

DELAWARE MOTION PICTURE AND TELEVISION DEVELOPMENT COMMISSION

Statutory Authority: 29 Delaware Code, Section 8750A (29 Del.C. §8750A)

FINAL

ORDER

1501 Administration and Operation of the Delaware Motion Picture and Television Development Commission

I. NATURE OF PROCEEDINGS

Pursuant to its authority under 29 Del.C. § 8750A, the State of Delaware Motion Picture and Television Development Commission proposed to adopt a regulation to establish certain procedures to be used in the administration and operation of the Delaware Motion Picture and Television Development Commission which shall include, without limitation, its receipt of applications for grants, rebates, and other financial assistance within the purview of the Commission; its review and evaluation of applications; and the exercise of its discretion to approve the award of grants, rebates, and other financial assistance for projects supported by the Entertainment Industry Fund.

Notice of a public comment period ending on May 3, 2023 on the Motion Picture and Television Development Commission's proposed regulation was published in the Delaware Register of Regulations for April 1, 2023 in accordance with 29 Del.C. §§ 10115 and 10118(a). This is the Motion Picture and Television Development Commission's Decision and Order adopting the proposed regulation pursuant to 29 Del.C. § 10118(b).

II. SUMMARY OF EVIDENCE, FINDINGS, AND CONCLUSIONS

1. Pursuant to 29 Del.C. § 8750A the Motion Picture and Television Development Commission has statutory authority to promulgate rules and regulations clarifying specific sections of its statute and its role in administering the Entertainment Industry Fund.

2. The proposed regulation establishes procedures to be used in the administration and operation of the Delaware Motion Picture and Television Development Commission which shall include, without limitation, its receipt of applications for grants, rebates, and other financial assistance within the purview of the Commission; its review and evaluation of applications; and the exercise of its discretion to approve the award of grants, rebates, and other financial assistance for projects supported by the Entertainment Industry Fund.

3. The public was given the required notice of the Motion Picture and Television Development Commission's intention to adopt the proposed regulation and was given ample opportunity to provide the Motion Picture and Television Development Commission with comments opposing the Motion Picture and Television Development Commission's plan.

4. One public comment was submitted via email during the public comment period. In addition to public comment regarding the proposed regulation, the email included an attached draft of the proposed regulation highlighting certain sections and proposing the entire deletion of Section 8.2 thereof. No data, statistics, or other evidence was provided with the comment. The Commission accepted and considered the entirety of the comment. The sole public comment expressed concerns about delays that might be occasioned by allegedly duplicative processes for review and acceptance of grant applications and sought to eliminate the Chairperson's role in finalizing applications for submission to the Commission as a whole.

5. The Commission appreciates the submission of the comment regarding this regulation. After due consideration, the Commission rejected the changes requested in the public comment because it did not agree that undue or prejudicial delay will result from the processes set forth in the regulation and because it disagrees that applicants will be deterred from participation in the grant application process. Further, the Commission does not agree that deletion of Section 8.2 of the proposed regulation is in the best interests of the process, the Commission, or the State of Delaware.

6. Thus, the Delaware Motion Picture and Television Development Commission concludes that its consideration of the proposed regulation was entirely within its prerogatives and statutory authority and, having received, reviewed, and rejected the proposed amendments in the sole public comment, is now free to adopt the proposed amended regulation.

7. On May 11, 2023 during its public meeting, the Commission unanimously voted to approve and adopt the regulation without amendment to the language and form of the proposed regulation included in the April 2023 Register of Regulations at page 828.

III. DECISION AND ORDER CONCERNING THE REGULATION

AND NOW on this 12th day of May, 2023, it is hereby ordered that:

1. The Motion Picture and Television Development Commission regulation referenced herein is adopted;
2. The text of the final regulation shall be in the form referenced herein, which remains unchanged as initially published in the April 1, 2023 Delaware Register of Regulations.
3. The effective date of this Order is ten days from the date of its publication in the Delaware Register of Regulations in accordance with 29 Del.C. §10118(e); and
4. The Motion Picture and Television Development Commission reserves to itself the authority to issue such other and further orders concerning its Regulation as it deems appropriate.

IT IS SO ORDERED by the Delaware Motion Picture and Television Development Commission:

/s/ Thomas J. Healy II

/s/ Joseph Zilcosky

/s/ David K. Sheppard, Esq.

/s/ Justin Healy

/s/ S. Elizabeth Lockman

/s/ Brian McGlinchey

/s/ Verity Watson

/s/ Raymond E. Bivens

***Please note: Electronic signatures ("/s/") were accepted pursuant to 6 Del.C. §12A-107(d).**

1501 Administration and Operation of the Delaware Motion Picture and Television Development Commission

1.0 Purpose and Scope

The purpose of this regulation is to set forth certain procedures to be used in the administration and operation of the Delaware Motion Picture and Television Development Commission which shall include its receipt of applications for grants, rebates, and other financial assistance within the purview of the Commission; its review and evaluation of applications; and the exercise of its discretion to approve the award of grants, rebates, and other financial assistance for projects supported by the Fund.

2.0 Statutory Authority and Enabling Legislation

The Delaware Motion Picture and Television Development Commission was established pursuant to 29 Del.C. §8750A and has the specific legal authority to adopt regulations pursuant to 29 Del.C. §8750A(f)(1). Section 33 of the Fiscal Year 2023 One-Time Supplemental Appropriations Act, S.B. 251 of the 151st General Assembly, establishes the "Entertainment Industry Fund" and a pilot program providing incentives for the entertainment industry in the creation of media projects and digital interactive entertainment in Delaware.

3.0 Definitions

When used in this regulation, the following words, terms, and phrases shall have the following meaning regardless of capitalization:

"Allowable project costs" means an amount equal to adequately documented expenditures incurred within the State of Delaware in connection with the project and verified by the Commission or Commission's designee, including labor and personnel costs, site lease or rental expenses, working capital, renovation, construction, or any other type of improvements to roads, utilities and related infrastructure, the acquisition of land, buildings, machinery, materials, and equipment, the expansion or renovation of an existing building, or the renovation of machinery, and equipment, relocation expenses provided, however, that allowable project costs shall not include any fees, taxes, charges or assessments paid to any governmental body.

"Applicant" means a person or business entity who submits a written request for the Commission to approve a distribution of funds to support a project as set forth in this Regulation.

"Application" means the written electronic or written submission by an applicant requesting the provision of monetary support for a project from the Entertainment Industry Fund in a form approved by the Commission. An application must identify whether it is a tier zero or tier one application as those terms are defined by this Regulation.

"Application evaluation report" means a written report presented to the Commission by the Commission or Commission's designee which provides the Commission an evaluation of whether an application adequately and properly justifies the provision of funding from the Entertainment Industry Fund and which makes a written recommendation about whether the Commission should make an award to the applicant.

"Chairperson" means the Chairperson of the Commission.

"Commission" means the Delaware Motion Picture and Television Development Commission.

"Commission's designee" means a person or entity contractually obligated to provide certain professional services to the Commission regarding the application and approval processes set forth in the law and regulations applicable to the Commission.

"Entertainment Industry Fund" shall mean the unencumbered aggregate of those funds reallocated to the Commission as described in Lines 10 through 20 of Section 33 of Senate Bill 252 of the 151st General Assembly or any other funds received by the Commission as permitted by law.

"Final project completion" means that period in time when the project has been fully completed by the applicant and which is a condition precedent to any obligation to pay over funds from the Entertainment Industry Fund. For the avoidance of doubt, adequate demonstration of final project completion shall be an express term and condition in any agreement which requires the eventual distribution of money from the Fund.

"Fund" means the **"Entertainment Industry Fund"**.

"Members" means the members appointed to serve on the Commission in accordance with 29 Del.C. §8750A.

"Project" or **"projects"** means "media projects" and "digital interactive entertainment" activities or operations within the meaning of Lines 13 and 14 of Section 33 of Senate Bill 252 of the 151st General Assembly.

"Substantive changes" means:

- a. a decrease of more than 1 percentage point in the interest rate for any fixed or variable rate loan made by the Commission;
- b. any changes in the collateral of a loan which would result in a decrease in the security position of the Commission;
- c. a 10% or greater increase in the amount of any loan or grant;
- d. an extension of loan payment schedule;
- e. a change employment benchmark date, or
- f. a change in any obligation to repay a part or all of a grant for a failure to meet benchmark employment, cessation of operations in the State, or other terms contained in the grant agreement.

"Tier one" means a project with an aggregate amount of incurred expenses of no less than \$500,000 in allowable project costs.

"Tier zero" means a project with an aggregate amount of incurred expenses of no less than \$100,000 in allowable project costs.

4.0 Forms of Award and Financial Assistance

4.1 Grants. The Commission is empowered to make grants to applicants (a "Grant").

4.1.1 Grant proceeds may only be used to reimburse allowable project costs related to the promotion of the motion picture and television industry within the State of Delaware or which incentivize the entertainment industry in the creation of media projects and digital interactive entertainment in the State of Delaware.

4.1.2 Recapture Provision. The Commission shall determine, in its sole discretion, those circumstances in which a grantee must repay all or part of a grant ("recapture").

4.1.2.1 Recapture may occur in response to the following events:

4.1.2.1.1 Substantial or complete cessation of operations by the applicant before project completion;

4.1.2.1.2 Failure to reach employment or other benchmarks; or

4.1.2.1.3 Misuse or other improper application of grant proceeds.

4.1.2.2 The recapture obligation shall be consistent with the Fund purposes, and should consider the number of years necessary to realize the objectives of the grant consistent with applicable industry standards ("recapture period").

4.1.3 Post-Grant Period; Annual Reporting. The applicant shall, for a period equal to the recapture period of the grant, submit to the Commission, on an annual basis, detailed financial statements in a form acceptable to the Commission, a progress report on the status of the project, including, but not limited to, the number of permanent, quality, full-time jobs created or saved as a result of the project and the wage scale applicable to those jobs, any economic impact of the funding (such as sales, costs, etc.) within the State of Delaware and any other information required by the Commission. This reporting period may be extended or reduced, as deemed appropriate, by the Commission in its sole discretion.

4.1.4 Final Project Completion Mandatory. Final project completion shall be a mandatory condition precedent to any distribution from the Fund.

4.1.5 Final Project Completion Report Required. A grantee must adequately demonstrate final project completion by submitting a written final project completion report as more fully set forth in the required written agreement resulting from approval of an application.

- 4.1.6 In addition to the required provisions set forth above, grant agreements from the Entertainment Industry Fund may only be made pursuant to a written agreement containing at least the following additional core requirements:
 - 4.1.6.1 Guidelines that identify allowable project costs;
 - 4.1.6.2 A specific definition of final project completion; and
 - 4.1.6.3 Terms and conditions which prevent fraud, waste, and abuse, including but not limited to terms and conditions which prevent self-dealing, the appearance of impropriety, or other potential conflicts of interest.
- 4.2 Equity Investment. The Commission is empowered to use the proceeds constituting the Entertainment Industry Fund to purchase common or preferred stock, membership units, or convertible debt from an applicant ("Equity Investment").
 - 4.2.1 Proceeds of an equity investment can be used for, but are not limited to, financing expenses (such as equipment), working capital, or the construction of soundstage, storage, or office space which will be dedicated to the promotion of the motion picture and television industry within the State of Delaware or which incentivize the entertainment industry in the creation of media projects and digital interactive entertainment in the State of Delaware.
 - 4.2.2 Post-Investment Period; Annual Reporting
 - 4.2.2.1 The applicant shall, for a period equal to the Equity Investment, submit to the Commission, on an annual basis:
 - 4.2.2.1.1 Detailed financial statements in a form acceptable to the Commission;
 - 4.2.2.1.2 Progress report on the status of the project, including:
 - 4.2.2.1.2.1 The number of permanent, quality, full-time jobs created or saved as a result of the project;
 - 4.2.2.1.2.2 The wage scale applicable to those jobs;
 - 4.2.2.1.2.3 Any economic impact of the funding (such as sales, costs, etc.) within the State of Delaware; and
 - 4.2.2.1.2.4 Any other information required by the Commission.
 - 4.2.2.1.3 The reporting period may be extended or reduced, as appropriate, by the Commission in its sole discretion.
 - 4.2.3 Any dividends or royalties earned from Equity Investment shall be deposited into the Fund in order to make them available to further the statutory purposes of the Fund.

5.0 Commission Procedures

- 5.1 In the event of any Commission vacancy, members will notify the appropriate elected or appointed official responsible for Commission appointments to fill the vacancy promptly.
- 5.2 The Commission will, consistent with the provisions of 29 Del.C. Ch. 100 make certain information contained in an application available to the public upon written request.
- 5.3 The Commission will, when practicable, schedule and locate meetings of the Commission in a way that achieves geographic balance and centrality.
- 5.4 Any substantive changes made to any grant agreement or contract, after initial approval by the Commission shall be resubmitted to the Commission for additional review and approval.
- 5.5 Any agreement to provide funds as authorized by this regulation shall not be modified or amended except pursuant to the written mutual agreement of the parties thereto.
- 5.6 No applicant may unilaterally alter the terms of a grant agreement or contract with the Commission after the approval process has completed or contemporaneous therewith.
- 5.7 The Commission or Commission's designee will organize and provide orientation for all new Commission members. The orientation will include:
 - 5.7.1 The responsibilities of Commission members and Commission or Commission's designee staff;
 - 5.7.2 Discussion of applicable state law and regulations; and
 - 5.7.3 A briefing by the staff of the Delaware Public Integrity Commission on matters including rules of conduct, conflict of interest, and public disclosure.
- 5.8 The Commission will, consistent with the State Employees', Officers' and Officials Code of Conduct, 29 Del.C. Ch. 58, encourage members to identify prospective projects and economic development opportunities to the Commission.

- 5.9 The Commission or Commission's designee shall present an annual operating budget report to the Commission for comment and review.
- 5.10 The Commission shall review any Entertainment Industry Fund grant for which the applicant has not requested disbursement of grant funds within one year of the execution of the grant agreement.
- 5.11 The Commission shall evaluate projected return on investment when applicable, any impact to gross State product and any personal income tax data related to each project where that information is used to determine the value of the project in the application evaluation report.
- 5.12 The Commission is authorized to retain experts in relevant fields to help the Commission to assess the accuracy of the information provided in the application evaluation report.
- 5.13 The Commission shall vote upon approval or denial of applications for grants from the Entertainment Industry Fund during the open session of its public meetings and may go into executive session during public meetings as permitted by 29 Del.C. Ch. 100.
- 5.14 The Commission or Commission's designee shall present an annual Entertainment Industry Fund cash management report to the Commission which shall include total Entertainment Industry Fund balances, amounts encumbered (and corresponding dates of encumbrances), Entertainment Industry funds committed to future projects and available Entertainment Industry Fund balances.

6.0 Application Procedures

- 6.1 Before applying, the applicant should consult with the Commission or Commission's designee to determine if the project meets Fund eligibility.
- 6.2 Eligibility Standards.
 - 6.2.1 To be eligible for approval, a project must comply with the requirements of this regulation and serve a public purpose by promoting the motion picture and television industry within the State of Delaware or providing incentives to the entertainment industry in the creation of media projects and digital interactive entertainment in the State of Delaware. Also, the applicant must be able to demonstrate to the satisfaction of the Commission that financial assistance from the State is necessary to effectuate the outcome of the project.
 - 6.2.2 The following projects do not qualify for approval:
 - 6.2.2.1 Private speculative real estate ventures;
 - 6.2.2.2 Improvement, remediation or repair of personal or real property personally owned or controlled by the applicant or by entity in which applicant has an ownership interest;
 - 6.2.2.3 Projects which do not attract or retain employment opportunities;
 - 6.2.2.4 Restaurants and professional office buildings;
 - 6.2.2.5 Refinancing of existing debt; and
 - 6.2.2.6 Funding projects located outside the State.
- 6.3 Applications. Applicant shall submit a properly executed, completed original application concerning the project to the Commission or Commission's designee for review in electronic format or in hard copy format upon the written approval of the Commission or Commission's designee. All applications must be signed by persons having actual authority to bind the applicant. No application will be reviewed by the Commission or Commission's designee until it is complete to the satisfaction of the Commission or Commission's designee. Applicants may obtain application forms through the Commission's designated website at <https://filmdelaware.com>.
- 6.4 Duplicative or Serial Applications Prohibited. Once an individual or entity has submitted an application, that individual or entity may not submit a second or amended application arising out of or relating to the same project without the prior written consent of the Commission. This limitation shall preclude submissions of tier zero and tier one applications for the same project.

7.0 Evaluation Process

- 7.1 Upon determination that the application is complete, the Commission or Commission's designee will evaluate the project through commercially reasonable inquiry which the Commission or Commission's designee determines is necessary to assess the fiscal soundness and responsibility of the applicant and the probability of market success and distribution.
- 7.2 After completing the evaluation, a determination shall be made regarding the merits of the request, and an application evaluation report shall be submitted to the chairperson by the Commission or Commission's designee.

7.3 If a positive recommendation regarding an application is made, the application and the application evaluation report will be presented to the chairperson for placement on the next appropriate meeting agenda of the Commission.

8.0 Approval Process

8.1 Timing. the Commission or Commission's designee shall use its reasonable best efforts to complete its review of the application and to forward the application to the chairperson for preliminary approval or disapproval within 60 days from the date it deems an application complete.

8.2 Chairperson Acceptance; Scheduling. Applications which are recommended for approval and the corresponding application evaluation report shall be reviewed for completeness by the chairperson and then scheduled for Commission review at the next available public meeting of the Commission unless the application or application evaluation report is deemed incomplete by the chairperson. Incomplete applications or application evaluation reports shall be returned to the Commission or Commission's designee for timely notification to the applicant in order to allow a reasonable opportunity to provide the Commission any additional or supplemental information.

8.3 Submission to Commission. Upon preliminary review by the chairperson, an application and an applicant evaluation report shall be submitted to the Commission for consideration, and the Commission shall vote whether to approve, disapprove, or table a vote on whether to approve an application.

8.4 Final Approval and Findings

8.4.1 If approved by the affirmative vote of a majority of Commission members present at a meeting, the approval shall be final ("final approval"). Applications that have received final approval will be submitted to the Commission's legal counsel for negotiation of an appropriate agreement which complies with the requirements of the law and this regulation.

8.4.2 Finality; Change in Circumstances

8.4.2.1 Final approval shall constitute official action on the part of the Commission.

8.4.2.2 Final approval may be withdrawn at any time prior to the disbursement of funds if the Commission determines that:

8.4.2.2.1 The applicant's circumstances have changed adversely since the date of final approval or since completion of the application, and that adverse change did not come to the Commission's attention prior to final approval; or

8.4.2.2.2 The application contained a statement that was materially false or failed to include information necessary to prevent the application from being materially false.

8.5 Tier Zero and Tier One Applications; Limitation on Approval. Notwithstanding any other provision of this regulation to the contrary, the Commission may not approve:

8.5.1 A tier zero application which itself, or in combination with any previously approved tier zero application, causes or results in a distribution of funds or encumbers an amount of funds greater than 20% of the total amount of money available in the Fund on the first day of July of the year in which an application is submitted for approval.

8.5.2 A tier one application which itself or in combination with any previously approved tier one application causes or results in a distribution of funds or encumbers an amount of funds greater than 80% of the total amount of money available in the Fund on the first day of July of the year in which an application is submitted for approval.

8.5.3 A tier zero application which requests an amount of grant funds greater than 20% of the aggregate amount of incurred expenses set forth in that tier zero application.

8.5.4 A tier one application which requests an amount of grant funds greater than 30% of the aggregate amount of incurred expenses set forth in that tier one application.

8.6 Final approval will be effective for a period not to exceed 1 year from the last date of the Commission meeting when an application was approved, and a written agreement setting forth the terms and conditions by which an applicant may receive a distribution from the Fund must be executed no later than 1 year following the date of final approval. The Commission may make limitations or grant extensions with respect to this 1-year period.