The Colorado Economic Development Commission
and
The Colorado Office of Economic Development and International Trade

Extension of Certain Unused Tax Credits Program Guidelines, Policies and Procedures

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Overview

Draft subject to change based on further discussion and EDC Approval.

The OEDIT role in this program will be managed by the division of Business Funding and Incentives. Please contact Tad Johnson at (oedit_bfi-i@state.co.us) if you have any questions or comments.

Statute

The Extension of Certain Unused Tax credits was created via House Bill 22-1418 and codified under C.R.S. 24-46-107. The statue text:

> **24-46-107. Temporary extension of carry-forward provisions - Colorado job growth incentive tax credit - enterprise zone tax credits - definitions - repeal.** (1) As used in this section, unless the context otherwise requires:
>
> (a) "Office" means the Colorado office of economic development created in section 24-48.5-101.
>
> (b) (I) "Taxpayer" means any person doing business in the state, including an affiliated group, that operates in a strategic industry that was disproportionally impacted by the COVID-19 pandemic and experienced significant financial hardship caused by the COVID-19 pandemic.
>
> (II) "Strategic industry" and "significant financial hardship" for purposes of the definition of "taxpayer" in subsection (1)(b)(I) of this section shall be determined by the commission and the office. When determining significant financial hardship, any financial assistance or relief that the taxpayer may have received from other sources including federal, state, or local assistance may be considered but shall not be dispositive for purposes of eligibility.
>
> (2) The commission may allow a taxpayer to carry forward for a period of five years the tax credits set forth in section 39-22-531 and in article 30 of title 39 that would otherwise expire between January 1, 2021, and December 31, 2025; except that the aggregate amount of all tax credits permitted to be carried forward pursuant to this subsection (2) is zero dollars for the first two years in the five-year period, ten

million dollars for the third year in the five-year period, and fifteen million dollars for the fourth and fifth year in the five-year period and the tax credit set forth in section 39-30-103.5 is not eligible for the five-year carry-forward period set forth in this section. Taxpayers must apply to the commission and the office pursuant to subsection (3) of this section for approval to carry forward the tax credits as set forth in this subsection (2).

(3) (a) A taxpayer may apply for approval by the commission to carry forward a tax credit as set forth in subsection (2) of this section in accordance with timing, deadlines, policies, and procedures established by the commission, in consultation with the office, and as follows:

(I) A taxpayer shall apply one time to the commission for the extended carry-forward period set forth in subsection (2) of this section and must identify in the application all of the anticipated credits that the taxpayer requests to extend for each tax year that the extended period applies to;

(II) At a minimum, the application must include certification by the taxpayer's president, chief executive officer, or chief financial officer that, based on the taxpayer's current and expected financial results, it is anticipated that the taxpayer will not be able to use the tax credits before the credits expire as the result of losses experienced during tax years 2020 and 2021 due to the COVID-19 pandemic;

(III) The application must include documentation from the taxpayer demonstrating significant financial hardship caused by the COVID-19 pandemic; and

(IV) In consultation with potential applicants, the commission and the office shall determine additional appropriate policies, procedures, requirements, and deadlines to administer the application process and extension approvals pursuant to this section, which may include additional verification procedures to demonstrate that applicants are making bonafide requests for the five-year extension.

(b) In consultation with the office, the commission shall receive, review, and approve applications by taxpayers on a first come, first served, rolling basis. In addition to the application requirements set forth in subsection (3)(a) of this section, the commission may consider additional economic development commitments to the state by the taxpayer in determining approval of applications including:

(I) The size of the taxpayer's current operation in the state relative to both the state as a whole and the region the taxpayer is based in;

(II) Any strategic economic development benefits that the taxpayer provides with existing operations to the state in terms of supply chain, benefits to other industries, or other spillover benefits that the applicant's operations provide to the state or region; and

(III) Any additional forthcoming economic development benefits that the taxpayer may provide to the state or region based on commitments that the applicant has recently made or proposes that are outside the scope of the original incentive award.

(c) When an application is approved, the commission shall issue letters to the department of revenue and approved taxpayers that must specify the type and amount of credits eligible for the five-year extension and for what years in the period the extension is eligible.

(4) This section is repealed, effective July 1, 2035.

Basic Program Structure

Tax Credits That Can Be Extended:

- Job Growth Incentive Tax Credits (JGITC) C.R.S. 39-22-531
- Enterprise Zone Investment Tax Credits (EZ ITC) C.R.S. 39-30-104
    - Including investments in Renewable Energy, Commercial Vehicles, and Qualified Job Training Programs
- Enterprise Zone New Employee Tax Credits (EZ) C.R.S. 39-30-105.1 (Business facility new employee credits)
    - Including Agricultural Manufacturing and Processing Employee Credits, Enhanced Rural Enterprise Zone Employee Credits, and EZ Employee Health Insurance Credits
- Enterprise Zone Tax Credits for Expenditures for Research and Experimental Activities C.R.S. 39-30-105.5
- Enterprise Zone Rehabilitation of Vacant Buildings Tax Credit C.R.S. 39-30-105.6

Tax Credits and Their Respective Carry-Forward Periods:

Types of Tax Credit	Carry-Forward Duration
Job Growth Incentive Tax Credit	10 Years
Enterprise Zone Business Facility New Employee Tax Credits (including Ag. Manufacturing/Processing)	5 Years
Enhanced Rural Enterprise Zone Business Facility New Employee Tax Credits (including Ag. Manufacturing/Processing)	7 Years
Enterprise Zone Employee Health Insurance Credit	7 Years
Enterprise Zone Research and Experimental Activities Tax Credit	Indefinitely
Enterprise Zone Vacant Building Rehabilitation Credit	5 Years

Type of Enterprise Zone Investment Tax Credits	Year's Issued	Carry-Forward Duration
Enterprise Zone Investment Tax Credits (including Commercial Vehicle and Job Training Investments)	2013 and Prior	12 Years
Enterprise Zone Investment Tax Credits (including Commercial Vehicle and Job Training Investments)	2014 and Later	14 Years
Enterprise Zone Investment Tax Credits (Renewable Energy Investments ONLY)	2013 and Prior	20 Years
Enterprise Zone Investment Tax Credits (Renewable Energy Investments ONLY)	2014 - 2017	22 Years
Enterprise Zone Investment Tax Credits (Renewable Energy Investments ONLY)	2018 and Later	14 Years

Limits on the Permission of Tax Credits' Extended Carry-Forward Periods:

The aggregate amount of all tax credits permitted in a given year by the EDC (i.e. when the EDC gives its approval) to be carried forward pursuant to this subsection (2) is zero dollars for the first two years in the five-year period, ten million dollars for the third year in the five-year period, and fifteen million dollars for the fourth and fifth year in the five-year period and the tax credit set forth in section 39-30-103.5 (Contribution Project Tax Credits) is not eligible for the five-year carry-forward period set forth in this section.   Note this does mean the tax credits actually need to be expiring in the year when the approval is given and they could expire in any of the five years CY2021 to CY 2025.

Calendar Year	Aggregate Maximum Carry-Forward Amount
CY2021	$0
CY2022	$0
CY2023	$10 million
CY2024	$15 million
CY2025	$15 million

Example (OEDIT's Proposal):
A tax credit that expires in tax year 2021, if approved in 2023 to be extended five years, may only be claimed in tax years 2023 through 2026. OEDIT and the DOR will allow a 5 year life from the date of the expiration date on the original expired tax credit. In this case from tax year 2021 plus five years to be used in tax years 2023 to 2026. Ones expiring in 2022 and approved for extension would be used in the next five tax years from 2023 through 2027. Future expiring tax credits in tax credits 2023, 2024, and 2025 would get five additional tax years.

Timeline (Tentative):

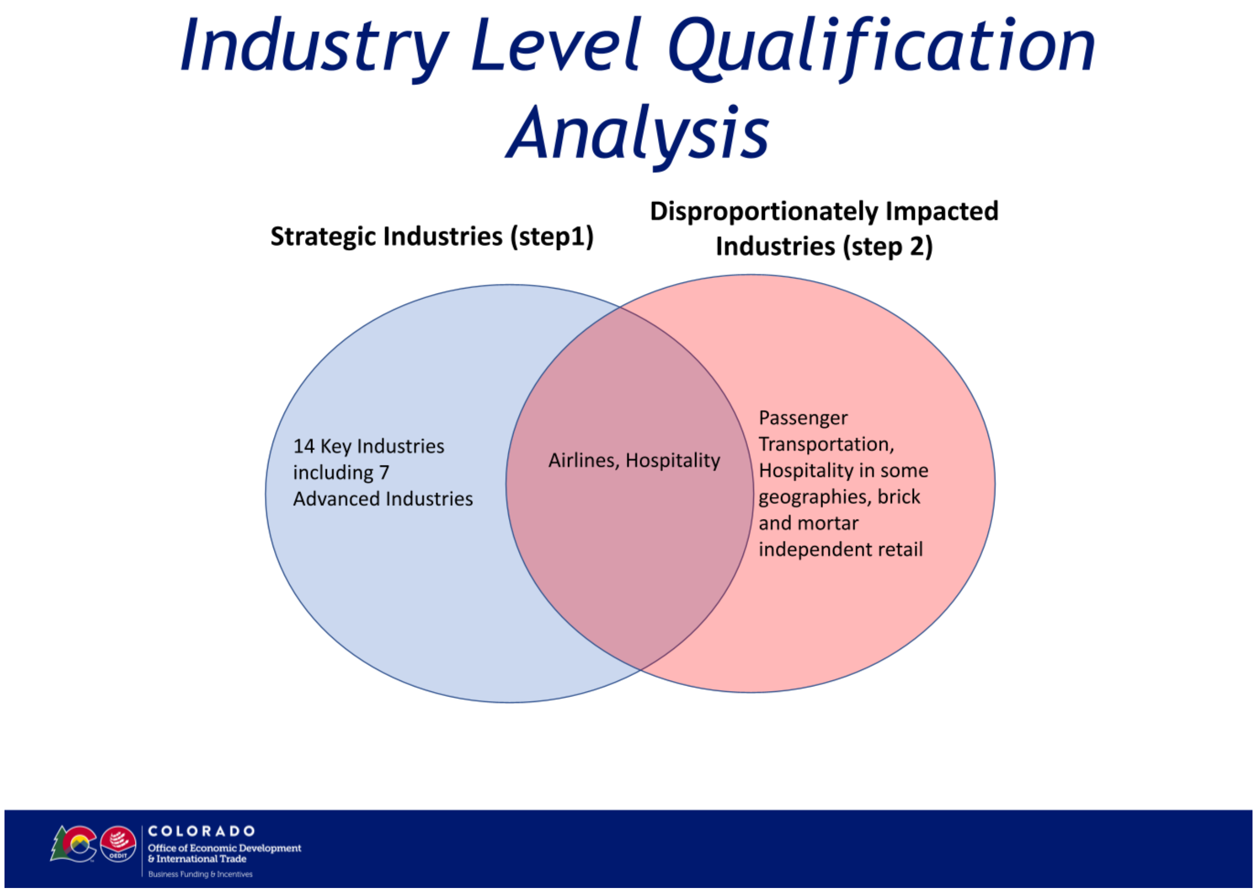
December 12, 2022 - OEDIT held a virtual stakeholder meeting to gauge interest in the program and receive input from potential applicants.
January 2023 - OEDIT will present draft guidelines, policies, and application materials to the Economic Development Commission and public/stakeholder comments.
February 2023 - OEDIT presented proposed finalized guidelines, policies, and application materials and EDC approved.
March 2023 - OEDIT will open the first annual "Expression of Interest" window; companies will express their interest in applying for an extension.
April 2023 - OEDIT will close the first annual "Expression of Interest window; OEDIT will then review applications and work with applicants to ensure minimum eligibility requirements are met.
August 2023 - OEDIT and Applicants will work together to finalize applications for presentation to the Economic Development Commission.

September 21, 2023 - OEDIT Staff will present the finalized applications to the Economic Development Commission for approval.
March 1 to March 31 2024 and 2025 - OEDIT may open and close the "Expression of Interest" window; if there is demand from potential applicants expressed to OEDIT and companies will formally express their interest in applying for an extension. If there is no demand expressed by applicants, OEDIT may not open this window.

Eligibility Requirements

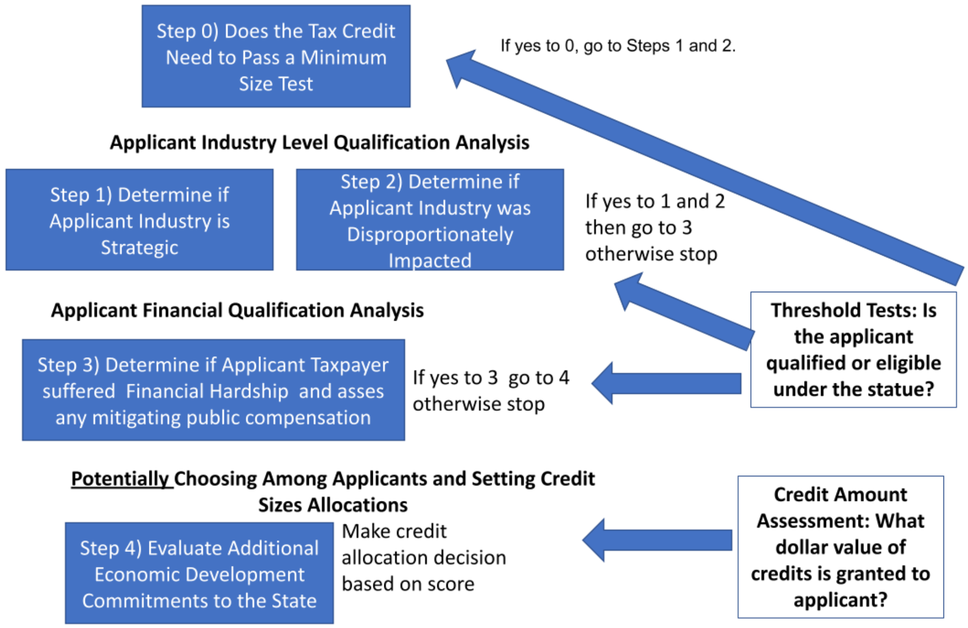
Businesses with tax credits that will go unused and will expire between January 1, 2021 and December 31, 2025, must meet the following eligibility requirements. OEDIT strongly recommends businesses informally confirm they meet these requirements before expressing interest in applying for an extension of certain unused tax credits.

1. Minimum Threshold for Amount of Expiring Tax Credits is **$400,000**
    a. This threshold is **<u>per tax credit</u>**; taxpayers will not be allowed to combine multiple credits to meet this threshold.
    b. This threshold will only be used for the first cycle/cohort of extensions.
2. Industry Eligibility will be based
    a. on Strategic Industries and.
        i. OEDIT will focus on Colorado's 14 key industries: Advanced Manufacturing, Aerospace, Bioscience, Creative Industries, Defense & Homeland Security, Electronics, Energy & Natural Resources, Financial Services, Food & Agriculture, Health & Wellness, Infrastructure Engineering, Technology & Information, Tourism & Outdoor Recreation, and Transportation & Logistics.
        ii. OEDIT will also consider the following factors:
            1. Primary employment.
            2. Supply-chain benefits.
            3. Substantial Capital Investments.
            4. Identified as important sector/subsector by Governor
            5. Federal Critical Infrastructure.
    b. Disproportionately Impacted Industries are industries that were disproportionately impacted by the COVID-19 Pandemic based on trend analysis of employment, payroll, revenues and profitability via government statistics and reports. The following industries have been identified as likely disproportionately impacted: Passenger Transportation, Hospitality in some regions, brick and mortar independent retail. Other industries may also qualify. <u>It will be the applicant's responsibility to provide data showing a given industry was disproportionately impacted.</u>



3. Specific Business Eligibility will be determined based on financial hardship caused by the COVID-19 Pandemic.
    a. Businesses will submit financial documentation to illustrate significant financial hardship caused by the COVID-19 Pandemic. (See detail in step 4)
4. Additional Factors the Economic Development Commission may consider:
    a. Size of the taxpayers' current operations in the state.
    b. Any additional strategic economic development benefits that the taxpayer provides.
    c. Any future economic development benefits the taxpayer may provide.

Logic Flow for Application Evaluation



Applying for an Extension

Overall Process of Applying for The Extension of Certain Unused Tax Credits

PRE-APPLICATION BUSINESS SELF-ASSESSMENT:

- Step 1: The business has an informal discussion with OEDIT to determine if the business has qualified tax credit(s)
- Step 2: The business tests for industry eligibility with OEDIT discussion.

FORMAL APPLICATION PROCESS:

- Step 3: The business formally expresses interest in applying for an extension
- Step 4: The business works with OEDIT to compile application materials
- Step 5: The business applies for the extension

Step 1: Qualified Tax Credit

The business must already have a tax credit which meets the following criteria in order to be qualified:

1. Is a JGITC, or qualifying Enterprise Zone Tax Credit(s).
2. Expires (unused) between Jan. 1, 2021 and Dec. 31, 2025.
3. Tax Credit amounts to at least $400,000 (cannot combine multiple TC's to meet threshold).

Step 2: Industry Eligibility

- Substep 1: Determine if applicant industry is strategic
    - OEDIT will focus on Colorado's 14 key industries: Advanced Manufacturing, Aerospace, Bioscience, Creative Industries, Defense & Homeland Security, Electronics, Energy & Natural Resources, Financial Services, Food & Agriculture, Health & Wellness, Infrastructure Engineering, Technology & Information, Tourism & Outdoor Recreation, and Transportation & Logistics.
    - OEDIT will also consider the following factors:
        - Primary employment.
        - Supply-chain benefits.
        - Substantial Capital Investments.
        - Identified as important sector/subsector by Governor
        - Federal Critical Infrastructure.
- Substep 2: Determine if industry was also disproportionately impacted by the COVID-19 Pandemic. The applicant will provide trend analysis on employment, payroll, revenue, profitability, and any other metric that would show how the industry was disproportionately impacted.

    - Passenger Transportation, Hospitality in some regions, brick and mortar independent retail.

NOTE: A successful recommendation by OEDIT to continue the application process means OEDIT will likely recommend to the EDC that the business is eligible, but final eligibility determination and authorization will occur in later steps after evaluation by the EDC.

Step 3: The Business Formally Expresses Interest in the Extension

Statute states that the commission shall receive, review, and approve applications by taxpayers on a first come first served, rolling basis. A taxpayer shall apply one time to the commission for the extended carry-forward period… and must identify in the application all of the anticipated credits that the taxpayer requests to extend for each tax year that the extended period applies to.

Annually, between CY 2023 and 2025, OEDIT will potentially have a formally open "Expression of Interest'' window for one month. During this time period, businesses that have met the above eligibility requirements will be allowed to express their interest in applying for an extension of certain unused tax credits. Once this window closes, OEDIT will work with each applicant to prepare their formal application for presentation to the Economic Development Commission later on in the year. This window will potentially be open annually for one month between Calendar Years 2023 through 2025.

OEDIT will also have a published method for potential applicants to communicate their desire to potentially participate in this program during the time periods that the "Expression of Interest" window is closed. If there are no potential applicants who have communicated with OEDIT expressing their desire to potentially apply, OEDIT may forgo future "Expression of Interest" windows.

Prior to this period (Steps 1 and 2), required application documentation will be kept to a minimum. OEDIT will review the applicants' names, industries, and tax credit amounts in order to determine preliminary eligibility.

Important Considerations for Step 3

- Businesses that apply during the first annual "Expression of Interest" window will be given first priority for allocation of all credits for the entire five year period. (This may exhaust all availability). This is how we propose to implement the first come first serve part of the statute.
- Within a given annual cohort, businesses will not get priority based on the timing of application submission during the expression of interest period or the full

application period. In other words, Businesses that express interest in the extension on March 31st will not be treated any differently from those that expressed interest in the extension on March 1st.

- OEDIT will implement the “rolling” application requirement in the statute by potentially having multiple annual “Expression of Interest” windows.
- If all credits are allocated during any annual application period, there will not be any “Expression of Interest” windows in future years, unless an awardee renounces their credits.
    - If a company knows they cannot use an extended credit, then they must notify OEDIT immediately in writing so we can make it available during the next annual cohort. This can only be done within the 5 year window, 2021 through 2025.
- If there are no potential applicants who have communicated with OEDIT expressing their desire to potentially apply, OEDIT may forgo future “Expression of Interest” windows.

Step 4: Compile Application Materials

Once the company has formally expressed interest in applying for an extension during the open period above, OEDIT staff will work with the applicants to:

- Substep 4a: Each Taxpayer will identify **all** of the anticipated tax credits the taxpayer is requesting to extend for each tax year that the extended period applies to.
    - For example, Taxpayer A has a total of $14M in tax credits and applies for an extension <u>in the first cohort of applications</u> (CY2023). The commission would approve $10M in 2023. The additional $4M would be earmarked first out of the $15M limit for 2024. The EDC would approve the schedule to allocate carry-forward amounts in future years.
        - With the EDC’s approval of the schedule to allocate future carry-forward amounts during the first cohort of applications, Taxpayer A is now first in line for the earmarked $4M for 2024; this is how OEDIT will implement the “First come, first served” section of statute. During 2024, the EDC would formally approve the $4M earmark for carry-forward.
        - If Taxpayer B has a total of $20M in tax credits and applies for an extension in the second cohort of applications (CY2024), the commission would approve the remaining $11M out of the $15M limit for 2024 (since Taxpayer A was first in line for the $4M that was previously earmarked). Their remaining $9M would be earmarked first out of the $15M limit for 2025. During 2025, the EDC would formally approve the $9M earmark for carry-forward.

- Substep 4b: Demonstrate significant financial hardship caused by the COVID-19 Pandemic. Documentation includes, but is not limited to:
    - Three Years (2017-2019) Pre-Pandemic Financial Statements (Income Statement, Balance Sheet, and Cash Flows) demonstrating profitability trends.
    - Two Years (2020 and 2021) of Financial Statements demonstrating significant financial hardship as a result of the COVID-19 Pandemic.
    - Financial Projections demonstrating that expiring tax credits cannot be used prior to their expiration date.
    - Summary of other funds received to mitigate against COVID-19. (For OEDIT's consideration, but not dispositive).

OEDIT will accept previously prepared financial statements (such as 10-K's), **audited financial statements, or financial statements accompanied by correlating federal tax returns**. Financial statements that are unaudited or have only been "compiled" by a CPA must be accompanied by correlating federal tax returns.

Financial Projections do not need any CPA review. However, OEDIT will require that the CEO or CFO of the company signs an attestation/certification on the veracity of the financial projections and inability to use expiring tax credits.

- Substep 4c: Additional economic development factors the Commission may consider:
    - Size of the taxpayers' current operations in the state.
    - Any additional strategic economic development benefits that the taxpayer provides.
    - Any future economic development benefits the taxpayer may provide.

These factors may also be considered by the EDC in allocating extensions.

Step 5: Applying for the extension

- Substep 5a: Once the business has expressed interest in extending certain unused credits and has worked with OEDIT staff to compile the required application materials, the business shall notify the Commission through OEDIT that they wish to extend the carry-forward periods for certain unused tax credits by submitting an application for approval.
    - This application will include which credits the business wants to extend the carry-forward periods to, the amounts to be extended each tax year, all financial documentation described in step 4, and any additional documentation required by the Commission in order to make a decision.

- Substep 5b: The application for approval to extend certain unused tax credits is reviewed by OEDIT and forwarded with a recommendation to the Economic Development Commission at the next public meeting.
- Substep 5c: The Commission ultimately decides to approve or reject the application for approval to extend certain unused tax credits.
    - The Commission's decision to approve or reject the application is based on the Commission's assessment of whether the business has met the following eligibility criteria:
        - Did the business demonstrate significant financial hardship caused by the COVID-19 pandemic?
        - Is the company in **both** a strategic industry **and** a disproportionately impacted industry?
        - Did the business identify all of the anticipated credits exceeding $400K that the taxpayer requests to extend?
        - Did the business illustrate that the taxpayer would not be able to use the tax credits before the credits expire, as a result of the COVID-19 pandemic?
        - Does the business have any additional economic development factors for the EDC to consider?
    - Note: If the business has met all the statutory and preliminary eligibility requirements, this review and approval by the EDC should be straightforward and will likely not require a high degree of discretion.

Oversubscription and First Come, First Served Policy

If at any time, credits are oversubscribed after applying the first come first served minimum eligibility rules, the commission will decide based on the information in substep 4c and other relevant factors, which applicants will receive the extended credits. OEDIT recommends that if there is oversubscription, the Commission first satisfies the entire request by the most strategic applicant (per substep 4c), and then work in descending order to satisfy applicants which provide less strategic value to the State. Thus, the highest ranked applicant will receive 100% of their request (as long as it is less than the full amount available ($40M) across the time period). If the next highest priority applicant requests more than the remaining amount available, the Commission will allow up to the remaining amount available to be extended; meaning only a portion of the request was satisfied. See example below:

Example: In 2023, Taxpayers A and B, who are both deemed to meet the eligibility requirements, apply for an extension of $35M and $8M in expiring tax credits, respectively. The commission deems Taxpayer A is more strategic to the State. Therefore, Taxpayer A would get $10M from the 2023 allocation, priority earmark of $15M in the 2024 allocation, and priority earmark of $10M in the 2025 allocation. Then Taxpayer B would receive an earmark of the remaining $5M from the 2025 allocation. Taxpayer B's remaining $3M requested would not be approved for an extended carry forward.

- Substep 5d: The Commission records its decision in the form of a motion.
- Substep 5e: OEDIT informs the taxpayer and the DOR which tax credits have been approved for an extended carry-forward period.