuant to section 191.2(d) of this Title fails to demonstrate that it has fifty full-time job equivalents or fails to demonstrate that it has a benefit-cost ratio of at least ten to one, the Department shall not issue such participant a tax credit.

(e) After reviewing such evidence and finding it sufficient, the Department shall calculate the appropriate amount of tax credit and issue a certificate of tax credit for one taxable year. The certificate shall specify the exact amount of each of the tax credit components that a participant may claim pursuant to Part 193 of this Title, and shall specify the taxable year in which such credit may be claimed. The tax credit components may only be claimed on tax returns for the tax year indicated on the certificate. If the participant is a business entity that passes through the tax credit components to its owners (such as partners in a partnership or members in a limited liability company), such owners can only claim their share of the credit components on the tax return that corresponds to the tax year indicated on the certificate issued to the participant. In order to receive a certificate of tax credit for subsequent taxable years, the participant must submit to the Department a performance report for each year containing evidence that the participant continues to satisfy applicable job creation and/or investment requirements indicated in the preliminary schedule of benefits. The participant must also provide data sufficient to allow the Department to calculate the proper amount of each tax credit component.

(f) A participant's increase in employment, qualified investment, or federal research and development tax credit attributable to research and development activities in New York State above its projections listed in its application shall not result in an increase in tax benefits under this regulation. However, if the participant's expenditures are less than the estimated amounts, the credit component shall be less than the estimate.

Part 193 Calculation of the tax credits.

§ 193.1 Calculation of the tax credits

(a) The Department shall calculate the amount of each tax credit component for which the participant is eligible pursuant to section 355 of the Economic Development Law. The amount of each component shall be separately stated on the certificate of tax credit.

(b) Excelsior Jobs Program Credit Component. A participant in the Program shall be eligible to claim a credit for each net new job it creates in New York State. The amount of such credit per job shall be equal to the sum of the following: five percent of the amount of remuneration equal to or less than fifty thousand dollars; four percent of the amount of remuneration in excess of fifty thousand dollars and equal to or less than seventy-five thousand dollars; and one and thirty three hundredth percent of the amount of remuneration in excess of seventy-five thousand dollars. However, the amount of the credit for each net new job shall not exceed five thousand dollars.

(c) Excelsior Investment Tax Credit Component. A participant in the Program shall be eligible to claim a credit on qualified investments. The credit shall be equal to two percent of the cost or other basis for federal income tax purposes of the qualified investment. A participant may not claim both the Excelsior Investment Tax Credit Component and the investment tax credit set forth in section 210(12), section 606(a), or section 1456(i) of the Tax Law for the same property in any taxable year. In addition, a taxpayer who or which is qualified to claim the Excelsior Investment Tax Credit Component and is also qualified to claim the Brownfield Tangible Property Credit component under section 21 of the Tax Law may claim either the Excelsior

Investment Tax Credit Component or such tangible property credit component, but not both with regard to a particular piece of property. The Excelsior Investment Tax Credit Component may not be claimed until a participant has received a certificate of tax credit, provided that qualified investments made on or after the issuance of the certificate of eligibility but before the issuance of the certificate of tax credit to the participant, may be claimed in the first taxable year for which the participant is allowed to claim the credit. Expenses incurred prior to the date the certificate of eligibility is issued are not eligible to be included in the calculation of the credit.

(d) Excelsior Research and Development Tax Credit Component. A participant in the program shall be eligible to claim a credit equal to ten percent of the portion of the participant's federal research and development tax credit that relates to the participant's research and development expenditures in New York State during the taxable year. If the federal research and development credit has expired, then the research and development expenditures relating to the federal research and development credit shall be calculated as if the federal research and development credit structure and definition in effect in two thousand nine were still in effect.

(e) Excelsior Real Property Tax Credit Component. A participant in the program who either qualified as a regionally significant project or is located in an investment zone shall be eligible to claim an excelsior real property tax credit for a period of five years. In the first year, the credit shall be equal to fifty percent of the eligible real property taxes on the real property comprising the regionally significant project or located in the investment zone that were assessed and paid in the year immediately prior to application. In the remaining years the credit shall be computed according to the following schedule:

(1)Year two: forty percent of eligible real property taxes on the real property comprising the regionally significant project or located in the investment zone that were assessed and paid in the year immediately prior to application;

(2)Year three: thirty percent of eligible real property taxes on the real property comprising the regionally significant project or located in the investment zone that were assessed and paid in the year immediately prior to application;

(3)Year four: twenty percent of eligible real property taxes on real property comprising the regionally significant project or located in the investment zone that were assessed and paid in the year immediately prior to application; and

(4)Year five: ten percent of eligible real property taxes on the real property comprising the regionally significant project or located in the investment zone that were assessed and paid in the year immediately prior to application.

For purposes of this credit component, the term "eligible real property taxes" shall have the same meaning as in section 15(e) of the Tax Law, provided that such subdivision (e) shall be read as if it specifically referenced the Excelsior Jobs program and participants in that program.

§ 193.2 Refundability of credits.

(a) The tax credit components established in this section shall be refundable as provided in the Tax Law. If a participant fails to satisfy the eligibility criteria, specifically the applicable job creation and/or investment requirements indicated in the preliminary schedule of benefits in any one year, it will lose the ability to claim credit for that year.

(b) The event of such failure shall not extend the original five-year eligibility period.

Part 194 Record retention and Reporting requirements

§ 194.1 Record retention.

(a) Each participant shall keep all relevant records for their duration of program participation plus three years.

(b) The Department shall have the right to inspect all relevant records upon reasonable notice to the Participant.

§ 194.2 Reporting.

(a) Each participant must submit a performance report annually, in such form as the Commissioner may require within thirty days of the end of its taxable year.

(b) The Commissioner shall prepare on a quarterly basis a program report for posting on the Department's website. The first report will be due June thirtieth, two thousand eleven, and every three months thereafter. Such report shall include, but not be limited to, the following information: number of applicants; number of participants approved; names of participants; total amount of benefits certified; benefits received per participant; total number of net new jobs created; number of net new jobs created per participant; aggregate new investment in the state; new investment per participant; and such other information as the Commissioner determines necessary.

Part 195 Removal from Program

§ 195.1 Removal from program.

(a) The Commissioner shall remove any participant from the program for failing to meet any of the requirements set forth in section 191.1(b) of this Title, or for failing to meet the minimum job or investment requirements set forth in section 191.2(c) and (d) of this Title.

(b) If the Commissioner has removed the participant from the program pursuant to subdivision (a) of this section, the Commissioner shall notify the participant of such removal in writing. Such notice of removal shall explain the reason or reasons for the removal from the program. The notice of removal shall state the effective date of removal, and advise the participant that it may appeal the removal in accordance with Part 196 of this Title. Such notice may be served by the Department on the participant by certified, registered or overnight mail sent to the participant at the address last provided to the Department by the participant.

Part 196 Appeal Procedures

§196.1 Applicability.

(a) This part shall apply to all appeals taken as a result of a participant being removed from the program pursuant to section 195.1(a) of this Title.

§ 196.2 Designation of Appeal Officers.

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

§ 196.3 Notice of Appeal.

(a) A participant that received a notice of removal pursuant to section 195.1(b) of this Title may send a written notice ("Notice of Appeal") to the Commissioner appealing the removal by no later than 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 and documentation supporting the basis for the appeal and all legal arguments that are the basis for the participant's challenge to the removal.

(c) All Notice of Appeals must be sent to the name and address indicated on the Notice of Removal.

(d) Counsel to the Department may file a response to the Notice of Appeal with the appeal officer. Any response should address the factual and legal allegations contained in the Notice of Appeal. A copy of the response shall be sent to the participant, or to the attorney representing the participant.

§ 196.4 Authority of Appeal Officer.

(a) The appeal officer shall evaluate the merits of the appeal and any response from counsel to the Department. Where the appeal officer deems it appropriate, the appeal officer may require the participant or counsel to the Department to address additional issues and/or submit additional information regarding the appeal. If the appeal officer requires submission of additional

documents by either participant or counsel to the Department, both parties shall receive copies of all submissions.

(b) Nothing herein shall preclude the appeal officer from obtaining information from any outside source, as he or she deems appropriate.

(c) The appeal officer shall determine whether he or she deems it necessary to conduct a fact-finding hearing, and the level of formality of any hearing conducted.

§ 196.5 Appeal Officer's Report.

(a) The appeal officer shall prepare a report and make recommendations to the Commissioner. The recommendations may be in the form of a proposed decision which will contain findings of fact and conclusions of law. This report, along with the entire record, shall be transmitted to the Commissioner, the counsel to the Department, and the business entity that filed the appeal.

§ 196.6 Appeal Decision.

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