FINANCING FILMS ONE STATE AT A TIME: A SURVEY OF SUCCESSFUL FILM INCENTIVE PROGRAMS

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INTRODUCTION

The film and television industry is synonymous with glamour, red carpets, and big business. Hollywood has long been regarded as the focal point of the industry, with many stars, film studios, and production companies located in the surrounding area. Hollywood's fate, however, is now changing as other cities, states, and even countries are striving for a piece of the action and the dollars associated with the production of blockbuster movies, television series, and even independent films. This Comment will focus on the incentives offered to the film and television production industry by various states, the positive economic effects, and

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the steps being taken to avoid the effects of "runaway productions."[1]

While the effects of international runaway productions should not be disregarded, the scope of this Comment is limited to the domestic aspects of the issue.[2] Part I of this Comment will discuss the recently enacted federal legislation providing incentives for the industry, and the legislation's potential impact on the states. Part II will discuss the various incentive programs offered by two of the largest players in the industry—California and New York—and their efforts to avoid losing productions to other states offering aggressive incentives in an attempt to gain a share of the profits and other economic benefits the industry can provide. This Comment will conclude in support of state incentive programs for the film and television production industry.

I. FEDERAL INCENTIVES TO KEEP FILM AND TELEVISION PRODUCTIONS IN THE UNITED STATES

The United States film and television industry has progressively seen productions relocate to other countries offering generous incentives.[3] These incentives are meant to benefit each country's local economy by attracting production revenue in addition to protecting its local filmmakers by

1. A "runaway production" is generally defined as a film or television production that is filmed in another country but is developed and intended for initial release or television-broadcast in the United States. U.S. LAB. MKT. INFO. DIV., STATE OF CAL. EMP. DEV. DEP'T, REPORT TO THE LEGISLATURE ON THE MOTION PICTURE INDUSTRY IN CALIFORNIA 5–6 (2005) [hereinafter 2005 CAL. LEG. REPORT]. As a subset of runaway productions, there are "creative runaways" and "economic runaways." *Id.* A creative runaway is a production that departs the United States because of creative considerations, whereas an economic runaway is one that departs for financial reasons. *Id.*

2. International issues involving runaway productions include potential international tax implications for production companies and whether foreign production incentives are in accord with the World Trade Organization Agreement on Subsidies and Countervailing Measures, which are beyond the scope of this comment. *See generally* Claire Wright, *Hollywood's Disappearing Act: International Trade Remedies to Bring Hollywood Home*, 39 AKRON L. REV. 739 (2006) (discussing these international runaway production issues).

3. For example, the United Kingdom and Germany provide for the immediate tax deduction of film production costs, potentially reducing an overall production budget by as much as 15%, in order to attract film production companies and investors. *See Special Rules for Certain Film and Television Productions in H.R.4520*, N.J. MOTION PICTURE & TELEVISION COMM'N, http://www.njfilm.org/Incentives3.htm (last visited Oct. 3, 2010).

lowering production costs.[4] In response, the American film and television production industry began lobbying for incentives to prevent further runaway productions and to maintain the industry's beneficial impact on the American economy.[5] In October 2004, Congress responded to these lobbying efforts with the passage of the American Jobs Creation Act of 2004 ("the Act").[6] Congress intended the Act to increase the productivity and competitiveness of American manufacturing, service, and high-technology industries.[7] On October 22, 2004, the Act was signed into law by President George Bush.[8] In addition to benefitting these industries, the Act reflects the importance of the film and television production industry on the United States economy.[9] It does so by specifically providing incentives for the industry to reduce runaway productions, thus enabling the United States to regain its lost market share in the global production industry.[10] Pursuant to the Act, Congress amended the Internal Revenue Code to provide three key benefits to the film and television production industry.[11] First, the industry can benefit from the domestic production of a qualified film[12]—the domestic production deduction—through 26 U.S.C.

4. Mark Litwak, *Runaway Home: Production Incentives from Foreign Jurisdictions Are Playing an Increasing Role in Determining Where Films Are Made*, L.A. LAW., May 24, 2004, at 24, *available at* http://www.marklitwak.com/downloads/LALawyer.pdf.

5. The Motion Picture Association of America has been one of the industry's biggest lobbyists and has lead the lobbying efforts for federal tax incentives that produced more than $400 million for domestic film production companies. *See* Jim Puzzanghera & Claudia Eller, *Search Starts for MPAA Chief Dan Glickman's Replacement,* L.A. TIMES, Oct. 20, 2009, at B1.

6. American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (codified as amended in scattered sections of 26 U.S.C.).

7. *Id.*

8. 2 AM. JUR. LEGAL FORMS 2D *Federal Tax Guide to Legal Forms* § 8:28.50 (2008).

9. The film and television production industry in 2007 employed more than 2.5 million Americans, earned over $41.1 billion in wages for American workers, generated over $38 billion in total output to U.S. vendors and suppliers, and also maintained a $13.6 billion trade surplus. MOTION PICTURE ASS'N OF AM., THE ECONOMIC IMPACT OF THE MOTION PICTURE & TELEVISION PRODUCTION INDUSTRY ON THE UNITED STATES 5 (2009).

10. Litwak, *supra* note 4, at 24.

11. The Internal Revenue Code is codified in Title 26 of the United States Code. *See generally* 26 U.S.C. §§ 1–9834 (2006).

12. A "qualified film" is defined as any film or video tape provided that "[fifty] percent of the total compensation relating to the production of such property is compensation for services performed in the United States by actors, production personnel, directors, and producers." § 199(c)(6).

§ 199.[13] Second, Congress, in 26 U.S.C. § 181, allowed the immediate write-off of domestic film and television production expenditures subject to certain limitations.[14] Finally, the Act resolved certain issues under the income forecast method of depreciation—the traditional method for expensing production costs.[15]

A. Film Production Qualifies for the Manufacturing Deduction

As part of the the Act, Congress extended a new itemized tax deduction to individuals and corporations for income derived from certain domestic production activities.[16] Aimed at specifically incentivizing domestic production,[17] the then newly-enacted § 199 allows for the deduction of up to 9% of either a taxpayer's qualified production activities income, or taxable income for the year.[18] Due to the broad definition Congress provided for "qualified production activities income,"[19] the entertainment industry can claim the deduction on the production of any qualified film, provided at least 50% of the total compensation associated with the production is for services performed in the United States by actors, production

13. Section 199 was enacted by Section 102 of the Jobs Creation Act, and has been subsequently amended by section 403(a) of the Gulf Opportunity Zone Act of 2005 and Section 514 of the Tax Increase Prevention and Reconciliation Act of 2005. *See* Gulf Opportunity Zone Act of 2005, Pub L. No. 109-135 Stat. 2577 (codified as amended in scattered section of 26 U.S.C.); *see also* Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. No. 109-222, 120 Stat. 345 (codified as amended in scattered sections of 26 U.S.C.).

14. § 181.

15. *See infra* Part I.C.

16. American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 102, 118 Stat. 1418, 1424–29 (codified as amended at 26 U.S.C. § 199).

17. 2 AM. JUR. LEGAL FORMS 2D, *supra* note 8.

18. 26 U.S.C. § 199(a)(1)(A)–(B) (2006). For taxable years beginning after 2004 and before 2010, the deduction phased-in at a rate of 3% for taxable years beginning in 2005 or 2006 and 6% for taxable years beginning in 2007, 2008, or 2009. § 199(a)(2). For any taxable year, "qualified production activities income" is defined as a taxpayer's domestic production gross receipts for the year less the cost of goods sold and other expenses, losses or deductions properly allocable to those receipts. § 199(c)(1).

19. § 199(c)(4)(A) (defining the domestic production gross receipts component of qualified production activities income to include: qualifying property predominantly or entirely manufactured, produced, grown or extracted in the Unites States; any qualified film produced in the United States; or electricity, natural gas, or potable water produced by the taxpayer in the United States).

personnel, directors, and producers.[20] Although the deduction has been challenged as incentivizing activity that would have been conducted domestically regardless of its availability,[21] its benefits to the film industry are readily apparent.[22] By conditioning the availability of the deduction on services performed in the United States, Congress is able to further its goal of increasing domestic employment opportunities and productivity. These increases will ultimately lead to enhanced economic activity, as well as potentially increasing individual income and payroll tax revenues, not only on a national level but also within the state in which the production occurs.[23]

B. The New Deduction for Qualified Film and Television Productions

Another new provision contained in the Act allows for the immediate deduction of any qualified film or television production expenses,[24] so long as the principal photography began after October 22, 2004, and before January 1, 2010.[25] As originally enacted, § 181 allowed the deduction of certain production expenses so long as the total costs did not exceed $15 million; if the costs exceeded that limitation, the deduction was lost.[26] In 2008, however, Congress amended § 181 to allow for the deduction of the first $15 million of production costs regardless of the aggregate cost of the production.[27] This aspect of the deduction is important to

20. § 199(c)(6).

21. NICHOLAS JOHNSON & ASHALI SINGHAM, CTR. ON BUDGET & POL'Y PRIORITIES, STATES CAN OPT OUT OF THE COSTLY AND INEFFECTIVE "DOMESTIC PRODUCTION DEDUCTION" CORPORATE TAX BREAK 1 (2010), *available at* http://www.cbpp.org/files/7-29-08sfp.pdf.

22. *See infra* note 123 and accompanying text.

23. The deduction has a further limitation of only being available up to 50% of the W-2 wages paid by the taxpayer claiming the deduction. § 199(b)(1). For federal income tax purposes, the wages earned by crew members are includable in gross income because it encompasses compensation for services. *Id.* § 61(a).

24. 26 U.S.C.A. § 181(a)(1) (2010) ("A taxpayer may elect to treat the cost of any qualified film or television production as an expense which is not chargeable to capital account. Any cost so treated shall be allowed as a deduction.").

25. § 181(f) ("This section shall not apply to qualified film and television productions commencing after December 31, 2009.").

26. 26 U.S.C. § 181(a)(2)(A) (2006), *amended by* 26 U.S.C.A. § 181(a)(2)(A) (2010).

27. Schuyler M. Moore, *U.S. Financial Bailout Brings New Amendments to Section 181 for the Deduction of Film Costs*, 24 NO. 8 ENT. L. & FIN. 1, 1 (2008).

carrying out Congress's intent of increasing film production in the United States. In particular, it extends the deduction's availability beyond low-budget films to potential box office blockbusters. This makes the production of large budget films in the United States much more attractive as compared to foreign jurisdictions offering similar immediate deductions.[28]

The technical aspects of § 181 further Congress's intent of creating jobs and increasing domestic productivity. In order to be considered a qualified film or television production, 75% of the total compensation associated with the production for actors, production crew, directors, producers, and other personnel must be for services performed in the United States.[29] Similar to the production deduction, this has the potential to impact a producer's decision regarding location, thereby increasing income and payroll tax revenues while at the same time reducing local unemployment. Additionally, Congress, in recognizing the positive economic impact the industry can have on a community, provided through § 181 an increased deduction of up to $20 million if a significant portion of the production costs are incurred in certain low-income areas, thereby furthering the federal and state governmental interests of improving these underdeveloped communities.[30]

C. The Income Forecast Method of Depreciation and Its Clarification

Prior to the enactment of the Act and the provisions discussed above, the Internal Revenue Code required film production costs to be capitalized under § 263A;[31] this requirement still applies to productions that are ineligible for treatment under § 181.[32] Section 263A requires that certain

28. *See id.*

29. 26 U.S.C.A. § 181(d)(1), (3).

30. *See id.* § 181(a)(2)(B) (providing that the communities eligible for the increased deduction limit include low-income communities as defined in 26 U.S.C. § 45D or a distressed community as designated by the Delta Regional Authority established under 7 U.S.C. § 2009aa-1).

31. 26 U.S.C. § 263A (2006) (requiring the capitalization of certain direct and indirect costs associated with property to which it applies).

32. Section 181 provides taxpayers with an election to treat qualified film or television production costs as an expense. § 181(a). If such election is not made or the production does not qualify, the capitalization rules of § 263A shall apply. *See* § 263A(b).

direct and indirect costs[33] associated with the production of a film, video tape, or similar property be capitalized instead of expensed as incurred.[34] After these costs have been capitalized, the Code allows for annual depreciation deductions under § 167.[35] The industry has two available depreciation methods: the straight line method and the income forecast method.[36] The straight line method allows for equal annual deductions over the useful life of the production.[37] The income forecast method—the most common method of depreciation used in the film industry—aims to match a film's income against its costs ratably over its useful life based on the annual estimated gross income of the production.[38] The amount of the depreciation deduction allowed under the income forecast method is determined by dividing the gross income generated during the year by the estimated total gross income expected to be generated during the ten years after the production is placed in service.[39] This ratio is then multiplied by the production's adjusted basis, yielding the amount of the deduction for the year.[40] In

33. § 263A(a)(2)(A)–(B).

34. § 263A(b) (stating that the section shall apply to real or "tangible personal property" produced by the taxpayer and defining "tangible personal property" to include "a film, sound recording, video tape, book or similar property").

35. *See id.* § 167(a) ("There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear . . . of property used in [a] trade or business, or . . . held for the production of income.").

36. Louis T. M. Conti & Glenn A. Adams, *Taxes in the Motion Picture Industry*, 66 FLA. B.J. 99, 100 (June 1992).

37. 26 C.F.R. § 1.167(b)-1 (2010) (providing that the annual depreciation deduction for a taxable year is determined by dividing the adjusted basis of the property by the number of years remaining in its useful life). The straight line method of depreciation may be used to determine the depreciation deduction for any depreciable property for which the taxpayer has not used another acceptable method. *Id.* The useful life of a film under the straight line method is based on the period in which the taxpayer can reasonably expect the film to generate income. *Id.* While the taxpayer determines the estimated useful life, the IRS is free to challenge such determination. SCHUYLER M. MOORE, TAXATION OF THE ENTERTAINMENT INDUSTRY 80–82 (9th ed., CCH 2008). The approaches used by courts and the IRS generally suggest that films have a useful life of at least five years. *Id.*

38. *See* Conti & Adams, *supra* note 36, at 100.

39. MOORE, *supra* note 37, at 83.

40. *Id.* Although the income forecast method traditionally was calculated using net revenue, the Jobs Creation Act amended § 167. *See* American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (codified as amended in scattered sections of 26 U.S.C.).. Section 167 currently provides that the taxpayer's gross income from the film should be used in the calculation; this change has the potential of increasing the initial depreciation deductions because distribution costs tend to be higher in the initial

furtherance of Congress's scheme to incentivize film and television productions in the United States, the Act has enhanced the income forecast method of depreciation by clarifying the previous ambiguity of the treatment of participation and residual interests.[41] Under the income forecast method, the Internal Revenue Service previously required costs associated with participations and residuals to be included in the adjusted basis of the property in the year the expenditures were made; it challenged taxpayers seeking to treat them in a different manner.[42] The Act amended § 167 to provide taxpayers with the freedom to treat participation and residual payments either as part of the adjusted basis of the depreciable property—so long as the amounts included relate to the income estimated to be earned before the close of the tenth taxable year after the film is placed in service[43]—or as amounts to be deducted in the year in which they are paid.[44] This clarification provides taxpayers with flexibility to choose the most beneficial depreciation method.[45]

D. What the States Can Expect from the Federal Incentives'

years of a film's useful life. *See* 26 U.S.C. § 167(g)(5)(E) (2006).

41. § 167(g)(7)(B) ("[T]he term 'participations and residuals' means, with respect to any property, costs the amount of which by contract varies with the amount of income earned in connection with such property.").

42. M. Katharine Davidson, *The Jobs Creation Act of 2004 and the Entertainment Industry*, L.A. LAW., May 2005, at 12, 14–16 (citing Assoc. Patentees, Inc. v. Comm'r, 4 T.C. 979 (1945), and Transamerica Corp. v. United States, 999 F.2d 1362 (9th Cir. 1993), as support for the different ways in which taxpayers have sought to treat participations and residuals, including immediately deducting them when paid or including the estimated total payments in the initial basis to be depreciated). In *Associated Patentees, Inc. v. Commissioner*, the taxpayer was contractually bound to make annual royalty payments attributable to the income earned in a particular year on certain patents that it acquired, and the U.S. Tax Court opined that the taxpayer's reasonable depreciation allowance for the year should include such payments so that the taxpayer can ratably recover the cost of the property over its useful life in a reasonable manner that would not distort the income earned from such property. *Assoc. Patentees, Inc.*, 4 T.C. at 986. The Ninth Circuit in *Transamerica Corp. v. United States* held that the taxpayer properly treated the participation and residual payments it was contractually required to make by including the total estimated payments in the cost of the film to be depreciated at the time the film was placed in service because this method would allocate the cost against the stream of income expected to be generated. *Transamerica Corp.*, 999 F.2d at 1370–71.

43. § 167(g)(7)(A).

44. § 167(g)(7)(D)(i).

45. *See* NICHOLAS JOHNSON, CTR. ON BUDGET & POLICY PRIORITIES, NEW FEDERAL LAW COULD WORSEN STATE BUDGET PROBLEMS 1 (2008), *available at* http://www.cbpp.org/files/2-13-08sfp.pdf.

Effect

Generally, state tax laws conform to the federal code.[46] As a result, states could very well adopt these newly enacted federal tax provisions benefitting the film and television production industry.[47] If states do adopt federal tax law, their tax codes may provide for the automatic inclusion of any changes to the federal code or may choose to adopt the federal tax code as of a particular date.[48] If a state adopts the latter method, it can incorporate any new federal changes by merely moving its conformity date forward.[49] These conforming states, however, are not required to accept every enacted federal tax law provision.[50] They can instead elect to disallow any federally provided deduction in the calculation of a taxpayer's state tax liability.[51]

Commentators have argued that the states conforming to the federal tax code should disallow many of the new federal tax law changes resulting from the numerous economic stimulus plans recently enacted because of the budgetary shortages most states are currently facing.[52] By refusing to adopt a federally allowed deduction, the state would increase a taxpayer's state tax liabilities, increasing the state's tax revenues for a given year and helping to balance its budget.[53] This potential increase in tax revenue would be a particularly timely benefit to the states if the economy continues to experience a protracted recovery.

The domestic production deduction has been specifically

46. James W. Wetzler, *Federal Tax Policy and the States: Corporate Integration*, 46 NAT'L. TAX J., 393, 393–94 (1993) *available at* http://ntj.tax.org/wwtax/ntjrec.nsf/F7D8DD1B04A65A288525686C00686E01/$FILE/v46n3393.pdf.

47. *Cf.* N.Y. TAX LAW § 612(a) (McKinney 2009) (explaining that for New York individual tax purposes the state generally follows federal tax law except for modifications made by statute).

48. *See* JOHNSON, *supra* note 45, at 3.

49. *Id.*

50. *See id.* at 1.

51. *See id.*

52. *See id.* (setting forth support for states disallowing the recent "bonus depreciation" provisions enacted in 2008 that allow business to immediately deduction up to 50% of new equipment purchases). *See also*, MICHAEL MAZEROV, CTR. ON BUDGET & POLICY PRIORITIES, OBSCURE TAX PROVISION OF FEDERAL RECOVERY PACKAGE COULD WIDEN STATE BUDGET GAPS 1 (2009), *available at* http://www.cbpp.org/files/5-19-09sfp.pdf (supporting state rejection of the newly enacted federal cancellation of indebtedness provisions).

53. *See* JOHNSON & SINGHAM, *supra* note 21, at 1.

targeted as a federal provision that should be excluded from state tax laws.[54] The argument in support of disallowing the domestic production deduction stems not only from the sweeping definition of qualified production activities, but also from the estimated negative impact of the deduction on state tax revenues.[55] It is estimated that the deduction will cost the adopting states an aggregate amount exceeding $500 million per year by the time the deduction is fully phased-in in 2011.[56] Another factor cutting against the deduction is that it is unlikely to promote or create in-state employment, because the deduction is federally available for all production activities conducted in the United States, regardless of the state in which those activities are conducted.[57] This could potentially result in states providing the deduction for production activities not conducted within their borders. Furthermore, the deduction is available only to offset the taxable income of profitable firms; therefore, opponents of the deduction see it as a benefit to large corporations while providing little or no help to small businesses struggling in the current economic environment.[58]

Today, practically every state has decoupled from at least one federal tax provision, and over twenty states have already disallowed the domestic production deduction since it was enacted in 2004.[59] These states could also find it administratively feasible to disallow the other statutory changes benefitting the film and television production industry provided in the Act.[60] If a state found it in its best interest to protect its revenues and exclude the other federal tax provisions aiding the industry, the legislature could act accordingly.[61] By expressly excluding only those sections sought to be disallowed, the state legislative action would not affect the state's conformity with the remainder of the federal

54. *See generally id.* (discussing the deduction's impact on state budgets and how numerous states have already disallowed the deduction).

55. *See id.* at 1.

56. *Id.*

57. *Id* at 7.

58. *Id.* at 2–3. The document also provides statistics of how the deduction favors large corporations—in short, 94% of the domestic production deductions claim were by the .4% of organizations with over $100 million dollars in assets. *Id.*

59. JOHNSON & SINGHAM, *supra* note 21, at 5.

60. *See id.* at 3.

61. *Id.*

tax code.[62]

Currently, two of the nation's most prominent locations for the film and television industry—California and New York[63]—have taken a mixed approach towards the federal incentives for the industry. These states have decoupled from the federal tax law regarding the domestic production deduction and currently disallow the deduction in calculating taxable income for state tax purposes.[64] They have, however, differed in their approaches regarding § 181, with California disallowing the immediate expensing of film and television production costs[65] and New York allowing the deduction.[66] Lastly, California has rejected the federal changes regarding the treatment of participations and residuals under the income forecast method of depreciation,[67] while New York generally follows the federal depreciation method for these interests provided under § 167.[68]

Despite the different positions taken by these states, the industry has welcomed the incentives. The incentives provided by the Act have increased domestic scripted television and made-for-television movie productions since its enactment, and have enabled the United States to avoid losing such productions to the global production marketplace.[69] By increasing domestic productions, these incentives reduce runaway productions and foster the in-state development of local production industries.

62. *Id.* at 5.

63. MOTION PICTURE ASS'N OF AM., THE ECONOMIC IMPACT OF THE MOTION PICTURE & TELEVISION PRODUCTION INDUSTRY ON THE UNITED STATES 11 (2007) (on file with author).

64. JOHNSON & SINGHAM, *supra* note 21, at 5.

65. *See* FRANCHISE TAX BD., STATE OF CAL., SUMMARY OF FEDERAL INCOME TAX CHANGES 2008, § 502, at 398–400 (2009), *available at* http://www.ftb.ca.gov/law/legis/08FedTax.pdf.

66. *See Specific Items of Income, Deductions, and Exclusions*, *in* RIA STATE & LOCAL TAXES NEW YORK EXPLANATIONS ¶ 56,160 (Westlaw current through July 2010) (explaining that New York generally follows the federal provisions for immediately expensing depreciable assets, with exception for statutory modifications).

67. *Id.* ¶ 56,135.

68. *Comparison of Federal and State Income Tax Laws*, *in* RIA STATE & LOCAL TAXES NEW YORK EXPLANATIONS, *supra* note 66, ¶ 10,725.

69. STEPHEN M. KATZ, THE CTR. FOR ENTM'T INDUS. DATA & RESEARCH, THE GLOBAL SUCCESS OF PRODUCTION TAX INCENTIVES AND THE MIGRATION OF FEATURE FILM PRODUCTION FROM THE U.S. TO THE WORLD 74–75 (Mark A. Rosenthal ed., 2006), *available at* http://www.ceidr.org/2005CEIDRReport.pdf.

II. STATES OFFER INCENTIVES TO MAKE THEMSELVES MORE ATTRACTIVE

While the federal government has recently provided the film and television production industry with tax incentives to stem the effects of runaway productions, state legislatures have begun providing similar incentives to entice the film industry to begin production within their respective jurisdictions.[70] The days of Hollywood's reign as the Mecca of the film industry are being threatened as California is experiencing continued domestic competition from New York, a state that contains extensive infrastructure and a developed local economy.[71] Hollywood is also experiencing competition from other states offering aggressive incentives, like New Mexico and Connecticut.[72] States continue to offer financial incentives to bring the industry within their borders because of numerous benefits that result. Such benefits include increases in employment, infrastructure investments, and local spending, each leading to the overall development of the local economy.[73]

A. The Empire State Spurs Production Growth

In 2004, the state of New York enacted the Empire State Film Production Credit, with the goal of promoting the film and television production industry within the state.[74] The credit, applicable to those taxable under Articles 9-A and 22 of Chapter 60 of the Consolidated Laws of the State of New York,[75] is available to a qualified production company or the

70. Examples of states providing incentives for the industry include: Alaska, Illinois, Kansas, Maine and Wyoming. *See* ENTM'T PARTNERS, BASIC OVERVIEW OF U.S. AND INTERNATIONAL PRODUCTION INCENTIVES 1–14 (2010), http://www.entertainmentpartners.com/Content/Support/support_files/EP_IncentivesOverview.pdf.

71. *See generally infra* Part II.A.

72. *See generally infra* Part II.A–B.

73. *See generally* MOTION PICTURE ASS'N OF AM., *supra* note 63 (describing the on-going beneficial impact of the industry on the American economy).

74. 2004 N.Y. Sess. Laws, ch. 60, pt. P, § 9 (McKinney). *See also* OFFICE OF TAX POLICY ANALYSIS, N.Y. STATE DEP'T OF TAX. & FIN., REPORT ON THE EMPIRE STATE FILM PRODUCTION TAX CREDIT 1 (Sept. 2008) [hereinafter EMPIRE STATE TAX CREDIT REPORT], *available at* http://www.tax.state.ny.us/pdf/stats/policy_special/film_production_credit/report_on_the_empire_state_film_production_credit_september_2008.pdf.

75. Articles 9-A and 22 contain New York's corporate and individual income tax

sole proprietor of a qualified production company.[76] As initially enacted, the credit was scheduled to expire in 2008 and was capped at $25 million annually.[77] Due to the program's initial success, the legislature amended the provision, extending the expiration date and increasing the dollar cap in order to attract more productions to the state and to keep competitive with its aggressive neighbors.[78] Currently, the credit will expire on January 1, 2014, and the annual credit cap will increase incrementally until that date from $75 million in 2009 to "$85 million in 2010, $90 million in 2011 and 2012, and $110 million in 2013."[79] In addition to these incremental increases in the credit cap, the New York legislature has approved additional allocations of $350 million for 2009[80] and $420 million annually for 2010–2014.[81]

In order to be eligible for the credit, a qualified production company must be engaged in the production of a qualified film.[82] The statute details those productions that will not qualify; such productions include those that would have likely been produced in the state regardless of the credit or those that contain content that the state does not seek to incentivize.[83] Examples of productions that will not qualify include: documentaries, news programs, instructional programs, award ceremonies, game shows, sporting events, daytime dramas or soap operas, music videos, and sexually

laws. *See* N.Y. TAX LAW §§ 208–219-a, 601–699 (McKinney 2009).

76. *Id.* § 24(a)(1) (McKinney 2009 & Supp. 2010). The statute defines a "qualified film production company" as a "corporation, partnership, limited partnership, or other entity or individual which or who is principally engaged in the production of a qualified film . . . ." § 24(b)(6).

77. *See* EMPIRE STATE TAX CREDIT REPORT, *supra* note 74, at 1.

78. *See id.* at 1, 15.

79. *Id.*

80. 2009 N.Y. Sess. Laws ch. 57, pt. Y-1, § 1 (McKinney). *See also* OFFICE OF TAX POLICY ANALYSIS, N.Y. STATE DEP'T OF TAX. & FIN., REPORT ON THE EMPIRE STATE FILM PRODUCTION TAX CREDIT 1 (2010) [hereinafter 2010 EMPIRE STATE TAX CREDIT REPORT], *available at* http://www.tax.state.ny.us/pdf/stats/policy_special/film_production_credit/report_on_the_empire_state_film_production_credit_august_2010.pdf.

81. 2010 N.Y. Sess. Laws ch. 312, pt. C, § 1 (McKinney). *See also* 2010 EMPIRE STATE TAX CREDIT REPORT, *supra* note 80.

82. The term "qualified film" is defined as "a feature-length film, television film, television pilot and/or each episode of a television series, regardless of the medium by means of which the film, pilot or episode is created or conveyed." N.Y. TAX LAW § 24(b)(3) (McKinney 2009).

83. §24(b)(3).

explicit material.[84] If a production qualifies, the amount of the credit is determined based on several elements provided in the statute,[85] and the production company must maintain detailed records to establish that the production meets the statutory requirements.[86]

The amount of the credit is currently 30% of the qualified production costs paid or incurred in the production of a qualified film.[87] The credit applies so long as the qualified production costs incurred for the use of tangible property or for the performance of services at a qualified production facility[88] amount to at least 75% of the total production costs incurred, regardless of location.[89] This requirement promotes the utilization of in-state production facilities and resources, as opposed to out-of state facilities, while enhancing the in-state production infrastructure through capital investments in new technology. If, however, the qualified production costs at a qualified film production facility are less than $3 million and the production shoots at least 75% of its total location days in New York, the qualified costs incurred in New York, but outside of a qualified production facility will be allowed in the calculation of the credit.[90] This tends to incentivize in-

84. *Id.*

85. For example, the production company must observe the statutory definition of qualifying production costs and the requisite spending thresholds. *See infra* notes 87–89 and accompanying text.

86. EMPIRE STATE TAX CREDIT REPORT, *supra* note 74, at 3.

87. *Id.* at 1. As enacted in 2004, the credit was limited to 10% of the qualified production costs paid or incurred in the production of a qualified film; the 2008 amendment increased the credit to its current rate of 30%. *Id.* The term "qualified production costs" is defined as "production costs only to the extent such costs are attributable to the use of tangible property or the performance of services within the state directly and predominantly in the production . . . of a qualified film." § 24(b)(1). The statute separately defines the term "production costs" as "any costs for tangible property used and services performed directly and predominantly in the production . . . of a qualified film." § 24(b)(2). The determinative factor for whether production costs are qualified for the purposes of the credit is that they were paid or incurred for the use of property or services within the State of New York, as opposed to another state. *See* N.Y COMP. CODES R. & REGS. tit.5, § 170.2 (2010).

88. A "qualified production facility" is a "building and/or complex of buildings and their improvements and associated back-lot facilities [in the state of New York] in which films are or are intended to be regularly produced and which contain at least one sound stage . . . having a minimum of seven thousand square feet of contiguous production space." § 24(b)(4)–(5). *See* EMPIRE STATE TAX CREDIT REPORT, *supra* note 74, app. A (providing a non-comprehensive list of the qualified production facilities in the State of New York).

89. § 24(a)(2).

90. *Id.* *See also* EMPIRE STATE TAX CREDIT REPORT, *supra* note 74, at 2 (explaining

state shooting, which provides the state with resulting economic benefits such as revenues generated by tourists following the production.[91]

Depending on the amount of production costs incurred, a filmmaker may be required to spread the allowable tax credit beyond "the taxable year in which the production of such qualified film is completed."[92] If the credit amounts to at least $1 million but less than $5 million, the full amount of the credit must be spread equally over the two consecutive tax years beginning with the year in which the production was completed.[93] Similarly, if the credit amounts to at least $5 million, the credit must be equally spread over the three consecutive tax years beginning with the year the production is completed.[94] This laddered approach allows the state to lock in productions and receive the resulting economic benefits while extending the cost of the program over a potentially longer period of time.

The Governor's Office for Motion Picture and Television Development ("GOMPTD") is charged with administering the credit and monitoring the amount of credits requested in relation to the annual cap.[95] Additionally, the GOMPTD, in conjunction with the Commissioner of Taxation and Finance, has to submit an annual report to the governor and legislature analyzing the effectiveness of the film credit program in stimulating filmmaking activity in New York State.[96] The report "shall include . . . the number of qualified films, the qualified production costs, the production costs, the qualified film production facilities, and the credit amounts claimed by each qualified film, [and] the impact on employment and the economy of the state and city of New York."[97] In addition, the report can include any

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that the 75% threshold only applies to the production's total location days and the days spent shooting at a qualified production facility are not considered in determining whether the threshold has been met).

91. An immediate increase in in-state shooting days was seen after initiating the program. MOTION PICTURE ASS'N OF AM., *supra* note 63, at 14. Additionally, research indicates that, "on average, a location featured in a successful film could expect to see visitors increase by an average of 54% over the next four years." *Id.* at 21.

92. § 24(a)(2).

93. *Id.*

94. *Id.*

95. EMPIRE STATE TAX CREDIT REPORT, *supra* note 74, at 4.

96. *Id.*

97. Act of Aug. 20, 2004, ch. 60, pt. P, § 8, 2004 N.Y. Sess. Laws (McKinney,

recommendations for administering the program, calculating the credit, or modifying or repealing the program.[98]

The results of the most recent annual report, dated September 2008, indicate that, despite the complexities in calculating the amount of the credit, it has proved to be highly effective in attracting and maintaining film and television productions.[99] From its inception, the film credit program has created more than 13,000 jobs and $3 billion in economic activity.[100] Based on the data collected at the end of 2007 by the GOMPTD, the total qualified costs for the 115 credit-approved projects were more than $1 trillion dollars, and there were nearly 125,000 total production hires.[101] These in-state spending and employments benefits were not limited to certain types of productions but were realized from each of the various production types that constitute a qualified production. For example, a 2004 television series generated over $29 million in qualified costs and over 5000 production hires; a 2005 feature film generated over $58 million dollars in qualified costs and over 2700 production hires; and a 2007 television pilot generated over $5 million in qualified costs and nearly 800 production hires.[102]

As demonstrated by these economic indicators, the state has an interest in maintaining and growing this industry. Beginning in 2006 and prior to the amendments to the film credit program, however, New York began to experience a significant loss of production projects, especially feature films, to its neighboring states,[103] particularly Connecticut, which had recently enacted an aggressive film incentive program of its own.[104] Connecticut's program, for example, offers a film

Westlaw through 2009-2010 Sess.).

98. *See Id.*

99. The September 2008 report includes program statistics for the application pools from 2004 through the end of calendar year December 2007. EMPIRE STATE TAX CREDIT REPORT, *supra* note 74, at 5. The data cited in the report and discussed here was compiled by the GOMPTD based on actual credit applications received and processed. *Id.*

100. *See* N.Y. State Governor's Office for Motion Picture & Television Dev., *2007 Report to the Legislature*, *in* EMPIRE STATE TAX CREDIT REPORT, *supra* note 74, at 15 [hereinafter GOMPTD Report].

101. A production hire is defined as someone working on the production in New York State. EMPIRE STATE TAX CREDIT REPORT, *supra* note 74, at 6.

102. *Id.* at 8–10.

103. GOMPTD Report, *supra* note 100, at 16.

104. CONN. GEN. STAT. ANN. § 10-100 (West 2010).

production tax credit,[105] a tax credit for capital expenditures for projects in the media and motion picture industry,[106] and a tax credit for companies undertaking animation production activities.[107] Like New York, states adopting incentives saw a jump in production projects as a result of adopting these incentives.[108] These gains, however, came at New York's expense. As compared to the previous twelve months, New York lost nearly $750 million in feature film productions alone, while Connecticut benefitted from an approximately $400 million gain in feature film productions during the same period.[109] The GOMPTD also anticipated that television productions would relocate to neighboring states as their industry related infrastructure developed, resulting not only in the further loss of production projects but also the relocation of New York vendors and service providers seeking to take advantage of the more attractive incentives offered by neighboring states.[110]

To counteract the further decline of New York's film industry, the state amended the Empire State Film Production Tax Credit program in 2008, increasing the credit to the current 30% level.[111] Positive results were immediate. According to the GOMPTD, during the first quarter of 2008 it received only nine initial film credit applications.[112] After the program amendment, however, the GOMPTD received a total of sixty-two initial credit applications[113] demonstrating the value of the program to the production companies in New York. Even as amended, however, the New York incentives are not as aggressive as those offered by neighboring states. For example, both the New York and Connecticut programs offer a 30% film tax credit rate, but Connecticut's program includes qualifying expenses that are prohibited by New York.[114] Thus, Connecticut provides a greater credit per

105. *Id.* § 12-217jj.
106. *Id.* § 12-217kk.
107. *Id.* § 12-217*ll*.
108. *See* GOMPTD Report, *supra* note 100, at 16.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 17.
113. *Id.* at 17. Statistical data on these applications is currently unavailable, but they will be analyzed as part of the next annual report. *See id.*
114. New York's program excludes costs of scripts, wages for writers, directors, and producers, and other above-the-line production costs that are included under

production dollar.[115]

Despite New York's relative conservativeness, the GOMPTD still expects the credits to help generate more than $2 billion in in-state economic activity in 2010 while providing jobs for more than 78,000 New Yorkers.[116] This demonstrates that, while film makers are concerned with the cost of production and look to take advantage of the most lucrative incentives available, they also consider factors beyond tax incentives when selecting a production location.[117] In the end, it appears that New York appropriately determined that it did not have to be as aggressive as its neighbors due to the state's highly-developed industry-related infrastructure and skilled workforce, landmark locations and other resources. Partly because of the film credit program, New York has been able to maintain its status as the largest production location in the United States outside of Hollywood.[118]

B. The Golden State Strikes Back

Over time, the California film and television production industry has been experiencing the effects of runaway productions[119] and the threats associated with them, including lost jobs and decreased tax revenues.[120] In February 2009, the California State Legislature approved new tax credits for the film and television production industry, initiated by Governor and former actor Arnold Schwarzenegger.[121] Aimed at

Connecticut's program. Memorandum from Jennifer Weiner, Policy Analyst, Fed. Reserve Bank of Bos., to Shelley Geballe, Distinguished Senior Fellow, Conn. Voices for Children 8 n.9 (Apr. 2, 2009), *available at* http://www.bos.frb.org/economic/neppc/memos/2009/weiner040209.pdf.

115. *Id.* at 8 n.10.

116. N.Y. State Governor's Office for Motion Picture & Television Dev., *2009 Report to the Legislature*, *in* 2010 EMPIRE STATE TAX CREDIT REPORT, *supra* note 80, at 27 [hereinafter 2009 GOMPTD Report].

117. Memorandum from Jennifer Weiner, *supra* note 114, at 8 n.9.

118. GOMPTD Report, *supra* note 100, at 17.

119. California's production industry views runaway productions to include any production that takes place in another state as well as productions taking place in other countries. 2005 CAL. LEG. REPORT, *supra* note 1, at 6.

120. JACK KYSER ET AL., L.A. COUNTY ECON. DEV. CORP., 2009–2010 ECONOMIC FORECAST AND INDUSTRY OUTLOOK: MID-YEAR UPDATE 70 (2009), *available at* http://www.laedc.org/reports/Forecast-2009-07.pdf.

121. Arnold Schwarzenegger was elected governor of California on October 7, 2003. *Biography for Arnold Schwarzenegger*, INTERNET MOVIE DATABASE, http://www.imdb.com/name/nm0000216/bio (last visited Nov. 4, 2010). He has also starred in the popular motion pictures COMMANDO (1985), PREDATOR (1987), THE

stimulating the local economy and maintaining California's status as the hub of the entertainment industry in the United States, the new program, commenced on July 1, 2009, authorizes a credit against taxes imposed by the state's personal income and corporate tax laws or a credit against qualified state sales and use taxes.[122] The legislature, however, needed to tailor the law to address the loss of many productions to other states[123] and the need to boost the local economy without incentivizing productions that would have occurred in California even without the program. As a result, the California program bears many similarities to New York's—an annual credit cap,[124] limited eligibility based on production type,[125] and spending requirement thresholds.[126]

On the program's start date, the California Film Commission (CFC) began accepting applications on a first-come, first-served basis.[127] Once an applicant fulfills all the documentation requirements, the CFC issues a letter stating the amount of the credit reserved for the particular project.[128] The amount of the credit is 25% of the qualified expenditures[129] for the production of a qualified motion picture in California.[130] In order to qualify for the credit, the production must meet the statutory definition of a qualified

RUNNING MAN (1987), THE TERMINATOR (1984) and others. *Id.*

122. Act effective Feb. 20, 2009, 3rd Ex. Sess., ch. 10, § 9, 2009 Cal. Legis. Serv. (West, Westlaw through 2009 Sess.) (codified at CAL. REV. & TAX. CODE § 23685 (West Supp. 2010)).

123. An example of the effect of productions relocating was seen in 2008 when "Ugly Betty," one of California's most prominent television productions at the time, relocated to New York affecting hundreds of production crew members. Richard Verrier, *California Budget Includes Tax Relief for Film, TV Shoots*, L.A. TIMES, Feb. 20, 2009, http://articles.latimes.com/2009/feb/20/business/fi-filmtaxcredits20.

124. The annual credit is capped at $100 million "for the 2009-10 fiscal year and each fiscal year thereafter, through and including the 2013-14 fiscal year." CAL. REV. & TAX. CODE § 23685(h)(i)(1)(A) (West 2010).

125. § 23685(b)(15)(A)–(B).

126. *Id.*

127. CAL. FILM COMM'N, CALIFORNIA FILM & TELEVISION TAX CREDIT PROGRAM GUIDELINES, 6, 9 (June 2009) (on file with author).

128. *Id.*

129. The term "Qualified expenditures" is defined as "amounts paid or incurred . . . within [California] in the production of a qualified motion picture and payments, including qualified wages, for services performed within [California] in the production of a qualified motion picture." § 23685(b)(16). Examples of qualified expenditures include: crew and staff salaries, wages and fringe benefits, production operation costs, and equipment and facilities rental costs. CAL. FILM COMM'N, *supra* note 127, at 4–5.

130. § 23685(a)(4)(B).

motion picture, which requires the production to be a feature film,[131] a movie of the week or miniseries,[132] a new television series,[133] an independent film,[134] or a television series that relocates to California.[135] This initial limitation specifically excludes certain types of productions, including commercials, music videos, talk shows, game shows, sporting events, documentaries, and sexually explicit films.[136] As with the New York program, this limitation is intended to avoid incentivizing productions already being shot in California and those that the legislature had no interest in promoting.[137]

In addition to meeting the classification requirement, the productions must meet the following requirements: (1) at least 75% of the production days must occur wholly in California or 75% of the production budget must be incurred for payment of services performed or purchases made within California; (2) the production must be completed within thirty months from the date the CFC approved the application; (3) the copyright for the motion picture must be registered with the United States Copyright Office; and (4) the principal photography must commence within 180 days after the application for the credit is approved by the CFC.[138] Each of these additional requirements furthers the aims of the program. The in-state spending requirements serve to increase economic activity within the state, while the timeframes provided for commencement and completion are

131. To qualify as a feature film, the production must have a minimum production budget of one million dollars and a maximum of seventy-five million dollars. § 23685(b)(15)(A)(i).

132. A qualifying movie of the week or miniseries must have a minimum production budget of five hundred thousand dollars. § 23685(b)(15)(A)(ii).

133. A new television series must be licensed for original distribution on basic cable and must have a minimum production budget of one million dollars. § 23685(b)(15)(A)(iii).

134. An independent film is defined as "a motion picture with a minimum budget of one million dollars . . . and a maximum budget of ten million dollars . . . that is produced by a company that is not publicly traded and publicly traded companies do not own, directly or indirectly, more than 25 percent of the producing company." § 23685(b)(6).

135. This term is defined as "a television series . . . that filmed all of its prior season or seasons outside of California and for which the taxpayer certifies that the credit provided pursuant to this section is the primary reason for relocating to California." § 23685(b)(22).

136. § 23685(b)(15)(D).

137. *See supra* Part II.A.

138. § 23685(b)(15)(B)(i)–(iv).

intended to avoid reserving and applying tax credit to productions that are ultimately never completed, resulting in diminished program returns to the state.[139] Lastly, the registered copyright requirement is designed to limit the incentive to only those productions with a truly commercial purpose.[140]

Similar to New York, California designed its film credit program with a vision of spurring its production industry and enticing new productions to the state without being as aggressive as its neighboring states.[141] For example, New Mexico has had substantial success with an aggressive film incentive program that extends beyond offering tax incentives; the state has a film investment loan program and provides a 50% reimbursement of wages for on-the-job training of New Mexico residents hired for advanced crew positions.[142] New Mexico's film production tax credit amounts to 25% of the in-state direct production,[143] and even postproduction[144] expenditures that are subject to taxation by New Mexico and are related to the production of a film or other commercial audiovisual products within the state.[145] In order to be eligible for the credit, the film production company[146] must also agree to pay all the obligations it has incurred in New Mexico and ensure that its creditors have sufficient notice to timely file any claims that may arise

139. *Id.*

140. The purpose of copyright law is to protect the commercial interests of an author or creator while promoting the progress of science and the useful arts. *Copyright Tutorial Module 1: Purpose of Copyright Law*, BRIGHAM YOUNG UNIV., http://www.lib.byu.edu/departs/copyright/tutorial/module1/page3.htm (last visited Sept. 12, 2010).

141. *See* § 23685(a)(1).

142. *New Mexico's Film Incentives*, N.M. FILM, http://www.nmfilm.com/filming/incentives/ (last visited Sept. 12, 2010).

143. The term "direct production expenditure" is statutorily defined to include, but is not limited to transactions that are subject to taxation in New Mexico and involve the payment of wages to a New Mexico resident; set construction and related services; equipment and facilities rental; food and lodging; insurance coverage purchased through a New Mexico-based agent; and other direct costs generally accepted by industry norms. N.M. STAT. ANN. § 7-2F-2(B) (2010).

144. "Postproduction expenditure" includes, but is not limited to, expenditures for editing; the addition of special effects; scoring and music editing; beginning and ending credits; and dubbing or subtitling; however, advertising, marketing, and distribution costs are expressly excluded. § 7-2F-2(F).

145. *Id.* § 7-2F-1(A)–(B).

146. A "film production company" means any "person that produces one or more films or any part of a film." § 7-2F-2(E).

against the company.[147] These measures are designed to avoid the financial harm to the local economy that could result if the production company was to incur liabilities to local New Mexican vendors and suppliers, claim the credit, and then not meet its obligations.

Although both California and New Mexico's film tax credits amount to 25% of the eligible expenses, New Mexico's credit program is broader than that of California, as it also applies to the production of video games, documentaries, and national and regional advertising campaigns.[148] Furthermore, New Mexico's credit program does not have minimum budget and spending requirements and does not have an annual aggregate credit cap.[149] This general availability of the credit program to any production activity occurring within the state reflects New Mexico's aspiration toward developing the in-state industry from the ground up and garnering the resultant economic benefits for its citizens.[150]

New Mexico's film investment loan program is the second component of the state's overall incentive scheme, and film companies can utilize it, in addition to the tax credit, so long as the companies establish independent eligibility for both programs.[151] The investment loan program has also been effective in attracting film productions to the state.[152] Under this program, the state may make debt or equity investments of up to $15 million in a New Mexico film private equity fund or film project.[153] Typically, the state will make a loan up to the $15 million limit at 0% interest that a company can use to fund a film production's entire budget, provided that the

147. § 7-2F-1(F).

148. § 7-2F-2(A), (D).

149. § 7-2F-1(J).

150. ERNST & YOUNG LLP, ECONOMIC AND FISCAL IMPACTS OF THE NEW MEXICO FILM PRODUCTION TAX CREDIT 1–2 (2009), *available at* http://www.nmfilm.com/locals/downloads/nmfilmCreditImpactAnalysis.pdf.

151. N.M. STAT. ANN. § 7-27-5.26(A) (2010).

152. *See* ERNST & YOUNG LLP, *supra* note 150, at 1.

153. § 7-27-5.26(B). A "New Mexico film private equity fund" is a limited partnership, limited liability company or corporation "that: (a) has as its primary business activity the investment . . . in film projects produced wholly or partly in New Mexico; (b) holds out the prospects for capital appreciation from such investments; and (c) accepts investments only from accredited investors as . . . defined [under] Section 2 of the federal Securities Act of 1933 . . . ." § 7-27-5.26(E)(2). A "film project" is any media program, including advertisements, fixed on a delivery medium from which it can be viewed or reproduced and that is intended for theater exhibition, or licensing to television stations and home viewing markets. § 7-27-5.26(E)(1).

budget is at least $2 million.[154] In return, the state takes a "negotiated participation in the production's post-breakeven revenues."[155] While the terms of the loan program are attractive to production companies, the eligibility requirements cater to the interests of New Mexico and its residents to ensure that they also benefit. For example, an applicant must provide the state with a guarantee for the principal amount of the loan.[156] The guarantee is usually in the form of an irrevocable Letter of Credit from a United States based bank or a corporate guarantee with the guaranteeing institutions meeting the requisite credit ratings set by the State Investment Council.[157] This requirement insulates the state from potential losses if the production is a bust or is not completed. The New Mexico Film Office must also approve the script for eligibility in the program because of the state's interest in not promoting productions with excessive violence, language or sexual content, and culturally sensitive material.[158] Additionally, at least 85% of the production must take place in New Mexico and at least 60% of the below-the-line payroll and personnel count must be comprised of New Mexican crew members.[159] These requirements further the state's interest in funding only those productions that are substantially produced in New Mexico with resident workers.[160]

The third component of New Mexico's incentive scheme—the workforce training reimbursement program—encourages film production companies to employ New Mexicans with some industry experience in more advanced positions in their film crews.[161] Further, it also provides those New Mexicans with the necessary training and relevant work experience to

154. *See Film Investment Loan Program*, N.M. FILM, http://www.nmfilm.com/filming/incentives/investment-program.php (last visited Sept. 12, 2010).

155. *New Mexico Film Investments*, N.M. STATE INV. COUNCIL, http://www.sic.state.nm.us/film.htm (last visited Sept. 12, 2010).

156. *See Film Investment Loan Program*, *supra* note 154.

157. *See id.* If the guarantee is in the form of an irrevocable Letter of Credit from a U.S. bank, the bank must have a minimum credit rating of "A" issued by either Moody's Investor Services or Standard & Poor's; a corporate entity providing the guarantee must have, at a minimum, an investment grade credit rating of "BBB." *Id.*

158. *Id.*

159. *Id.*

160. *See id.*

161. *See Workforce Advancement*, N.M. FILM, http://www.nmfilm.com/locals/workforce-advancement/ (last visited Sept. 12. 2010).

enhance their skill sets and contribute their expertise to future film productions in New Mexico.[162] The goal is to expand the state's manpower resources for the film and television production industry.[163] The New Mexico film division pre-approves personnel that will qualify for the reimbursement by ensuring that they are residents of New Mexico,[164] have participated in an accredited training course or on-the-job training,[165] and have been certified as film trainees by the film division.[166] The program will reimburse an eligible production company 50% of the salaries paid to qualifying personnel.[167] This reimbursement, however, will occur only upon completion of a film production in New Mexico, and the production company seeking the reimbursement must submit information relating to the employment status and salary paid to qualifying personnel.[168]

The New Mexico film production incentives, although questioned at times since inception,[169] have positively impacted New Mexico's economy by attracting large-scale, hit productions to the state.[170] A recent study by the Quantitative Economics and Statistics Division of public accounting firm Ernst & Young LLP quantified the benefits of New Mexico's film production tax incentives and detailed the success of the program in increasing film production activity, investment in film studios and equipment, and spending by tourists visiting the state to film-related attractions.[171] By attracting the film production industry to the state, the program benefits New Mexico residents by creating high-

162. *See id.*

163. *Id.*

164. N.M. STAT. ANN. § 21-19-7.1(A)(1)(a) (2010).

165. § 21-19-7.1(A)(1)(b).

166. § 21-19-7.1(A)(1)(c).

167. § 21-19-7.1(A)(3). *See also Film Crew Advancement Program*, N.M. STATE INV. COUNCIL, http://www.nmfilm.com/filming/incentives/film-crew-advancement.php (last visited Sept. 12, 2010).

168. § 21-19-7.1(A)(2).

169. Steve Terrell, *Panelists Warn Against Cutting New Mexico Film Incentives*, SANTA FE NEW MEXICAN, Oct. 6, 2009, http://www.santafenewmexican.com/Local%20News/Panelists-warn-against-cutting-film-incentives.

170. The movie "No Country for Old Men" starring Tommy Lee Jones and Woody Harrelson was filmed in New Mexico, although set in Texas, and ultimately won the Oscar for Best Motion Picture of the Year at the 2008 Academy Awards. *No Country for Old Men*, INTERNET MOVIE DATABASE, http://www.imdb.com/title/tt0477348/ (last visited Sept. 12, 2010).

171. ERNST & YOUNG LLP, *supra* note 150, at 15.

quality jobs that provide health coverage and benefits.[172]

The Ernst & Young study identified that, since the incentive program was adopted in 2002, film production credit was increased twice, raising the rate from 15% to 25%.[173] With each rate increase, the state saw a corresponding increase in both the number of qualifying film productions and the total spending associated with those productions.[174] For example, thirty credit-qualifying film projects were shot in New Mexico in 2007 compared to the twenty-two films shot in 2006.[175] Between 2006 and 2007, production spending increased from $223 million to $253 million.[176] In analyzing the production expenditures of the movies shot in 2007 that supplied complete budget information, Ernst & Young determined that, on average, approximately 21% of a film's production expenditures do not qualify for the tax credit.[177] This means that roughly $53 million of the $253 million spent on New Mexico film productions in 2007, while not qualifying for the tax credit, generated positive economic activity and tax revenue for the state and local governments of New Mexico.[178] The 2007 productions also directly employed more than 2200 workers, generated approximately $166 million in indirect spending, and helped to create 1600 jobs in other sectors of the state economy.[179] The total economic impact from 2007 film production activities resulted in more than $418 million of in-state spending and the employment of more than 3800 individuals.[180]

The Ernst & Young report also considered the positive impacts from the direct and indirect effects of the film productions in conjunction with the benefits from film-related capital expenditures and tourism.[181] The number of New

172. Megan Kamerick, *Ernst & Young: NM Film Incentives = Good ROI*, N.M. BUS. WEEKLY (Jan. 16, 2009), http://albuquerque.bizjournals.com/albuquerque/stories/2009/01/12/daily53.html.

173. ERNST & YOUNG LLP, *supra* note 150, at 1.

174. *Id.* at 2. When the credit was initially increased from 15% to 20% in 2005, total spending increased by $120 million; when the credit was increased to 25% a year later, total spending further increased by an additional $79 million. *Id.*

175. *Id.* at 1.

176. *Id.* at 3.

177. *Id.* at 6.

178. *Id.*

179. ERNST & YOUNG LLP, *supra* note 150, at 7.

180. *Id.*

181. *See id.* at 6–15.

Mexico's film productions has grown tremendously since the inception of its incentive program, and the state has also benefitted from the expansion of its film-industry infrastructure with production companies making capital expenditures for the construction of film studios and equipment investments.[182] For 2007, capital expenditures totaled approximately $188 million and generated more than 1500 jobs.[183] Tourism in the state has also benefited significantly from the incentive program because those travelers that are familiar with the productions made in New Mexico are extending visits area to include trips to "locations where movies were filmed or other film-related attractions."[184] Although the Ernst & Young report makes detailed estimates on the effect of the tax credit program on tourism,[185] the results indicate that 2007 film production activities will subsequently generate $285 million in film-related spending and both direct and indirect tourism spending while generating approximately 3800 direct and indirect jobs.[186]

The ultimate fiscal impact of the New Mexico film credit is also positive. Based on the increased spending and employment resulting from the direct and indirect impact of the 2007 in-state film production activities, capital expenditures, and tourism, combined state and local tax revenue increased by approximately $32 million, $13 million, and $26 million, respectively, for a total of approximately $71 million.[187] Based on these additional tax revenues, the tax credit program is estimated to have generated $1.50 for each dollar of tax credit accrued during 2007—a positive return on investment for New Mexico and its residents.[188]

182. *Id.*

183. *Id.* at 8.

184. *Id.* at 9. The results of a 2008 survey of New Mexico tourists indicated that 84% of the respondents had seen a 2007 or 2008 film produced within the state and the remaining respondents indicated that they had seen a film produced prior to 2007. *Id.*

185. The estimates made assume: a one-year lag between film production and film release; 100% of spending for films produced in the prior year affects tourism, 75% of spending for films produced two years prior, 50% of spending for films produced three years prior, 25% of spending for films produced four years prior; and an annual discount rate of 5% to estimate the total film activity impacts on future tourism spending for a given year. *See* ERNST & YOUNG LLP, *supra* note 150, at 10.

186. *Id.* at 11.

187. *Id.* at 12–14.

188. *Id.* at 15.

CONCLUSION

The benefits of a state film incentive program are apparent based on the programs discussed above; however, not all programs will prove to be beneficial to state budgetary issues.[189] The aforementioned programs are specifically designed for the circumstances of the respective state and are useful examples for any state looking to enact a new program of its own or to modify one that has not produced desired results. Each state's program contemplates the level of production activity already occurring within the state, which formulates the basis for the extent and nature of the incentive offered. Both New York and California, as opposed to Connecticut and New Mexico, already had established and highly active film and television production industries with the requisite infrastructure in place and available to production companies prior to enacting their programs. This allows them to be less aggressive than their neighbors in offering incentives to the industry.[190] This determined level of established production activity in turn affects, among other factors, the extent of the credit offered, the types of productions and related expenses eligible to participate, and the thresholds for minimum spending requirements.[191] By analyzing these considerations, states can determine their competitiveness with other states—both near and far—based not only on the total incentive dollars offered to the industry but also the number of productions for which it will be competing.[192] Although the nature of the business is a numbers game, financial incentives offered by the location are not always determinative of where production will occur.[193] As such, states should carefully consider the effects of the

189. *See* Carrie Rickey, *Budget Woes Threaten Film Tax Break*, PHILA. INQUIRER, June 23, 2009, at A1, A6.

190. *See supra* Part II.A–B.

191. *See* Memorandum from Jennifer Weiner, *supra* note 114, at 3–5.

192. *See* EMPIRE STATE TAX CREDIT REPORT, *supra* note 74, at 17–19.

193. For example, the television show "The Sopranos" was based on a New Jersey mob family. *The Sopranos*, INTERNET MOVIE DATABASE, http://www.imdb.com/title/tt0141842/ (last visited Jan. 12, 2011) As such, the television show was filmed at various locations throughout New Jersey to maintain its authenticity regardless of the financial incentives offered by other jurisdictions. *See generally The Sopranos – Filming Locations*, INTERNET MOVIE DATABASE, http://www.imdb.com/title/tt0141842/locations (last visited Jan 12, 2011) (listing the various filming locations throughout the state of New Jersey).

contemplated program on their fiscal budgets and their interest in promoting the industry within their borders. When a state initiates a well designed program, it will be able to attract productions and the resultant economic benefits, all while preventing the entertainment industry from taking advantage of the program.