

**PART 240 OF THE REGULATIONS OF THE COMMISSIONER OF THE
DEPARTMENT OF ECONOMIC DEVELOPMENT IS ADDED TO READ AS
FOLLOWS:**

EMPIRE STATE MUSICAL AND THEATRICAL PRODUCTION TAX CREDIT PROGRAM
PART 240

§ 240.1 Purpose and general description.

The purpose of these regulations is to set forth the application process by which a qualified musical and theatrical production company may apply for benefits under the Empire State Musical and Theatrical Production Tax Credit Program established by Chapter 59 of the Laws of 2014. These regulations establish procedures for the allocation of such credits, including, but not limited to, the application process, standards for evaluating applications, and such other provisions deemed necessary and appropriate. The New York State Department of Economic Development shall administer the program, including the issuance of tax credit certificates.

§ 240.2 Definitions. As used in this regulation, the following terms shall have the following meanings:

- (a) “Authorized applicant” means a qualified musical and theatrical production company that is scheduled to begin the technical period for a qualified musical and theatrical production after submitting an initial application to the Department.
- (b) “Certificate of conditional eligibility” means a notification by the Department to the authorized applicant indicating that the applicant appears to be a qualified musical and theatrical production company scheduled to complete a qualified touring production. Such notification may include, but is not limited to, the following information: name and address

of the authorized applicant, taxpayer identification number, a statement that the authorized applicant appears to be scheduled to complete a qualified touring production, and a disclaimer stating that actual receipt of the tax credit is subject to completion and approval of the final application.

- (c) “Certificate of tax credit” means a certificate issued by the Department which states the amount of the Empire State Musical and Theatrical Production Tax Credit that the approved applicant has qualified for based on the Department’s analysis under section 24-a 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 musical or theatrical production to which the credit applies, the amount of the tax credit to be received by the approved applicant, the allocation year of the tax credit, a disclaimer stating that the tax credit shall not be claimed before the later of either the taxable year the production of the qualified musical or theatrical production is complete or the taxable year immediately following the allocation year for which the musical or theatrical production 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.
- (d) “Commissioner” means the Commissioner of the New York State Department of Economic Development.
- (e) “Completeness of the application” means that all questions on the application itself were fully addressed by the applicant and that any additional substantiating documents that were requested by the Department were provided.

- (f) “Completion of a qualified touring production” means that a qualified musical or theatrical production company has completed a qualified touring production, consisting of at least eight (8) shows in three (3) or more localities.
- (g) “Department” means the New York State Department of Economic Development.
- (h) “Final application” means a document created by the Department and submitted by an approved applicant which contains information concerning actual production expenditures regarding a qualified musical or theatrical production that could make it eligible for the Empire State Musical and Theatrical Production Tax Credit under section 24-a 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 musical or theatrical production’s total production budget, the total musical and theatrical production costs at musical and theatrical production facilities in and outside of New York, and any other information the Department determines is necessary.
- (i) “Initial application” means a document created by the Department and submitted by an authorized applicant which contains information concerning projected musical and theatrical production expenditures regarding a qualified musical or theatrical production that could make it eligible for the Empire State Musical and Theatrical Production Tax Credit under section 24-a of the Tax Law and the provisions of this Part. Such application shall include, but is not limited to, the following information: the number of shows scheduled to be performed and the venues in which these shows will be performed, the estimated total production budget for the qualified musical or theatrical production, estimates of musical and theatrical production expenditures at qualifying musical and theatrical production facilities,

estimates of musical and theatrical production expenditures in New York State and outside of New York State, and any other information the Department determines is necessary.

- (j) “Program” means the Empire State Musical and Theatrical Production Tax Credit Program.
- (k) “Qualified musical and theatrical production” means a for-profit live, dramatic stage presentation in a qualified production facility, certified pursuant to this Part, as a qualified touring production.
- (l) “Qualified musical and theatrical 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 musical or theatrical production and performs in a qualified production facility.
- (m) “Qualified production expenditure” means any costs for tangible property used and services performed directly and predominantly in the production of a qualified musical and theatrical production within the state including: (i) expenditures for design, construction and operation, including sets, special and visual effects, costumes, wardrobes, make-up, accessories and costs associated with sound, lighting, and staging, (ii) all salaries, wages, fees, per diems, payroll tax expenditures, fees for workers’ compensation insurance, and other compensation including related benefits for services performed of which the total allowable expense shall not exceed two hundred thousand dollars per week, and (iii) technical and crew production costs, such as expenditures for qualified production facilities, or any part thereof, props, make-up, wardrobe, costumes, equipment used for special and visual effects, sound recording, set construction, and lighting. Production expenditures for certain assets not destroyed during the production of a qualified musical and theatrical production are to be discounted when applied towards a tax credit under this Part in accordance with guidance to

be provided by the Department. Expenditures associated with the performance of a show before a paying audience shall be deemed to be directly and predominantly in the production of a qualified musical and theatrical production only when the show is performed in a qualified production facility and the show has not been performed in any facility, other than a qualified production facility, subsequent to the completion of the technical period in a qualified production facility. Expenditures not directly and predominantly in the production of a qualified musical and theatrical production include, but are not limited to, expenditures for advertising, marketing, and publicity, and any expenditures for the technical period of the musical and theatrical production incurred at a location other than a qualified production facility.

- (n) “Qualified production facility” means a facility located in the state but outside the city of New York (i) in which live theatrical productions are or are intended to be primarily presented, (ii) that contains at least one stage, a seating capacity of one thousand (1,000) or more seats, and dressing rooms, storage areas, and other ancillary amenities necessary for the qualified musical and theatrical production, (iii) for which receipts attributable to ticket sales constitute seventy-five (75) percent or more of gross receipts of the facility, and (iv) which is not a licensee, or affiliated with a licensee, of the New York state gaming commission under the racing, pari-mutuel wagering and breeding law.
- (o) “Qualified touring production” means a live, dramatic stage production that, in its original or adaptive version, is performed in a qualified production facility, and has begun or will begin a tour, consisting of eight (8) or more shows in three (3) or more localities. A production is performed in a qualified production facility when the activities comprising the technical period for the production are conducted therein prior to the commencement of a tour.

- (p) “Show” means a live performance of a dramatic musical or theatrical presentation.
- (q) “Technical period” means those activities, as determined by the Department, performed by technical personnel of a qualified touring production prior to the commencement of a qualified touring production, including, but not limited to, those personnel responsible for lighting, sound, wardrobe, and props.
- (r) “Transportation expenditures” means transportation expenditures incurred and paid directly and predominantly in the production of a qualified musical and theatrical production. Such expenditures shall include the packaging, crating, and transportation within the State for use in a qualified musical and theatrical production of sets, costumes, or other tangible property constructed or manufactured in and out of State, and the transportation of the cast and crew within the State, including hotel costs for the cast and crew. Such term shall include the packaging, crating, and transporting within the State of property and equipment used for special and visual effects, sound, lighting and staging, costumes, wardrobes, make-up and related accessories and materials, as well as any other performance or production-related property and equipment. Transportation expenditures shall not include any costs to transport property and equipment to be used only for filming and not in a qualified theater production, any indirect costs, and expenditures that are later reimbursed by a third party, or any amounts that are paid to persons or entities as a result of their participation in profits from the exploitation of the production.

§ 240.3 Eligibility. For the purposes of this Part, only an authorized applicant shall be eligible to apply for the Empire State musical and theatrical production tax credit.

§240.4 Application Process.

(a) Initial application -- notice of intent.

- (1) An authorized applicant shall submit an initial application to the Department prior to commencement of the technical period of a qualified musical and theatrical production for which it seeks a tax credit under this article. The purpose of the initial application is to notify the Department of its intent to produce a qualified musical and theatrical production in a qualified production facility and submit a final application for the Empire State musical and theatrical production tax credit.
- (2) The Department shall evaluate the initial application based upon the completeness of the application and whether it was submitted in accordance with paragraph one of this subdivision.
- (3) After review of the initial application, the Department shall notify the authorized applicant of its eligibility and may issue a certificate of conditional eligibility to the authorized applicant.

(b) Final application.

- (1) An applicant may submit a final application to the Department following the completion of a qualified touring production.

(2) Upon receipt of a final application, the Department may request additional documentation, including copies of receipts of qualified musical and theatrical production expenditures, to determine if the production qualifies for the Empire State Musical and Theatrical Production Tax Credit. The Department shall approve or disapprove the final application based upon criteria set forth in section 240.6 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 240.8 of this Part, or reapply pursuant to the provisions of this Part.

§ 240.5 Allocation of Empire State Musical and Theatrical Production Tax Credit

- (a) Amount of credit. The amount of the credit shall be the product (or pro rata share of the product, in the case of a member of a partnership) of twenty-five (25) percent and the sum of the qualified production expenditures and the transportation expenditures.
- (b) Aggregate amount of tax credits. The aggregate amount of tax credits allowed under this Program in any calendar year shall be four (4) million dollars. Such aggregate amount of credits shall be allocated by the Department among taxpayers in order of priority based upon the date of filing a final application for allocation of a Musical and Theatrical Production Tax Credit with the Department. If the total amount of allocated credits applied for in any

particular year exceeds the aggregate amount of tax credits allowed for such year, such excess shall be treated as having been applied for on the first day of the subsequent year.

§ 240.6 Criteria for evaluation of final applications.

A final application shall not be approved by the Department unless the Department determines, in its discretion, that the following criteria are met:

- (1) the application is complete;
- (2) the applicant completed a qualified touring production;
- (3) the applicant did not knowingly submit false or misleading information to the Department.

§240.7 Record retention.

All applicants must maintain records, in paper or electronic form, of any qualified musical and theatrical production costs used to calculate their potential or actual benefit(s) under the Program for a minimum of three (3) years from the date the applicant claims an Empire State Musical and Theatrical Production Tax Credit. The Department shall have access to the records during normal business hours at an office of the applicant within the State or, if no such office is available, at a mutually agreeable and reasonable venue within the State, for the term specified above for the purposes of inspection, auditing and copying.

§ 240.8 Appeal process.

- (a) If an applicant's final application is disapproved by the Department, or if an approved applicant disagrees with the amount of an Empire State Musical and Theatrical Production Tax Credit granted by the 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 thirty (30) days from the date of the denial letter issued by the 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 thirty (30) days from the date of issuance of the certificate of tax credit. Failure to request an appeal within thirty (30) days shall be deemed a waiver of an applicant's right to appeal.
- (b) Upon receipt of a timely letter of appeal, an independent hearing officer will be appointed by the Commissioner to handle the appeal.
- (c) An appeal may be conducted via a hearing, or, with the approval of both parties, via written submissions.
- (d) The independent hearing officer shall render a recommended order on the appeal to the Commissioner within sixty (60) days of the conclusion of a hearing or receipt of the written submission of both parties. The Commissioner or his designee shall issue a final order within sixty (60) days of receipt of the report of the independent hearing officer. 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.

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

- (a) Employees and officers of the 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 under the Program, as well as information regarding taxpayers who are applying for credits or who are claiming credits, including information contained in or derived from credit claim forms submitted to the department of taxation and finance and applications for certification submitted to the Department.
- (b) The Commissioner and the commissioner of the department of taxation and finance may release the names and addresses of any taxpayer claiming a credit under the Program and the amount of the credit issued to the taxpayer. Provided, however, if a taxpayer claims this credit because it is a member of a limited liability company or a partner in a partnership, only the amount of credit earned by the entity and not the amount of credit claimed by the taxpayer may be released.

§240.10 Annual Report

The Department shall submit to the governor, the temporary president of the senate, and the speaker of the assembly, an annual report on February first of each year evaluating the effectiveness of the Program in stimulating the growth of the musical and theatrical industry in the State. Such report shall include, but need not be limited to, in total and by qualified musical and theatrical production, the number of qualified musical and theatrical productions which received a musical and theatrical production credit, the qualified production expenditures, the transportation expenditures, the qualified production facilities, and the credit amounts claimed by each qualified musical and theatrical production, as well as the impact on employment and the economy of the state. Such report shall include (1) the credit-eligible man hours for each project and the total wages for such credit-eligible man hours for each project as well as the name of

each taxpayer allocated a 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; and (2) the amount of tax credit allocated 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 information identifying the project associated with each taxpayer for which a tax credit was claimed under this section, including the name of the musical and theatrical production and county in which the production is performed must be included in such report. Such report shall be based on data available from the final application filed with the Department. Notwithstanding any provision of law to the contrary, the information contained in the report shall be public information. The report may also include any recommendations of changes in the calculation or administration of the credit, and any other recommendation of the Commissioner regarding modification or repeal of the Program, and such other information regarding the Program as the Commissioner determines useful and appropriate.