

CHAPTER 68:01:02

APEX LOAN PROGRAM

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68:01:02:01. Definitions. Words used in this chapter mean:

(1) "Applicant," a person, partnership, joint venture, corporation, profit or nonprofit development corporation, or other qualified enterprise that has completed an APEX application for a loan from the APEX fund;

(2) "Borrower," an applicant who has been awarded a loan from the APEX fund;

(3) "APEX," the agriculture processing and export fund;

(4) "Equity," capital that has no guaranteed or mandatory return which must be paid out in any event, has no definite timetable for repayment of the capital investment, and may not be withdrawn at the contributor's option without the permission of the superior debt holders;

(5) "USDA RD," United States Department of Agriculture Rural Development;

(6) "GOED," the Governor's Office of Economic Development;

(7) "IRP," Intermediary Relending Program;

(8) "Preliminary design stage," that portion of the project associated with market research studies identifying the project scope and need, compilation of the business plan, written initial cost estimates, written site options and description, and the commitment of the regulated lender;

(9) "Primary jobs," jobs that provide goods and services that 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;

(10) "REDI," Revolving Economic Development Initiative;

(11) "Regulated lender," as defined in SDCL 54-3-14, including state-sanctioned lending authorities and federally sanctioned lending authorities;

(12) "Total project costs," the direct costs associated with the purchase of land, necessary site development and improvements, construction or acquisition and remodeling of buildings and works necessary to the operation and protection of the project, purchase and installation of machinery and equipment, fees for services, approved in-kind contributions, and adequate financing of working capital.

Source: 16 SDR 158, effective March 25, 1990; 21 SDR 14, August 3, 1994; 27 SDR 66, effective January 4, 2001.

General Authority: SDCL 1-16B-14(4).

Law Implemented: SDCL 1-16B-37, 1-16B-44.

68:01:02:02. Eligibility requirements. To be eligible for a loan under this chapter, an applicant must satisfy SDCL 1-16B-41 and be a for-profit business, a for-profit or nonprofit development corporation, or nonprofit business cooperative that is either a start-up business, an existing business, or the relocation of an existing business from out-of-state that will create new jobs in South Dakota and that will do the following:

(1) Export a minimum of 75 percent of its product to entities outside the state of South Dakota or replace an import;

(2) Provide employment opportunities for low-income persons or displaced farm families to the maximum extent practicable;

(3) Use a South Dakota grown or produced agricultural product as at least 50 percent of the raw material; and

(4) Locate in a municipality with a population less than 25,000, as listed according to the latest decennial census.

An applicant may request a waiver of subdivision (1), (3), or (4) by petitioning the authority; however, not more than two of the subdivisions may be waived for any one applicant. A two-thirds vote by the authority is necessary to approve a waiver.

Source: 16 SDR 158, effective March 25, 1990; 21 SDR 14, effective August 3, 1994; 27 SDR 66, effective January 4, 2001.

General Authority: SDCL 1-16B-14(4).

Law Implemented: SDCL 1-16B-3, 1-16B-37, 1-16B-41, 1-16B-44.

68:01:02:03. Application requirements. Application forms shall be provided by the GOED and must be completed and signed before an application is presented to the board. Information from a REDI fund application may be considered and applied to an APEX fund application.

Source: 16 SDR 158, effective March 25, 1990; 21 SDR 14, effective August 3, 1994.

General Authority: SDCL 1-16B-14(4).

Law Implemented: SDCL 1-16B-40, 1-16B-44.

Cross-Reference: REDI fund, ch 68:02:01.

68:01:02:04. Loan amounts. A loan may not exceed the lesser of \$250,000 or 75 percent of the total project costs. No more than 25percent of an IRP loan may be used for loans in excess of \$150,000. This limit does not apply to revolved funds.

Source: 16 SDR 158, effective March 25, 1990; 27 SDR 66, effective January 4, 2001.

General Authority: SDCL 1-16B-14(4).

Law Implemented: SDCL 1-16B-37, 1-16B-43, 1-16B-44.

68:01:02:05. Equity contribution. An applicant must provide an equity contribution of a minimum of 10 percent of the total project costs as determined by the authority.

In-kind contributions and completed work may be applied toward the equity contribution and total project costs if, in the judgment of the authority and the USDA RD, such in-kind contributions and work completed contribute sufficiently to the current project.

The equity requirement may be waived by a two-thirds vote of the authority, with the approval of USDA RD.

Source: 16 SDR 158, effective March 25, 1990; 21 SDR 14, effective August 3, 1994; 27 SDR 66, effective January 4, 2001.

General Authority: SDCL 1-16B-14(4).

Law Implemented: SDCL 1-16B-43, 1-16B-44.

68:01:02:06. Permissible uses of loan proceeds. APEX loan proceeds may be used for the following purposes;

(1) Purchase and development of land, easements, rights-of-way, buildings, facilities, leases, or materials;

(2) Construction or acquisition and remodeling of buildings and works necessary to the operation and protection of the project;

(3) Purchase and installation of machinery, equipment, and leasehold improvements;

(4) Fees, services, and costs related to the construction of the project;

(5) Other purposes not listed in this section and not prohibited in § 68:01:02:07, as individually approved by the authority and the USDA RD;

(6) Business construction, conversion, enlargement, repair, modernization, or development; and

(7) Business and industrial acquisitions if the loan will keep the business from closing, prevent the loss of employment opportunities, or provide expanded job opportunities.

Source: 16 SDR 158, effective March 25, 1990; 27 SDR 66, effective January 4, 2001.

General Authority: SDCL 1-16B-14(4).

Law Implemented: SDCL 1-16B-4, 1-16B-37, 1-16B-44.

68:01:02:07. Impermissible uses of loan proceeds. The borrower may not use the proceeds for any of the following purposes:

- (1) Agricultural production;
- (2) Transfer of ownership, unless the loan will keep the business from closing, prevent the loss of employment opportunities in the area, or provide expanded job opportunities;
- (3) Financing or refinancing the preliminary design stage or existing debt;
- (4) Assistance in excess of what is needed to accomplish the purpose of the ultimate recipient's project;
- (5) Distribution or payment to the owners, partners, shareholders, or beneficiaries of the ultimate recipient or members of their families if such persons will retain any portion of their equity in the ultimate recipient;
- (6) Charitable institutions that would not have revenue from sales or fees to support the operation and repay the loan, churches, organizations affiliated with or sponsored by churches, and fraternal organizations;
- (7) Assistance to government employees, military personnel, or principals or employees of the intermediary or organizations for which such persons are directors or officers or in which they have ownership of 20 percent or more;
- (8) A loan to an ultimate recipient who has an application pending with or a loan outstanding from another intermediary involving an IRP revolving fund if the total IRP loans would exceed the limits established in Sec. 4274.331 (b) of Rural Development Instruction 4274-D as of February 6, 1998;
- (9) Community antenna television services or facilities;
- (10) Any illegal activity;
- (11) Any project that is in violation of either a federal, state, or local environmental protection law or regulation or an enforceable land use restriction unless the assistance given will result in curing or removing the violation;
- (12) Lending and investment institutions and insurance companies; and
- (13) Golf courses, race tracks, or gambling facilities.

Source: 16 SDR 158, effective March 25, 1990; 27 SDR 66, effective January 4, 2001.

General Authority: SDCL 1-16B-14(4).

Law Implemented: SDCL 1-16B-4, 1-16B-37, 1-16B-44.

68:01:02:08. Factors for action by authority. The authority, when making a decision on an application, may, in addition to other factors necessary to make a sound loan decision, consider the following:

(1) Program impact factors:

- (a) Population of the community where the project is to be located;
- (b) Amount of agricultural products used;
- (c) Number of jobs created for low-income persons and displaced farm families;
- (d) Amount of loan requested;
- (e) Net economic effect of increasing or stabilizing the economy on the community, area, and state;
- (f) Competitive effect on existing businesses;
- (g) Support of the public entities of the community and area;
- (h) The amount of the owner's equity contributed to the project;
- (i) The effect of the project on the environment, health, and safety of the people in the community and state;
- (j) Compatibility with economic development plans of the area and state;
- (k) Potential for creating quality jobs and growth of those jobs;
- (l) Payroll pay structure; and
- (m) Employee benefit package;

(2) Business feasibility factors:

- (a) The potential success of the business;
- (b) The character, experience, management record, and background of the applicant;
- (c) The capacity of the applicant to repay the loan. In determining the capacity of the applicant, the authority shall consider the following:
 - (i) The amount of the loan;
 - (ii) The economic feasibility of the project and product;
 - (iii) The ability of the applicant to service the debt from cash flow of operations, capital, or collateral;
 - (iv) The review of financial status of the project, business plan, and applicant;
 - (v) The satisfaction of engineering standards, legal requirements, and environmental regulations; and
 - (vi) The availability of necessary public utilities;
- (d) The total capitalization of the project, which includes all capitalization subordinated to APEX;
- (e) The terms and conditions of the loan and their compatibility with the needs of the business and APEX; and

(f) The availability of sufficient unencumbered collateral to secure the interests of APEX.

Source: 16 SDR 158, effective March 25, 1990; 21 SDR 14, effective August 3, 1994.

General Authority: SDCL 1-16B-14(4).

Law Implemented: SDCL 1-16B-37, 1-16B-44.

68:01:02:09. Action by authority on applications. Within 60 days after the GOED receives a completed application, the authority, in accordance with SDCL 1-16B-38, shall either approve the application as requested, disapprove the application for modification, approve the application contingent on the realization of certain defined conditions, or disapprove the application.

The authority may extend the time for consideration of an application for up to 50 additional days by advising the applicant of the extension in writing or by telephone.

Source: 16 SDR 158, effective March 25, 1990.

General Authority: SDCL 1-16B-14(4).

Law Implemented: SDCL 1-16B-14(4), 1-16B-37, 1-16B-38, 1-16B-44.

68:01:02:10. Reservation of right to make loan. If the authority approves the loan application, the application shall then be sent to USDA RD for approval. Except as provided in this section, no loan agreement may be entered into unless USDA RD approves the loan.

If USDA RD rejects a loan application, the authority, in accordance with SDCL 1-16B-38, may approve the loan from authority funds or revolving funds that are not subject to an agreement between the authority and USDA RD if the loan meets the guidelines in this chapter.

Source: 16 SDR 158, effective March 25, 1990; 27 SDR 66, effective January 4, 2001.

General Authority: SDCL 1-16B-14(4).

Law Implemented: SDCL 1-16B-37, 1-16B-41, 1-16B-43, 1-16B-46.

68:01:02:11. Acceptance by applicant -- Time restrictions. Within six months after the official loan approval by the authority and USDA RD, the applicant must accept the commitment letter of the authority in writing or the approval may be withdrawn at the discretion of the authority.

Within six months after written acceptance, the applicant must begin the project. Final disbursement of the loan proceeds must be made within one year after approval by the authority, unless the time is extended by the authority pursuant to prior written consent. The request for extension must be submitted at a regularly scheduled meeting prior to the expiration of the six-month period. The authority shall decide the length of the extension period.

Source: 16 SDR 158, effective March 25, 1990; 21 SDR 14, effective August 3, 1994; 27 SDR 66, effective January 4, 2001.

General Authority: SDCL 1-16B-14(4).

Law Implemented: SDCL 1-16B-14(4), 1-16B-37, 1-16B-44.

68:01:02:12. Review of financial status. After the loan is approved by the authority and the USDA RD but before the loan agreement is entered into, the authority or the GOED may conduct an overall review of the applicant's financial status. This review may include an analysis of all assets and liabilities and an analysis of the ability of the business to service and honor the loan commitments. If the applicant's financial condition has materially changed since the approval of the loan, the authority may disapprove the loan or seek modification of loan amounts and equity contributions.

Source: 16 SDR 158, effective March 25, 1990; 27 SDR 66, effective January 4, 2001.

General Authority: SDCL 1-16B-14(4).

Law Implemented: SDCL 1-16B-37, 1-16B-44, 1-16B-46.

68:01:02:13. Loan agreement. After the application for a loan is approved by the authority and the USDA RD and after the financial status of the applicant is reviewed, the authority 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. The requirements to secure the loan shall be included in the loan agreement.

Loans may be secured or unsecured. Secured loans may be secured by liens on the interest of the borrower in all real and personal property, tangible or intangible; easements; rights-of-way; water rights; leasehold interest used in connection with the project; and any other assets of the borrower considered necessary by the authority to adequately collateralize the loan.

Source: 16 SDR 158, effective March 25, 1990; 27 SDR 66, effective January 4, 2001.

General Authority: SDCL 1-16B-14(4).

Law Implemented: SDCL 1-16B-37, 1-16B-44, 1-16B-46.

68:01:02:14. Maturity and interest rate. The maturity of the loan may not be more than 20 years with regular payments amortized over the term of the loan with a balloon payment prior to maturity. The authority shall match the term with the useful life of the assets being financed.

The interest rate of the loan shall be for a fixed rate as negotiated.

The borrower is responsible for arranging other financing when the note becomes due. If the borrower is unable to obtain financing, the borrower may apply before the loan due date for an extension of the loan by the authority at an interest rate and for a time period to be set by the authority.

Source: 16 SDR 158, effective March 25, 1990; 21 SDR 14, effective August 3, 1994; 27 SDR 66, effective January 4, 2001.

General Authority: SDCL 1-16B-14(4).

Law Implemented: SDCL 1-16B-37, 1-16B-44, 1-16B-46.

68:01:02:15. Lender agreement. After an application is approved for a loan from APEX and USDA RD, the authority shall execute a lender agreement with the regulated lender. The lender agreement shall provide the rights and responsibilities of the lender and the authority and the terms and conditions of the agreement. The requirement for a lender agreement may be waived at the discretion of the board based upon participation of a participating lender or a servicing lender or if the applicant is a participant in other loan programs within the GOED.

The borrower is responsible for any servicing fee. The regulated lender's servicing fee may include any necessary contracting to monitor or service the loan that is performed by the lender or any other authority-approved party. The authority may enter into a participation agreement, servicing agreement, or both with a regulated lender and borrower concerning any APEX loan.

Source: 16 SDR 158, effective March 25, 1990; 21 SDR 14, effective August 3, 1994; 27 SDR 66, effective January 4, 2001.

General Authority: SDCL 1-16B-14(4).

Law Implemented: SDCL 1-16B-14(5), 1-16B-37, 1-16B-46.

68:01:02:16. Reporting requirements for regulated lender. A regulated lender that enters into a servicing agreement may submit to the authority a regular management report, inventory report, asset report, and operations report as directed by the authority. The regulated lender shall also assist the borrower in complying with the borrower's reporting requirements.

Source: 16 SDR 158, effective March 25, 1990.

General Authority: SDCL 1-16B-14(4).

Law Implemented: SDCL 1-16B-14(5), 1-16B-37, 1-16B-46.

68:01:02:17. Reporting requirements for borrower. The borrower shall submit to the authority annually a report containing the following information:

- (1) An employment report;
- (2) The amount of agricultural products used in the business and the amount of the product that is exported from the state;
- (3) The number of jobs for low-income persons and displaced farm families;
- (4) Financial statements in a form acceptable to the authority as specified in the loan authorization document; and
- (5) Other information as requested by the authority.

The authority may require that the financial statements be compiled, reviewed, or audited by an independent accountant at the expense of the borrower.

Source: 16 SDR 158, effective March 25, 1990; 21 SDR 14, effective August 3, 1994.

General Authority: SDCL 1-16B-14(4).

Law Implemented: SDCL 1-16B-37, 1-16B-44, 1-16B-46.

68:01:02:18. Inspection of business by authority -- Retention of records. During the term of the loan, the authority or GOED may inspect construction, inspect the operation of the business, and request the borrower to provide accounting records, payments, and invoices to ensure compliance with the terms of the loan agreement. The borrower shall retain accounting and tax records for the term of the loan or for a period of three years, whichever is longer.

The authority may contract for project monitoring and servicing during the planning, construction, and operation of the business and project.

Source: 16 SDR 158, effective March 25, 1990.

General Authority: SDCL 1-16B-14(4).

Law Implemented: SDCL 1-16B-37, 1-16B-44, 1-16B-46.

68:01:02:19. Default on loan agreement. If the borrower violates any of the terms of the loan agreement, the authority may place the borrower in default. Upon default, the authority may do one or more of the following:

(1) Declare immediately due and payable the entire principal amount then outstanding and the accrued interest;

(2) Take possession of the facility; repair, maintain, operate, sell, lease, or otherwise dispose of the facility to another entity; and charge the account of the borrower for expenses for repair, maintenance, and operation of the project and other expenses necessary to cure the cause of the default;

(3) Take any other action considered appropriate by the authority to protect the interest of the authority and USDA RD;

(4) Exercise any and all rights of a creditor under the South Dakota uniform commercial code or any other statute; and

(5) Take any action allowed by, enforce any responsibility imposed upon the borrower by, or enforce any remedies agreed to in the loan agreement executed between the borrower and the authority.

Source: 16 SDR 158, effective March 25, 1990; 27 SDR 66, effective January 4, 2001.

General Authority: SDCL 1-16B-14(4).

Law Implemented: SDCL 1-16B-44, 1-16B-46.

68:01:02:20. Interim financing. Interim financing is not refinancing of existing debt. The authority may require that the borrower use a commitment for an APEX loan to secure interim financing from a regulated lender. The authority shall satisfy the interim financing loan in accordance with the terms of the interim financing loan agreement upon certification of completion of the project in accordance with the APEX commitment.

Source: 16 SDR 158, effective March 25, 1990.

General Authority: SDCL 1-16B-14(4).

Law Implemented: SDCL 1-16B-37, 1-16B-44, 1-16B-46.