



Division of Secretariat

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MEMORANDUM

TO: Joel Jundt
FROM: Karla L. Engle
DATE: September 13, 2022
RE: September 21, 2022 Railroad Board Meeting

The Department of Transportation requests that the South Dakota State Railroad Board set a hearing date to consider amendments to or repeal of the following administrative rules:

- 70:05:01:01 – Terms
- 70:05:01:02 – Meetings and quorum
- 70:05:01:03 – Declaratory rulings
- 70:05:01:04 – Approval of division action.
- 70:05:01:05 – Adoption of guidelines for property management – Notice required.
- 70:05:02:16 – Record of income
- 70:05:03:01 – Definitions
- 70:05:03:03 – Application requirements
- 70:05:03:04 – Equity contributions
- 70:05:03:05 – Permissible uses of loan proceeds
- 70:05:03:06 – Factors for board action
- 70:05:03:07 – Acceptance and time restrictions of applicant
- 70:05:03:08 – Loan agreement
- 70:05:03:09 – Borrower reporting requirements
- 70:05:03:10 – Inspection of the borrower by the board and retention of records
- 70:05:03:11 – Additional notification requirements
- 70:05:03:12 – Maturity and interest rate
- 70:05:03:13 – Review of financial status
- 70:05:03:15 – Delegation of administrative functions
- 70:05:04:01 – Deadline for submission of information for railroad tax credit – Application form – Information required

I enclose a copy of the proposed rule revisions with this memo. Thank you.

CHAPTER 70:05:01

ADMINISTRATION

Section

70:05:01:01 Terms.

70:05:01:02 Meetings and quorum, Repealed.

70:05:01:03 Declaratory rulings.

70:05:01:04 Approval of division action, Repealed.

70:05:01:05 Adoption of guidelines for property management -- Notice required, Repealed.

70:05:01:01. Terms. Terms defined in SDCL 49-16B-2 have the same meaning when used in this article. In addition, terms used in this article mean:

(1) "Board," the South Dakota State Railroad Board;

(2) "Department," the South Dakota Department of Transportation.

Source: 8 SDR 35, effective October 4, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987.

General Authority: SDCL ~~1-44-25~~ 1-26-15; 1-44-30; 49-16C-3; 10-28-21.6.

Law Implemented: SDCL ~~1-44-25~~ 1-26-15; 1-44-30; 49-16C-3; 10-28-21.6.

70:05:01:02. Meetings and quorum. ~~The board shall hold regular meetings on a quarterly basis and special meetings at the call of the chairman or at the request of the director of the division of railroads. A majority of the board is required to take official action~~ Repealed.

Source: 8 SDR 35, effective October 4, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987.

~~**General Authority:** SDCL 1-44-25.~~

~~Law Implemented: SDCL 1-44-25, 1-44-27.~~

70:05:01:03. Declaratory rulings. By filing a written request with the ~~director of the division of railroads~~ secretary of the department, a person may petition the board to issue a decision on the applicability of any statute, rule, or order pertaining to railroad matters under its jurisdiction. The board shall send a written decision to the petitioner within 45 days after the ~~director~~ secretary receives the request.

Source: 8 SDR 35, effective October 4, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987.

General Authority: SDCL ~~1-44-25~~ 1-26-15.

Law Implemented: SDCL 1-26-15, ~~1-44-25~~.

70:05:01:04. Approval of division action. ~~The board shall approve or disapprove a proposed action of the division within 15 days after the director's request~~ Repealed.

Source: 8 SDR 35, effective October 4, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987.

~~General Authority: SDCL 1-44-25.~~

~~Law Implemented: SDCL 1-44-27.~~

70:05:01:05. Adoption of guidelines for property management -- Notice required. ~~The board shall, by resolution, adopt guidelines for the management of railroad property. Prior to the adoption of guidelines, a notice of the intent to adopt shall be published, consistent with SDCL 1-26-4.1, not less than 20 days before the date of the board meeting at which the guidelines will be considered~~ Repealed.

Source: 8 SDR 174, effective July 1, 1982; 13 SDR 129, 13 SDR 134, effective July 1, 1987.

~~General Authority: SDCL 1-44-25.~~

~~Law Implemented: SDCL 1-44-28.~~

70:05:02:16. Record of income. A record of all agreements, maps, ~~records,~~ and income related to the management of railroad property shall be kept on file in the ~~division of railroads~~ department.

Source: 8 SDR 35, effective October 4, 1981; 13 SDR 129, 13 SDR 134, effective July 1, 1987.

General Authority: SDCL 1-44-30.

Law Implemented: SDCL 1-44-29.

CHAPTER 70:05:03

RAILROAD TRUST FUND LOANS

Section

- 70:05:03:01 Definitions.
- 70:05:03:02 Eligibility requirements.
- 70:05:03:03 Application requirements.
- 70:05:03:04 Equity contribution, Repealed.
- 70:05:03:05 Permissible uses of loan proceeds.
- 70:05:03:06 Factors for board action.
- 70:05:03:07 Acceptance Loan Agreement and time restrictions ~~of applicant.~~
- 70:05:03:08 Loan agreement security.
- 70:05:03:09 Borrower reporting requirements.
- 70:05:03:10 Inspection of the borrower by the board and retention of records.
- 70:05:03:11 Additional notification requirements.

- 70:05:03:12 Maturity and interest rate.
- 70:05:03:13 Review of financial status.
- 70:05:03:14 Default on loan agreement.
- 70:05:03:15 Delegation of administrative functions.

70:05:03:01. Definitions. Words used in this chapter have the following meanings:

(1) "Applicant," a regional railroad authority created pursuant to the provisions of SDCL chapter 49-17A;

(2) ~~"Board," the South Dakota state railroad board~~ "Benefitted entity," an individual, corporation, partnership, limited liability company, or other business entity that will directly benefit from a railroad trust fund loan;

(3) "Borrower," an applicant who has been awarded a loan from the railroad trust fund;

(4) "Railroad trust fund," a special fund within the state treasury created pursuant to SDCL chapter 49-16C;

(5) ~~"Division," the South Dakota division of railroads;~~

~~(6)~~ "Primary jobs," jobs that provide goods and services which are primarily exported from the state, that gain market share from imports to the state, or that meet an unmet need in the area and result in the creation of new wealth. Primary jobs are derived from businesses that bring new income into an area, stimulate other local businesses, or assist a community to diversify and stabilize its economy;

~~(6)~~ "Railroad infrastructure," components of railroad track or other railroad structures, including bridges and drainage facilities;

(7) "Total project costs," the direct costs associated with the purchase of materials and services, necessary site development and improvements, construction or rehabilitation, and works necessary to the operation and protection of the project;

(8) "Rail operator," the railroad company that will provide rail service.

Source: 19 SDR 107, effective January 24, 1993.

General Authority: SDCL 49-16C-3.

Law Implemented: SDCL 1-44-20, 49-16C-3, ~~49-17A-26~~.

70:05:03:03. Application requirements. The ~~division~~ department shall provide application forms to applicants. The application must be complete before it is processed. Applications must include the following information:

(1) The applicant's name and address;

(2) A detailed description of the proposed railroad project;

~~(2) (3)~~ The names, and addresses, ~~resumes, and references~~ of the proposed rail operator and any other benefitted entity;

~~(3) (4)~~ Articles of incorporation and bylaws or other agreements that describe the legal operation or structure of the ~~rail operator~~ regional railroad authority;

~~(4) Balance sheets, cash flow statements, and income statements for the previous three years;~~

(5) A statement that addresses the economic benefit of the project;

(6) Assurance of compliance with local zoning laws and building codes;

(7) The approximate project commencement date, the completion date, and the date by which the project will be fully operational;

(8) Any other information requested by the department or the board to make a sound loan decision, ~~including financial condition of the rail operator and a description of its operations.~~

Source: 19 SDR 107, effective January 24, 1993.

General Authority: SDCL 49-16C-3.

Law Implemented: SDCL 49-16C-3.

70:05:03:04. Equity contribution. ~~The board may require an equity contribution by the applicant or others to the total project costs. In-kind contributions and completed work may be applied toward such equity contribution if, in the judgment of the board, such in-kind contributions and completed work contribute sufficiently to the current project. The applicant must provide proof of ability to make such equity contribution.~~ Repealed.

~~— **Source:** 19 SDR 107, effective January 24, 1993.~~

~~— **General Authority:** SDCL 49-16C-3.~~

~~— **Law Implemented:** SDCL 49-16C-3.~~

70:05:03:05. Permissible uses of loan proceeds. Railroad trust fund loans may be used for acquisition, development, and improvement of "railroad ~~facilities~~" ~~as they are defined in SDCL 49-16B-2(3)~~ infrastructure.

Source: 19 SDR 107, effective January 24, 1993.

General Authority: SDCL 49-16C-3.

Law Implemented: SDCL 49-16C-3.

70:05:03:06. Factors for board action. When making a decision on an application, the board may consider the following in addition to other factors necessary to make a loan decision:

- (1) Number of primary jobs created;
- (2) Amount of the loan requested;

- (3) Net economic effect on the area and state;
- (4) Transportation needs of the area served by the project;
- (5) Support of the public entities of the community and area;
- (6) The amount of the ~~equity~~ financial contribution by the applicant or others to the project;
- (7) The effect of the project on the environment, health, and safety of the people in the area and state;
- (8) Compatibility with the economic development plans of the area and state;
- (9) The potential success of the project;
- (10) The character, experience, management record, and financial capacity of the rail operator and any other benefitted entity;
- (11) The capacity of the applicant to repay the loan. In determining the capacity of the applicant, the board may consider the following:
 - (a) The amount of the loan;
 - (b) The economic feasibility of the project;
 - (c) The ability of the applicant to service the debt;
 - (d) The financial status of the project, applicant, and rail operator;
 - (e) The satisfaction of engineering, legal, and environmental regulations;
- (12) The total capitalization of the project, including any capitalization subordinated to the trust fund loan; and
- (13) The terms and conditions of the loan ~~and their compatibility with the needs of the project.~~

Source: 19 SDR 107, effective January 24, 1993.

General Authority: SDCL 49-16C-3.

Law Implemented: SDCL 49-16C-3.

70:05:03:07. ~~Aceptance~~ Loan agreement and time restrictions ~~of applicant~~. The applicant must comply with any conditions required by the board before approval of the application is given. Within 90 days after the board approves the loan, the applicant ~~must accept the approval in writing shall execute a loan agreement with the department. The loan agreement shall contain the rights and responsibilities of the parties and the terms and conditions of the loan. If mitigating circumstances prevent the execution of a loan agreement within the 90-day period, the board may grant an extension of time.~~ Within 6 months after ~~written acceptance~~ execution of the loan agreement, the applicant ~~must shall~~ commence construction of the project. If mitigating circumstances prevent starting the project and a diligent effort has been made, an applicant may apply to the board for an extension of time. The request for extension must be submitted to the ~~director of the division of railroads~~ secretary of the department prior to the expiration of the 6-month period unless the board waives this requirement. The board shall decide the length of the extension period based on the mitigating circumstances.

Source: 19 SDR 107, effective January 24, 1993.

General Authority: SDCL 49-16C-3.

Law Implemented: SDCL 49-16C-3.

70:05:03:08. Loan agreement security. ~~After the application for a loan is approved, the board shall execute a loan agreement with the borrower. The loan agreement shall contain the rights and responsibilities of the parties and the terms and conditions of the loan as determined by the board including requirements to secure the loan.~~

——Loans may be secured by a guarantee or promissory note executed by the benefitted entity; liens on the interest of the borrower in all real and personal property; easements; rights-of-way; a commitment by the borrower to exercise taxing authority; and any other assets of the borrower considered necessary by the board to adequately secure the loan.

Source: 19 SDR 107, effective January 24, 1993.

General Authority: SDCL 49-16C-3.

Law Implemented: SDCL 49-16C-3.a

70:05:03:09. Borrower reporting requirements. ~~The~~ Until the principal and any interest is paid in full, the borrower shall submit ~~to the board~~ an annual report to the department containing the following information:

- (1) A summary of ~~operations for the status of~~ the status of the project;
- (2) A ~~financial statement~~ an update concerning the borrower's ability to comply with the loan agreement; and
- (3) ~~Other~~ Any other information requested by the board concerning the financial condition of the borrower ~~or compliance with the loan agreement~~ and the benefitted entity.

~~The borrower shall submit to the board a regular balance sheet, income statement, and cash flow statement as directed by the board. The board may request quarterly financial statements during the first year of operation.~~

The board may require that ~~the~~ financial statements be audited at the expense of the ~~borrower~~ benefitted entity, if the board reasonably believes the financial statements provided ~~by the borrower~~ do not clearly or completely state the ~~borrower's~~ benefitted entity's financial condition, or are not prepared according to generally accepted accounting principles.

Source: 19 SDR 107, effective January 24, 1993.

General Authority: SDCL 49-16C-3.

Law Implemented: SDCL 49-16C-3.

Cross-Reference: Certified Public Accountants and Public Accountants, art 20:37.

70:05:03:10. Inspection of the borrower by the board and retention of records. During the term of the loan, the board or ~~division~~ department may inspect the project and require the borrower to provide any books and records necessary to ensure compliance with the terms of the loan agreement. The borrower shall retain all of its accounting and tax records for ~~the term of the loan~~ three years after all principal and interest on the loan has been paid.

Source: 19 SDR 107, effective January 24, 1993.

General Authority: SDCL 49-16C-3.

Law Implemented: SDCL 1-44-20, 49-16C-3.

70:05:03:11. Additional notification requirements. The borrower shall notify the board in a timely manner of any change in the rail operator or any other benefitted entity. If the notice required in this section is not provided, the board may call the loan immediately due and payable.

Source: 19 SDR 107, effective January 24, 1993.

General Authority: SDCL 49-16C-3.

Law Implemented: SDCL 49-16C-3.

70:05:03:12. Maturity and interest rate. The maturity of the loan ~~may not be more than 20 years~~ shall be set by the board, and interest may be either fixed or variable, ~~adjusted annually,~~ over the term of the loan.

The board shall set the interest rates ~~annually~~. The board may consider the following in setting the interest rate:

- (1) State and national market interest rates;

- (2) State and national economic conditions;
- (3) The solvency and balance of the fund; and
- (4) Other economic or business information determined by the board to be relevant.

Source: 19 SDR 107, effective January 24, 1993.

General Authority: SDCL 49-16C-3, 49-16C-4.

Law Implemented: SDCL 49-16C-3, 49-16C-4.

70:05:03:13. Review of financial status. ~~After the loan is approved but before the loan is closed, the~~ The board or the ~~division~~ department may conduct an overall review of the ~~applicant's~~ financial status of an applicant or borrower and any benefitted entity. The review may include an analysis of all assets and liabilities and an analysis of the ability of the applicant or borrower and any benefitted entity to service and honor the loan commitments.

Source: 19 SDR 107, effective January 24, 1993.

General Authority: SDCL 49-16C-3.

Law Implemented: SDCL 1-44-20, 49-16C-3.

70:05:03:15. Delegation of administrative functions. The ~~division~~ department shall perform the administrative functions for the creation, processing, and review of loan applications; the preparation, ~~and~~ negotiation, and execution of agreements; the review of the financial status of an applicant or borrower and any benefitted entity; and other functions necessary to expedite the loan process and assist the board in the performance of its duties.

Source: 19 SDR 107, effective January 24, 1993.

General Authority: SDCL 49-16C-3.

Law Implemented: SDCL 1-44-20, 49-16C-3.

70:05:04:01. Deadline for submission of information for railroad tax credit -- Application form -- Information required. A railroad seeking certification for railroad tax credits pursuant to SDCL 10-28-21.2 shall submit information to the South Dakota Department of Transportation no later than June 1 of the year following the year in which the replacement, improvement, and repair of rail lines was completed. The information shall be submitted on a form approved by the South Dakota Department of Transportation. The information shall include the following:

- (1) The name of the railroad;
- (2) The total amount of qualifying capital expenditures incurred statewide for replacement, improvement, and repair of rail lines;
- (3) A list of the counties where the replacement, improvement, and repair of rail lines took place;
- (4) A description of the kind of work which was performed and an explanation of the purpose and justification for the work performed in each county;
- (5) The date the work was begun and the date the work was completed in each county;
- (6) The location of the rail line where the work was performed in each county, including the name of the line segment and the mile post markers corresponding to the starting and ending points of the work;
- (7) The amounts of the labor, material, and total capital expenditures incurred in each county;
- (8) The amount of expenditures in each county which were funded with state or federal grant funds or paid for by any third party;

(9) ~~The total number of qualifying miles of mainline track the railroad owns in South Dakota~~
A copy of the tax credit certification submitted by the railroad for each county where a tax credit
is claimed; and

(10) A statement, signed by a person authorized to act on behalf of the railroad, certifying that all information provided is true and all documents submitted are authentic.

Source: 31 SDR 89, effective December 28, 2004.

General Authority: SDCL 10-28-21.6.

Law Implemented: SDCL 10-28-21.6.