

Clearinghouse Rule 09-049

**PROPOSED ORDER OF THE STATE OF WISCONSIN
DEPARTMENT OF TRANSPORTATION
ADOPTING RULES**

CR 09-049

The Wisconsin Department of Transportation proposes an order to renumber TRANS 512.06; renumber and amend TRANS 510.08(1) and (3); amend TRANS 510.08(2)(b); and create TRANS 510.08(1)(a) and (b), (3)(a) to (c), and 512.06(2) and (3), relating to the transportation facilities economic assistance and development program, and the transportation infrastructure loan program.

**REPORT OF THE DEPARTMENT OF TRANSPORTATION
ON THE FINAL RULE DRAFT**

This report is submitted to the chief clerks of the Senate and Assembly for referral to the appropriate standing committees. The report consists of the following parts:

Part 1--Analysis prepared by the Department of Transportation.

Part 2--Rule text in final draft form.

Part 3--Recommendations of the Legislative Council.

Part 4--Analysis prepared pursuant to the provisions of s. 227.19(3), Stats.

Submitted by:

JAMES S. THIEL
Attorney
Office of General Counsel
Department of Transportation
Room 115-B, Hill Farms State
Transportation Building
P. O. Box 7910
Madison, WI 53707-7910
(608) 266-8928

PART 1

Analysis Prepared by the Wisconsin Department of Transportation

Statutes interpreted: s. 84.01(6m)(b)3., 6. and 7., Stats., as created by 2007 Wis. Act 125

Statutory authority: ss. 84.01(6m)(b)3., 6. and 7., Stats., as created by 2007 Wis. Act 125, and 227.11(2)(a), Stats.

Explanation of agency authority: Presently, chs. Trans 510 and 512 do not include a requirement for the submittal of a verified statement signed by both an independent certified accountant and the director or principal officer of the recipient of an economic development grant or loan as required under 2007 Wis. Act 125. Also, these rules do not specify what actions the Department is permitted to take in the event of the submittal of false or misleading information or noncompliance with the contract. Ch. Trans 510 includes no specific guidelines requiring that grant or loan recipients submit a report to the Department, as required under 2007 Wis. Act 125.

Related statute or rule: ss. 84.185(4) and 85.52, Stats.

Plain language analysis: This rule making will implement the provisions of 2007 Wis. Act 125 that relate to: (1) providing verified statements from an independent certified accountant and the director or principal officer of the recipient of a grant or loan, (2) permitting the Department to recoup payments made, withhold payments due, or impose a forfeiture on a noncompliant recipient of a grant or loan, and (3) including contract provisions into project agreements specifying the format and frequency of the report to be submitted by the recipient to the Department. These rule changes will affect the reporting and evaluation of performance measures for each economic development program administered by the Department.

Summary of, and preliminary comparison with, existing or proposed federal regulation: No federal regulation applies to other DOT programs defined as an “economic development program” under 2007 Wis. Act 125. The Act defines economic development program as a program or activity having the primary purpose of encouraging the establishment and growth of business in the state, including the creation and retention of jobs. Department programs are transportation infrastructure projects that contribute to the mobility, safety and transportation efficiency for transporting freight and the traveling public.

Comparison with Rules in the Following States:

Michigan: Economic grants and loans to businesses are administered through the Michigan Economic Development Corporation, formed in 1999 through an alliance between the State of Michigan and several local communities. The Corporation is the successor to the Michigan Jobs Commission, the state's economic development department. The corporation maintains the database regarding the grant and loan awards and conducts audits regarding the performance of the financial programs. Travel Michigan, a division of the Corporation, provides the tourism promotional functions for the state. There is no online website or annual reports available via the website with a listing for the grant and loan recipients.

Minnesota: s. 116J.994, creation of a Business Assistance Report with a list of businesses receiving state assistance, amount of subsidy, number of jobs, hourly wages, and cost of health

insurance broken down by wage level. Information on companies receiving assistance is posted online.

Illinois: Public Act 552-93 of 2003, annual progress reports required as to the amount and type of assistance, job creation/retention, job classifications and average wages. Progress reports are available online in searchable database by year and program type.

Iowa: Iowa Code s. 15.113 and other statutes require mandatory reports regarding the financial assistance provided to private businesses. The Iowa Department of Economic Development administers and provides oversight for the assistance programs. The development agency adopted rules on June 15, 2007, to implement a new job counting and tracking method. Under this Department, there is a legal and compliance team responsible for conducting onsite monitoring at project completion, job maintenance, contract amendments, and the preparation of progress reports. These reports are published periodically and are available online.

Summary of factual data and analytical methodologies used and how the related findings support the regulatory approach chosen: The amendments to ss. Trans 510.08 and 512.06 were proposed to bring the Department's economic development programs in compliance with the specific reporting and evaluation requirements of s. 84.01(6m)(b)6. and 7., as created by 2007 Wis. Act 125.

Analysis and supporting documentation used to determine effect on small businesses: A database of 296 previous and current TEA grant awards were analyzed for impacts to small businesses

Effect on small business: Since TEA grants provide transportation infrastructure necessary for newly-created or expanded businesses in the state, the analysis revealed that the kind of businesses in the program will have little or no difficulty in complying with the jobs reporting requirement. Job numbers are also reported as part of the unemployment compensation program under the Department of Workforce Development. The sponsoring community receiving the grant award will be asked to provide a jobs information report compiled by an independent certified accountant and a public official of the recipient community for each business as specified in the jobs guarantee agreement that benefited from the transportation infrastructure improvement. The annual jobs report will be provided to the TEA grant manager annually for seven years or for a duration as specified in the jobs guarantee agreement. Failure to provide annual reports could result in the reimbursement of the grant to the Department of Transportation. The Department's Regulatory Review Coordinator may be contacted by e-mail at ralph.sanders@dot.state.wi.us, or by calling (414) 438-4585.

Fiscal effect: The Department estimates that there will be no fiscal impact on the liabilities or revenues of any county, city, village, town, school district, vocational, technical and adult education district, sewerage district, or federally-recognized tribes or bands.

Anticipated costs incurred by private sector: The Department estimates that there will be no fiscal impact on state or private sector revenues or liabilities.

Agency contact person and copies of proposed rule: Copies of the proposed rule may be obtained, without cost, by writing to: Dennis Leong, Department of Transportation, Division of Investment Management, Economic Development Section, Room 901, P. O. Box 7913, Madison,

PART 2
TEXT OF PROPOSED RULE

SECTION 1. Trans 510.08(1) is renumbered Trans 510.08(1)(intro.) and amended to read:

Trans 510.08(1)(intro.) The scheduling of an approved transportation facility improvement and the obligation of state funds shall occur only after the eligible applicant, the department, and any applicable third parties execute a formal project agreement, setting forth specific terms, conditions and responsibilities of the parties. The secretary or his or her designee shall execute the agreement on behalf of the department. Responsibilities for scheduling and monitoring an approved transportation facility improvement shall be determined cooperatively by the department, the applicant and the governmental entity in which the transportation facility improvement is primarily located. The contract entered into by a grant or loan recipient is subject to the following requirements:

SECTION 2. Trans 510.08(1)(a) and (b) are created to read:

Trans 510.08(1)(a) Each grant or loan recipient shall submit a report to the department. Each contract shall specify the frequency and format of the report to be submitted to the department and the performance measures to be included in the report.

(b) For recipients of a grant or a loan of at least \$100,000, a verified statement shall be submitted to the department that shall include the following:

1. A reporting of the number of jobs associated with the grant or loan and other performance measures as required by the department. The department may determine the format, content and frequency of the verified statement, and may require that the verified statement include wage reports or similar documents filed with the department of workforce development.

2. Signature by both an independent certified public accountant licensed or certified under ch. 442, Stats., and the director or principal officer of the recipient to attest to the accuracy of the verified statement. The recipient shall make available for inspection the documents supporting the verified statement.

SECTION 3. Trans 510.08(2)(b) is amended to read:

Trans 510.08(2)(b) The guaranteed number of direct jobs associated with the economic development project do not exist 7 years after the date the project agreement is executed. The base number of jobs to be used for comparison shall be established on the date funds are awarded. Verification of the number of direct jobs associated with the economic development project shall be made utilizing information available from the department of ~~industry, labor and human relations~~ workforce development and other sources.

SECTION 4. Trans 510.08(3) is renumbered Trans 510.08(3)(intro.) amended to read:

Trans 510.08(3)(intro.) In order to ensure compliance with the terms of the project agreement under sub. (1), the department may perform audits and inspections of the applicant's and third parties' records related to the transportation facility improvement. The applicant shall, on request, provide the department with information necessary to document whether the jobs guarantee has been satisfied. If the applicant submits false or misleading information to the department, or fails to comply with the terms of the contract entered into with the department and fails to provide to the satisfaction of the department an explanation for the noncompliance, then the department may do any of the following:

SECTION 5. Trans 510.08(3)(a) to (c) are created to read:

Trans 510.08(3)(a) Recoup payments made to the recipient.

(b) Withhold payments to be made to the recipient.

(c) Impose a forfeiture on the recipient pursuant to the following:

1. The department shall use its discretion in determining the amount of the forfeiture, with consideration given to the integrity and responsibility of the recipient and the effect that the recipient's actions had on the public. Under no circumstances shall the forfeiture exceed 50% of the grant or loan. General transportation aids or other monies payable to the applicant may be withheld in the amount of the forfeiture.

2. The recipient may submit information and arguments in opposition to a proposed forfeiture and request an informal meeting with the department. If the department determines that the recipient's opposition raises a genuine dispute over facts relevant to the proposed forfeiture, it will designate a hearing examiner and conduct a fact-finding hearing where the recipient may appear with counsel, present witnesses, and confront and cross-examine any person the department presents. The department's decision to impose a forfeiture shall be made based upon the information in the administrative record or, if a fact-finding hearing was conducted, the written findings of fact prepared by the department's designated hearing examiner.

3. Until the forfeiture is paid in full, the department may consider the recipient ineligible for any further grants or loans under chs. Trans 510 and 512.

SECTION 6. Trans 512.06 is renumbered Trans 512.06(1).

SECTION 7. Trans 512.06(2) and (3) are created to read:

Trans 512.06(2) For agreements entered into by recipients of a loan of at least \$100,000, a verified statement shall be submitted to the department that shall include the following:

(a) A reporting of the number of jobs associated with the grant or loan and other performance measures as required by the department. The department may determine the format, content and frequency of the verified statement, and may require that the verified statement include wage reports or similar documents filed with the department of workforce development.

(b) Signature by both an independent certified public accountant licensed or certified under ch. 442, Stats., and the director or principal officer of the recipient to attest to the accuracy of the

verified statement. The recipient shall make available for inspection the documents supporting the verified statement.

(3) If the applicant submits false or misleading information to the department, or fails to comply with the terms of the contract entered into with the department and fails to provide to the satisfaction of the department an explanation for the noncompliance, then the department may do any of the following:

(a) Recoup payments made to the recipient.

(b) Withhold payments to be made to the recipient.

(c) Impose a forfeiture on the recipient pursuant to the following:

1. The department shall use its discretion in determining the amount of the forfeiture, with consideration given to the integrity and responsibility of the recipient and the effect that the recipient's actions had on the public. Under no circumstances shall the forfeiture exceed 50% of the grant or loan. General transportation aids or other monies payable to the applicant may be withheld in the amount of the forfeiture.

2. The recipient may submit information and arguments in opposition to a proposed forfeiture and request an informal meeting with the department. If the department determines that the recipient's opposition raises a genuine dispute over facts relevant to the proposed forfeiture, it will designate a hearing examiner and conduct a fact-finding hearing where the recipient may appear with counsel, present witnesses, and confront and cross-examine any person the department presents. The department's decision to impose a forfeiture shall be made based upon the information in the administrative record or, if a fact-finding hearing was conducted, the written findings of fact prepared by the department's designated hearing examiner.

3. Until the forfeiture is paid in full, the department may consider the recipient ineligible for any further grants or loans under chs. Trans 510 and 512.

(END OF RULE TEXT)

Effective Date. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22(2)(intro.), Stats.

Signed at Madison, Wisconsin, this ____ day of **August**, 2009.

FRANK J. BUSALACCHI
Secretary
Wisconsin Department of Transportation

PART 4
CR 09-049

ANALYSIS OF FINAL DRAFT OF TRANS 510/512

(a) **Basis and Purpose of Rule.** This rule making will implement the provisions of 2007 Wis. Act 125 that relate to: (1) providing verified statements from an independent certified accountant and the director or principal officer of the recipient of a grant or loan, (2) permitting the Department to recoup payments made, withhold payments due, or impose a forfeiture on a noncompliant recipient of a grant or loan, and (3) including contract provisions into project agreements specifying the format and frequency of the report to be submitted by the recipient to the Department. These rule changes will affect the reporting and evaluation of performance measures for each economic development program administered by the Department.

(b) **Modifications as a Result of Testimony at Public Hearing.** The public hearing was held in Madison on August 5, 2009. No modifications were made to the proposed rule as a result of testimony at the hearing.

(c) **List of Persons who Appeared or Registered at Public Hearing.** No one appeared/registered at the hearing.

(d) **Summary of Public Comments and Agency Response to those Comments.** The written comment period was held open until close of business the day of the hearing. No public comments received.

(e) **Explanation of any Changes Made to the Plain Language Analysis or Fiscal Estimate.** No changes made.

(f) **Response to Legislative Council Recommendations.** The Legislative Council report contained a number of comments, all of which have been addressed.

(g) **Final Regulatory Flexibility Analysis.** Since TEA grants provide transportation infrastructure necessary for newly-created or expanded businesses in the state, the analysis revealed that the kind of businesses in the program will have little or no difficulty in complying with the jobs reporting requirement. Job numbers are also reported as part of the unemployment compensation program under the Department of Workforce Development. The sponsoring community receiving the grant award will be asked to provide a jobs information report compiled by an independent certified accountant and a public official of the recipient community for each business as specified in the jobs guarantee agreement that benefited from the transportation infrastructure improvement. The annual jobs report will be provided to the TEA grant manager annually for seven years or for a duration as specified in the jobs guarantee agreement. Failure to provide annual reports could result in the reimbursement of the grant to the Department of Transportation.