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RULE ADOPTIONS

OTHER AGENCIES
NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY

42 N.J.R. 2322(b)

Adopted Amendments: *N.J.A.C. 19:31-12.1* through *12.7*

Adopted New Rule: N.J.A.C. 19:31-12.8

Authority Assistance Programs

Technology Business Tax Certificate Transfer Program

Proposed: July 6, 2010 at *42 N.J.R. 1348(a)*.

Adopted: September 7, 2010 by the New Jersey Economic Development Authority, Caren S. Franzini, Chief Executive Officer.

Filed: September 7, 2010 as R.2010 d.206, **with a technical change** not requiring additional public notice and comment (see *N.J.A.C. 1:30-6.3*).

Authority: *N.J.S.A. 34:1B-1* et seq., P.L. 2009, c. 90 and P.L. 2010, c. 10.

Effective Date: October 4, 2010.

Expiration Date: January 18, 2011.

Summary of Public Comment and Agency Response:

No public comments were received.

Federal Standards Statement

The adopted amendments and new rule are not subject to any Federal standards or requirements; therefore, a Federal standards analysis is not required.

Full text of the adoption follows (addition to proposal indicated in boldface with asterisks ***thus***):

SUBCHAPTER 12. TECHNOLOGY BUSINESS TAX CERTIFICATE TRANSFER PROGRAM

19:31-12.1 Applicability and scope

The rules in this subchapter are promulgated by the New Jersey Economic Development Authority to implement P.L. 1997, c. 334, as amended by P.L. 2009, c. 90 and P.L. 2010, c. 10. This Act establishes a corporation business tax benefit certificate transfer program to assist new or expanding emerging technology and biotechnology companies in New Jersey.

19:31-12.2 Definitions

The following words and terms, as used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

"Allowable expenditures" means costs incurred in connection with the operation of the new or expanding emerging technology or biotechnology business in the State, including, but not limited to, the expenses of fixed assets, such as the construction, acquisition and development of real estate, materials, start-up, tenant fit-out, working capital, salaries, and research and development expenditures.

. . .

"Biotechnology business" means an emerging corporation that has a headquarters or base of operations located in New Jersey that owns, has filed for, or has a license to use protected, proprietary intellectual property and whose primary business is the research, development, production, or provision of biotechnology for the purpose of developing or providing products or processes for specific commercial or public purposes, including, but not limited to, medical, pharmaceutical, nutritional, and other health-related purposes, agricultural purposes, and environmental purposes.

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"Camden innovation zone" means the innovation zone in the southern part of the State bounded as follows: in the north by the Ben Franklin Bridge, in the east by Interstate 676, in the south by Kaighns Avenue, and in the west by the Delaware River.

. . .

"Financial statements" means a statement prepared by an independent Certified Public Accountant (CPA), which shall include an opinion letter indicating the scope of the services performed (compilation, review, or audit) in accordance with Generally Accepted Accounting Principles (GAAP) as determined by the Financial Standards Accounting Board (FASB) and shall include a balance sheet, statement of income and expenses, cash flow statement, other statements as determined by the independent CPA, and footnotes where applicable.

"Full-time employee" means a person employed by a new or expanding emerging technology or biotechnology company for consideration for at least 35 hours a week, or who renders any other standard of service generally accepted by custom or practice as full-time employment and whose wages are subject to withholding as provided in the New Jersey Gross Income Tax Act, *N.J.S.A. 54A:1-1* et seq., or who is a partner of a new or expanding emerging technology or biotechnology company who works for the partnership for at least 35 hours a week, or who renders any other standard of service generally accepted by custom or practice as full-time employment, and whose distributive share of income, gain, loss, or deduction, or whose guaranteed payments, or any combination thereof, is subject to the payment of estimated taxes, as provided in the New Jersey Gross Income Tax Act, *N.J.S.A. 54A:1-1* et seq. To qualify as a "full-time employee," an employee shall also receive from the new or expanding emerging technology or biotechnology company health benefits under a group health plan as defined under section 14 of P.L. 1997, c. 146 (*N.J.S.A. 17B:27-54*), a health benefits plan as defined under section 1 of P.L. 1992, c. 162 (*N.J.S.A. 17B:27A-17*), or a policy or contract of health insurance covering more than one person issued pursuant to Article 2 of chapter 27 of Title 17B of the New Jersey Statutes. "Full-time employee" shall not include any person who works as an independent contractor or on a consulting basis for the new or expanding emerging technology or biotechnology business.

"Greater New Brunswick innovation zone" means the innovation zone bounded as follows: in the north by Route 287 to Stelton Road to Metlars Lane to Route 18, in the east by Route 1, in the south by Suydam Road/Claremont

Road/Finnegan's Lane, and in the west by the Millstone River and Raritan River, which includes parts of North Brunswick, New Brunswick, Piscataway and Franklin Township and Rutgers University's Livingston campus.

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"License" means an agreement that states therein that it is granting a license and that authorizes the applicant to control aspects of the development of the protected proprietary intellectual property. The protected proprietary intellectual property must be directly related to the applicant's primary business of providing a scientific process, product, or service. License shall not include an agreement, such as an exclusive distribution agreement or similar business arrangement that is not registered with the U.S. Federal Government, such as the U.S. Patent and Trademark Office, that does not grant the applicant control of the protected proprietary intellectual property.

. . .

"New or expanding" means a technology or biotechnology company that:

1. On June 30 of the year in which the company files an application for surrender of unused but otherwise allowable tax benefits under P.L. 1997, c. 334 (*N.J.S.A. 34:1B-7.42a* et al.) and on the date of the exchange of the corporation business tax benefit certificate, has fewer than 225 employees in the United States of America;

2. On June 30 of the year in which the company files such an application, has at least one full-time employee working in this State if the company has been incorporated for less than three years, has at least five full-time employees working in this State if the company has been incorporated for more than three years but less than five years, and has at least 10 full-time employees working in this State if the company has been incorporated for more than five years; and

3. On the date of the exchange of the corporation business tax benefit certificate, the company has the requisite number of full-time employees in New Jersey that were required on June 30 as set forth in paragraph 2 above.

In calculating the number of employees under this definition, employees of all affiliates and subsidiaries as shown on its consolidated financial statements, employees of any company that owns or controls at least 50 percent of the applicant, as well as the employees of any consolidated group of affiliated corporations as filed for Federal income tax purposes shall be included.

"Newark innovation zone" means the innovation zone in the northern part of the State bounded as follows: in the north by Interstate 280, in the east by McCarter Highway (Route 21) and the Pennsylvania Railroad, in the south by Market Street to South Orange Avenue, and in the west by Bergen Street.

. . .

"Protected proprietary intellectual property" means intellectual property that is protected via a patent pending, patent awaiting approval, approved patent or registered copyright.

. . .

"Unused net operating loss carryover" means net operating loss for any tax year as defined in *N.J.S.A. 54:10A-4(k)(6)(B)*.

. . .

19:31-12.3 Eligibility

(a) A business shall be eligible to apply to the program if the Authority finds that the business:

1.-2. (No change.)

3. Meets the definition of new or expanding.

(b) No application shall be approved in which the business:

1. Has demonstrated positive net operating income in any of the two previous full years of ongoing operations as determined on its financial statements; or

2. Is directly or indirectly at least 50 percent owned or controlled by another corporation that has demonstrated positive net operating income in any of the two previous full years of ongoing operations as determined on its financial statements or is part of a consolidated group of affiliated corporations, as filed for Federal income tax purposes, that in aggregate has demonstrated positive net operating income in any of the two previous full years of ongoing operations as determined on its combined financial statements.

19:31-12.4 Application to the program

(a) Each application submitted by a selling business to the program shall be accompanied by a non-refundable $ 2,500 application fee. Complete applications must be received by June 30 for each State fiscal year.

(b) In order for the Department of Treasury, Division of Taxation to issue a certificate, each application submitted to the program shall include: a selling business application which includes the information set forth in (c) below; a spending certification form attesting to having spent the proceeds of the prior year's sale of tax benefits in accordance with the definition of allowable expenditures; a Buying Business Information Sheet which identifies the buying business name, address, telephone number, the estimated value of benefits to be transferred in an amount equal to at least 80 percent of the surrendered tax benefit and from whom and a business certification; an agreement between the buying and selling business defining the terms of the sale of the certificate; and the Tax Benefit Identification Form which summarizes the accumulated net operating losses and research and development credits authorized to be sold and the value intended to be sold. For determination of eligibility for the program, the initial application package shall also include a selling business application and a spending certification form.

(c) In addition to the material specified in (b) above, a completed application shall include, but is not limited to:

1.-2. (No change.)

3. Financial statements for the two most recent full years of operation;

Recodify existing 6. and 7. as 4. and 5. (No change in text.)

6. A list of all corporations that form a consolidated group of affiliated corporations as filed for Federal income tax purposes, the number and location of all employees of such corporation(s), and financial statements for the two most recent full years of operation;

7. A representation as to the location of the applicant's primary place of business in an Innovation Zone;

8. A description of the applicant's technology or biotechnology business which shall demonstrate that such business is the primary business of the applicant and that the applicant meets the other criteria of the definition of technology or biotechnology business. Where applicable, documentation of protected proprietary intellectual property must be provided;

9. A list of all full-time employees employed in New Jersey, including social security number for each, and in the United States at the time of application and copies of most recent year's Federal and New Jersey W-3 forms for applicant, parent company and all related entities, or documentation from a professional employer organization summarizing W-2 forms issued on behalf of the applicant, parent company and all related entities in New Jersey and in the United States for the calendar year prior to the year in which the company files its application and at the time of the application;

10. A list of 100 percent of ownership percent of the applicant by percentage;

11. A copy of the certificate of incorporation for the applicant's company; and

12. (No change in text.)

(d)-(e) (No change.)

19:31-12.5 Evaluation process

(a) When all of the required information is received, the Authority shall perform its own review based on the standards set forth in *N.J.A.C. 19:31-12.3*.

(b) (No change.)

(c) After approval of the tax benefit by the Division of Taxation as evidenced by the issuance of a tax certificate which will be sent to the Authority, the Authority will issue final approval of the grant only upon the receipt of a certificate from the applicant, dated the date of the closing of the sale of the tax benefit certificate that states, among other matters, the number of employees employed on that date by the applicant in the United States of America and in New Jersey, and that as of the date of the certificate, the company is operating as a new or expanding emerging biotechnology or technology business and has no current intention to cease operating as a new or expanding emerging biotechnology or technology business.

19:31-12.6 Approval process

(a) All applications for eligibility in the program shall be presented to the members of the Authority for approval or denial.

(b) When the members approve or deny a request, the minutes at which such determination occurs are submitted to the Governor.

(c) (No change.)

(d) An applicant may appeal the Board's action by submitting in writing to the Authority, within 20 days from the date of the Board's action, an explanation as to how the applicant has met the program criteria. The Authority cannot consider any new evidence or information about the project other than evidence or information that would demonstrate that the applicant met all of the application criteria by the June 30 deadline. Appeals will be handled by the Authority as follows:

1. The Chief Executive Officer shall designate an employee of the Authority to serve as a hearing officer for the appeal and to make a recommendation on the merits of the appeal to the Board. The hearing officer shall perform a review of the written record and may require an in-person hearing. The hearing officer has sole discretion to determine if an in-person hearing is necessary to reach an informed decision on the appeal;

2. Following completion of the record review and/or in-person hearing, as applicable, the hearing officer shall issue a written report to the Board containing his/her finding(s) and recommendation(s) on the merits of the appeal; and

3. The Board shall consider the hearing officer's recommendation(s) and, based on that review, shall issue a final decision on the appeal.

19:31-12.7 Allocation of tax benefits

(a) The Program is authorized to provide no more than $ 60,000,000 of tax benefits over each State fiscal year. Of the $ 60,000,000 of transferable tax benefits authorized for each State fiscal year $ 10,000,000 shall be allocated exclusively among the eligible companies that operate within the boundaries of the innovation zones, except as provided in (a)2ii below. In the event the total amount of transferable tax benefits approved exceeds these limitations or any subsequent limitations, the Authority shall allocate the transfer of tax benefits as follows:

1. Each company is limited to a maximum lifetime tax benefit of $ 15 million.

2. The Authority shall allocate the $ 10 million designated for eligible companies in innovation zones as follows:

i. For eligible companies in innovation zones, each company is eligible for an allocation of the lesser of $ 250,000 or the value of their eligible benefits. After these allocations are made to these companies from the $ 10 million innovation zone allocation, any remaining balance of the $ 10 million shall be apportioned among eligible companies in innovation zones with unmet eligible benefits on a pro rata basis;

ii. If in any State fiscal year, there is an unused portion of the $ 10 million allocated exclusively for companies in innovation zones, that portion shall be available for that State fiscal year for the surrender of transferable tax benefits by new and/or expanding emerging technology and biotechnology businesses that do not operate within the boundaries of an innovation zone; and

iii. The eligible companies in innovation zones with remaining unmet eligible benefits shall participate in the allocation of the remaining pool as set forth in (a)3 below.

3. The Authority shall allocate the remaining tax benefits as follows:

i. Businesses with less than $ 250,000 in tax benefits will be authorized to sell all of their benefits in the current year;

ii. Businesses with more than $ 250,000 in tax benefits will be authorized to sell at least $ 250,000 of their benefits in the current year; and

iii. If the total amount of benefits authorized under (a)2 and 3i and ii above exceeds $ 60 million, each applicant shall receive a lesser amount on an apportioned basis, otherwise after the dollars are set aside in the amounts provided in (a)2 and 3i and ii above, the remaining funds available to the program, in that fiscal year, shall be allocated among the businesses with more than $ 250,000 of tax benefits. The available tax benefits shall be determined by reducing the amount of tax benefits to be transferred for each business by the minimum amount of tax benefits authorized for that business and then multiplying that amount by the following factor:

Numerator of Fiscal Year Dollar Authorization less Total Minimum Tax Benefits Authorized over denominator of Total Tax Benefits Requested to be Transferred less Total Minimum Tax Benefits Authorized**.**

The total minimum tax benefits authorized is the amount authorized for businesses with less than $ 250,000 of tax benefits plus the minimum tax benefits authorized for businesses with more than $ 250,000 of tax benefits. The total tax benefits requested to be transferred is the total amount of tax benefits requested to be transferred by all businesses.

19:31-12.8 Recapture of tax benefits

(a) Unless excepted pursuant to (b) below, if a selling business fails to use the private financial assistance received for the surrender of tax benefits as required by this subchapter or fails to maintain a headquarters or a base of operation in the State during the five years following receipt of the private financial assistance, the seller shall forfeit and remit the face value of the tax credit certificate received for the surrender of tax benefits to the Department of Treasury in accordance with the provisions below.

(b) The forfeiture requirement in (a) above pertaining to the failure to maintain a headquarters or a base of operation in this State shall not be applicable if the failure is due to the liquidation of the new or expanding emerging technology or biotechnology business.

(c) In the event a selling business fails to maintain a headquarters or base of operation in the State during the five years following the receipt of the private financial assistance, the Authority will allow the selling business to retain 20 percent of the face value of the tax credit certificate for each full year the business remained in New Jersey providing the business forfeits and remits to the Department of Treasury 20 percent per year on a cumulative basis for each year the business had remaining on the five year requirement to maintain a headquarters or base of operation in New Jersey.

Examples:

Move within one year of disbursement, recapture percentage equal to 100 percent of the face value of the tax credit certificate

Move within two years of disbursement, recapture percentage equal to 80 percent of the face value of the tax credit certificate

Move within three years of disbursement, recapture percentage equal to 60 percent of the face value of the tax credit certificate

Move within four years of the disbursement, recapture percentage equal to 40 percent of the face value of the tax credit certificate

Move within five years of the disbursement, recapture percentage equal to 20 percent of the face value of the tax credit certificate

(d) In the event a selling business fails to use the tax benefits or cash benefits as required by the Act, the Authority shall require the selling business to remit to the Department of Treasury 100 percent of the amount of the unallowable expenditures.