

TEMPORARY RULE
RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Department of State Treasurer

RULE CITATION: 20 NCAC 01I .0101-.0105

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X Object, based on:
 - X Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA

COMMENT:

Staff recommends objection to all rules for lack of statutory authority to engage in temporary rulemaking. To be clear, staff thinks G.S. 147-86.10 and 147-86.15 allow the Treasurer to promulgate rules governing short-term loans. Staff notes this authority is closely related to the "Uniform Plan" governing cash management in G.S. 147-86.11, but staff believes agencies still have the ability to adopt rules outside the Uniform Plan to "devise techniques and procedures for the receipt, deposit, and disbursement of moneys coming into their control and custody." G.S. 147-86.10. G.S. 147-86.10 allows the Treasurer to promulgate rules governing disbursement of moneys coming into his control, including the short-term loans allowed pursuant to 147.86.15. Therefore, staff recommends objection only for lack of statutory authority to promulgate temporary rules governing short-term loans.

§ 147-86.10. Statement of policy.

It is the policy of the State of North Carolina that all agencies, institutions, departments, bureaus, boards, commissions, and officers of the State, whether or not subject to the State Budget Act, Chapter 143C of the General Statutes, shall devise techniques and procedures for the receipt, deposit, and disbursement of moneys coming into their control and custody which are designed to maximize interest-bearing investment of cash, and to minimize idle and nonproductive cash balances. This policy shall apply to the General Court of Justice as defined in Article IV of the North Carolina Constitution, the public school administrative units, and the community colleges with respect to the receipt, deposit, and disbursement of moneys required by law to be deposited with the State

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Treasurer and with respect to moneys made available to them for expenditure by warrants drawn on the State Treasurer. This policy shall include the acceptance of electronic payments in accordance with G.S. 147-86.22 to the maximum extent possible consistent with sound business practices. (1985, c. 709, s. 1; 1999-434, s. 2; 2006-203, s. 120.)

§ 147-86.11. Cash management for the State.

(a) Uniform Plan. - The State Controller, with the advice and assistance of the State Treasurer, the State Budget Officer, and the State Auditor, shall develop, implement and amend as necessary a uniform statewide plan to carry out the cash management policy for all State agencies. The State Auditor shall report annually to the General Assembly on the implementation of the plan as shown in the audits completed during the prior fiscal year. The State Treasurer shall recommend periodically to the General Assembly any implementing legislation necessary or desirable in the furtherance of the State policy. When used in this section, "State agency" means any agency, institution, bureau, board, commission or officer of the State; however, except as provided in G.S. 147-86.12, 147-86.13, 147-86.14, and 147-86.22, this Article does not apply to the agencies, institutions, bureaus, boards, commissions and officers of the General Court of Justice as defined in Article IV of the North Carolina Constitution or to the local school administrative units and community colleges and their officers and employees.

(b) Duties of Auditor. - The State Auditor pursuant to authority under G.S. 147-64.6 shall monitor agency compliance with this Article, and make any comments, suggestions, and recommendations the Auditor deems advisable to the agencies.

(c) Treasurer's Report. - The State Treasurer shall publish a quarterly report on all funds in the control or custody of the State Treasurer showing cash balances on hand, investments of cash balances and a comparative analysis of earnings and investment performances.

...

§ 147-86.15. Cash management of the Highway Fund and the Highway Trust Fund.

The State Treasurer may combine the balances of the Highway Fund and the Highway Trust Fund for cash management purposes. The State Treasurer may make short-term loans between the Funds to accomplish the purposes of this section.

In its Findings of Need Form, the agency lists three reasons why the agency has authority to engage in temporary rulemaking pursuant to G.S. 150B-21.1. Upon review, staff believes that none of the three reasons listed by the agency confer temporary rulemaking authority.

Reason 1: Session Law 2019-251, Sec. 1.2

First, the agency cites a recent act of the General Assembly, S.L. 2019-251. In its Findings of Need Form, the agency states:

The language of this Session Law affects and alters DST's cash management authority under N.C. Gen. Stat. § 147-86.15 by mandating that the Department of Transportation (DOT) and not the Treasurer "shall transfer one hundred million dollars. . . in nonrecurring funds as a loan from the Highway Trust Fund to the Highway Fund." DST is unaware of a single prior instance in which DST was requested to use, or even contemplated using, the Treasurer's authority to make

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loans from the Highway Trust Fund to the Highway Fund without explicit guidance enacted by the General Assembly.

DST is seeking to have the proposed Cash Management Rules in place before the May 1, 2020 deadline to comply with S.L. 2019-251. (emphasis retained from filing)

In requiring the loan, the General Assembly did not describe or classify the loan as a “short-term loan” and it also directed DOT instead of the Treasurer to transfer the funds from the Highway Trust Fund to the Highway Fund. As a result, staff believes the two loans described in S.L. 2019-251, Sec. 1.2 do not fall within the Treasurer’s existing rulemaking authority granted in G.S. 147-86.15. Therefore, these loans do not alter existing rulemaking authority and do not confer temporary rulemaking authority. It is also unclear to staff whether these rules as drafted would apply to the May 1, 2020 loan given the definition of “short-term loan” in 20 NCAC 011 .0101(3) since it requires short-term loans to be “by the State Treasurer, made pursuant to G.S. 147-86.15.”

The Session Law mandating the loans also does not create temporary rulemaking authority for the proposed rules. The Session Law states: “The Department of Transportation shall repay the Highway Trust Fund loan according to a repayment schedule approved by the Department of the State Treasurer.” S.L. 2019-251, Sec. 1.2(b). The proposed rules do not address a repayment schedule for the two loans. Instead, the proposed rules provide a broader application, approval, and tracking process for short-term loans.

In its Findings of Need Form, the agency states it needs these rules in place before the required loan transfer on May 1, 2020. Staff notes the legislation also required a loan transfer on February 1, 2020, which occurred before these rules were filed with OAH for publication on March 2, 2020.

SESSION LAW 2019-251

Loan to Highway fund

SECTION 1.2.(a) Notwithstanding any provision of law to the contrary, the Department of Transportation shall transfer one hundred million dollars (\$100,000,000) in nonrecurring funds as a loan from the Highway Trust Fund to the Highway Fund according to the following schedule:

- (1) \$50,000,000 on or before February 1, 2020.
- (2) \$50,000,000 on or before May 1, 2020.

SECTION 1.2.(b) The Department of Transportation shall repay the Highway Trust Fund loan according to a repayment schedule approved by the Department of the State Treasurer.

§ 147-86.15. Cash management of the Highway Fund and the Highway Trust Fund.

The State Treasurer may combine the balances of the Highway Fund and the Highway Trust Fund for cash management purposes. The State Treasurer may make short-term loans between the Funds to accomplish the purposes of this section.

Reason 2: Session Law 2019-251, Sec. 1.1

For its second reason, the agency cites a different section of the same recent act of the General Assembly, S.L. 2019-251, Sec. 1.1. The agency explains it needs to engage in temporary rulemaking in response to the new Session Law to ensure adequate funding for the required issuance of \$400 million in Build NC Bonds in addition to the \$100 million in loans between the Highway Trust Fund and the Highway Fund. In its Findings of Need Form, the agency states:

The Treasurer must issue Build NC Bonds pursuant to the S.L. 2019-251 mandate, while also continuing to ensure that the Highway Trust Fund is sufficiently funded to (a) repay the special indebtedness resulting from the sale of Build NC Bonds and (b) comply with bond covenants such as minimum cash balance requirements. Finally, DST must approve a viable repayment schedule of the one hundred-million-dollar (\$100,000,000) loan described above.

The proposed rules do not govern Build NC Bonds or a repayment schedule. Based on the language in the cited portion of the Session Law, Section 1.1, staff fails to see any statutory authority or temporary rulemaking authority for the governance of cash management or short-term loans.

Staff notes issuance of \$400 million in Build NC Bonds and the loans totaling \$100 million from the Highway Trust Fund to the Highway Fund are required by the same Session Law. In Section 2.1 of the same Session Law, the General Assembly requires a "Cash Watch Weekly Report" from DOT. In the weekly report to the Joint Legislative Transportation Oversight Committee and the Fiscal Research Division, DOT is required to include the cash balances of the Highway Fund and the Highway Trust Fund.

SESSION LAW 2019-251 BUILD NC BONDS

SECTION 1.1.(a) Notwithstanding G.S. 142-97(4), for the 2019-2020 fiscal year, the Department of the State Treasurer shall authorize the issuance and sale of Build NC Bonds in the amount of four hundred million dollars (\$400,000,000).

SECTION 1.1.(b) Nothing in this section shall be construed as modifying the Build NC Bonds limit set forth in G.S. 142-97(3).

BUDGET ACCOUNTABILITY REPORTING

SECTION 2.1.(a) G.S. 143C-6-11 reads as rewritten:
"§ 143C-6-11. Highway appropriation.

...

(n) Cash Watch Weekly Report. – The Department of Transportation shall publish for public review a **weekly report** of the Department's cash position, which shall be entitled "NCDOT Cash Watch Numbers." The report shall be issued as a press release to all interested parties, posted on the Department's Web site, and submitted to the Joint Legislative Transportation Oversight Committee and the Fiscal Research Division. In addition to any cash flow category the Department determines is beneficial to include, the report shall contain the following:

- (1) Beginning Combined Cash Balance Total
 - a. Highway Fund Total
 - b. Highway Trust Fund Total
- (2) Less Disbursements
 - a. Payroll
 - b. Debt Service
 - c. STI Construction Costs
 - d. General Operating Costs
 - e. Map Act Claims/Settlements
 - f. State Aid Payments
 - g. Disaster Related Costs

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- h. Other
- (3) Ending Combined Cash Balance Total
 - a. Highway Fund Total
 - b. Highway Trust Fund Total
- (4) Reserved Cash
 - a. Statutory Cash Balance
 - b. GARVEE/Federal Repayment Reserve
 - c. Transportation Emergency Reserve
 - d. Other Reserves
 - e. Trustee Accounts – Build NC proceeds
 - f. Trustee Accounts – GARVEE
 - g. Trustee Accounts – Other Bonds

Reason 3: A Recent Change in State Budgetary Policy

The Treasurer cites a recent change in budgetary policy as a third reason for temporary rulemaking authority. Specifically, the Treasurer attached a January 17, 2020 DOT report to the Joint Legislative Transportation Oversight Committee. The report, mandated by S.L. 2019-251, explains DOT’s plans to restructure the way DOT handles federal funding. The report states: “DOT plans to implement this structural budget change between July 1, 2020 and September 30, 2020.” The Treasurer cites DOT’s report to the Transportation Oversight Committee and DOT’s intent to restructure its budget as authority to engage in temporary rulemaking for the proposed rules.

G.S. 150B-21.1(a)(3) allows an agency to adopt a temporary rule if adherence to the notice and hearing requirements in the permanent rulemaking process would be contrary to the public interest and the immediate adoption of the rule is required by “a recent change in federal or State budgetary policy.” G.S. 150B-21.1(a2) defines “recent” as “an act, change, regulation, or order occurring or made effective no more than 210 days prior to the submission of a temporary rule to the Rules Review Commission.” Based on the Treasurer’s filing, the change in budgetary policy has not yet occurred or been made effective. Staff also notes the Treasurer’s filings do not contain any approval of the budgetary change by OSBM or the General Assembly. As a result, there has been no documentation submitted to RRC evidencing a change in budgetary policy occurring or made effective prior to the submission of these temporary rules.

§ 150B-21.1. Procedure for adopting a temporary rule.

(a) Adoption. - An agency may adopt a temporary rule when it finds that adherence to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following:

- (1) A serious and unforeseen threat to the public health, safety, or welfare.
- (2) The effective date of a recent act of the General Assembly or the United States Congress.
- (3) A recent change in federal or State budgetary policy.
- (4) A recent federal regulation.
- (5) A recent court order.
- ...

(a2) A recent act, change, regulation, or order as used in subdivisions (2) through (5) of subsection (a) of this section means an act, change, regulation, or order occurring or made effective no more than 210 days prior to the submission of a temporary rule to the Rules Review Commission.

Note: Change in Public Hearing

Staff notes the agency changed the date and time of its public hearing in substantial compliance with the APA. While G.S. 150B-21.2(e) specifically addresses the timeframe for rescheduling public hearings during the permanent rulemaking process, G.S. 150B-21.1 does not address the same for temporary rulemaking. However, G.S. 150B-21.1(a3)(4) requires public hearings to be held at least five days after notice of temporary rulemaking.

In the agency's Proposed Temporary Rule Form, the Public Hearing on these rules was scheduled for March 18, 2020 at 3:00-4:00 PM at the Dogwood Conference Room at 3200 Atlantic Avenue. On March 16, the agency rescheduled its public hearing for March 24, 2020 at 2:00-3:00 PM, more than five days after the updated notice. The hearing was held at the same location, with an option to for the public to participate via conference call. Staff does not recommend objection for failure to comply with the APA due to substantial compliance.

§ 150B-21.1. Procedure for adopting a temporary rule.

(a3) Unless otherwise provided by law, the agency shall:

- (1) At least 30 business days prior to adopting a temporary rule, submit the rule and a notice of public hearing to the Codifier of Rules, and the Codifier of Rules shall publish the proposed temporary rule and the notice of public hearing on the Internet to be posted within five business days.
- (2) At least 30 business days prior to adopting a temporary rule, notify persons on the mailing list maintained pursuant to G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a temporary rule and of the public hearing.
- (3) Accept written comments on the proposed temporary rule for at least 15 business days prior to adoption of the temporary rule.
- (4) Hold at least one public hearing on the proposed temporary rule no less than five days after the rule and notice have been published.

§ 150B-21.2. Procedure for adopting a permanent rule.

(e) Hearing. - An agency must hold a public hearing on a rule it proposes to adopt if the agency publishes the text of the proposed rule in the North Carolina Register and the agency receives a written request for a public hearing on the proposed rule within 15 days after the notice of text is published. The agency must accept comments at the public hearing on both the proposed rule and any fiscal note that has been prepared in connection with the proposed rule.

An agency may hold a public hearing on a proposed rule and fiscal note in other circumstances. When an agency is required to hold a public hearing on a proposed rule or decides to hold a public hearing on a proposed rule when it is not required to do so, the agency must publish in the North Carolina Register a notice of the date, time, and place of the public hearing. The hearing date of a public hearing held after the agency publishes notice of the hearing in the North Carolina Register must be at least 15 days after the date the notice is published. If notice of a public hearing has been published in the North Carolina Register and that public hearing has been cancelled, the agency shall publish notice in the North Carolina Register at least 15 days prior to the date of any rescheduled hearing.

1 20 NCAC 01I .0101 is adopted under temporary procedures, with changes, as follows:

2
3 **SUBCHAPTER 01I – CASH MANAGEMENT**

4
5 **20 NCAC 01I .0101 DEFINITIONS**

6 The following definitions apply to this ~~Section~~Subchapter:

7 (1) ~~“Existing Loan” means an allocation of cash made to the Highway Fund from the Highway Trust~~
8 ~~Fund, which was made prior to the effective date of the Rules in this Subchapter, and that is not a~~
9 ~~“Short-Term Loan” or “Transfer.”~~

10 ~~(1)(2)~~ “Highway Fund” means the special revenue fund to which revenue designated for transportation-
11 related operations, maintenance, and improvements is deposited.

12 ~~(2)(3)~~ “Highway Trust Fund” means the fund created pursuant to G.S. 136-176.

13 ~~(3)(4)~~ “Short-Term Loan” means an allocation of cash either from the Highway Fund to the Highway Trust
14 Fund or from the Highway Trust Fund to the Highway Fund, by the State Treasurer, made pursuant
15 to G.S. 147-86.15, which complies with the short-term loan process requirements of this
16 ~~Rule, Subchapter~~, consisting of a term of 12 months or ~~less~~fewer from the date of the allocation, at
17 which time the allocation of cash must be fully repaid to the fund from ~~where~~which the allocation
18 originated.

19 ~~(4)(5)~~ “Transfer” means any other movement of cash between the Highway Fund and Highway Trust Fund
20 by the State Treasurer that the State Treasurer determines to be necessary to fulfill the obligations
21 of G.S. Chapter 147, Article 6A, that is not a “Short-Term Loan.”

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23 *History Note: Authority G.S. 147-86.15;*

24 *Temporary Adoption Eff.*

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1 20 NCAC 01I .0102 is adopted under temporary rule procedures, with changes, as follows:

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3 **20 NCAC 01I .0102 SHORT-TERM LOANS AND REQUESTS FOR SHORT-TERM LOANS**

4 (a) The State Treasurer may initiate Short-Term Loans to effectuate the purposes of G.S. 147-86.15.

5 (b) The State Treasurer may receive a request from another state agency to make a Short-Term Loan. This request
6 shall be made as follows:

7 (1) The agency shall send a written request to the address in 20 NCAC 01A .0101 to the attention of
8 the State Treasurer, with copies to the Director of the State and Local Government Finance
9 Division, and the Chief Financial Officer of the Department of State Treasurer.

10 (2) The written request shall contain the following information:

11 (A) The requested amount of the Short-Term Loan;

12 (B) The specific purpose(s) of the Short-Term Loan;

13 (C) The anticipated disbursements and anticipated receipts to document the need for the
14 Short-Term Loan, including the associated budget codes;

15 (D) The anticipated recipients of all the Short-Term Loan proceeds and the amount to be
16 received by any contractors, vendors, suppliers, local, State or federal agencies, or other
17 third parties that will receive Short-Term Loan proceeds in order to fulfill the purpose of
18 the Short-Term Loan;

19 (E) The anticipated repayment schedule, including date(s) of repayment, amounts to be
20 repaid at each repayment date, method(s) of repayment (i.e. Cash Management Control
21 System transfer);

22 (F) The current cash balances of the Highway Fund and the Highway Trust Fund;

23 (G) The projected cash balances remaining in the Highway Fund and Highway Trust
24 Fund after the Short-Term Loan is made; ~~and~~

25 (H) The projected balances of total outstanding Short-Term Loans made pursuant to
26 G.S. 147-86.15 after the new Short-Term ~~loan~~ Loan is ~~made~~ made; ~~and~~

27 (I) The projected balance of total outstanding Existing Loans after the new Short-Term Loan
28 is made.

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30 *History Note: Authority G.S. 147-86.15;*

31 *Temporary Adoption Eff.*

1 20 NCAC 01I .0103 is adopted under temporary rule procedures as follows:
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3 **20 NCAC 01I .0103 REVIEW AND APPROVAL**

4 (a) Within 10 business days of receipt of all of the information required in Rule 20 NCAC 01I .0102, the State
5 Treasurer, or designee, shall review and render a decision to approve or deny the requested Short-Term Loan. The
6 State Treasurer, or designee, may approve the amount requested for a Short-Term Loan in whole or in part.

7 (b) In reviewing a request for a Short-Term Loan, the State Treasurer, or designee:

8 (1) shall consider the amount of any bonds currently outstanding where the source of repayment of
9 any portion of outstanding bonds is from the Highway Fund or Highway Trust Fund;

10 (2) shall consider whether approval of the Short-Term Loan accomplishes the purposes of G.S. 147-
11 86.15; and

12 (3) may request additional information relevant to the uses or the repayment of the Short-Term Loan
13 from the agency requesting the Short-Term Loan.

14 (c) If the Short-Term Loan is denied, in whole or in part, the State Treasurer, or designee, shall inform the agency in
15 writing.

16 (d) If the Short-Term Loan is approved, in whole or in part, the State Treasurer, or designee, shall inform the agency
17 of the approval in writing and confirm that the Short-Term Loan may be made.

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19 *History Note: Authority G.S. 147-86.15;*

20 *Temporary Adoption Eff.*

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1 20 NCAC 01I .0104 is adopted under temporary rule procedures, with changes, as follows:

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3 **20 NCAC 01I .0104 TRACKING SHORT-TERM LOAN PROCEEDS**

4 (a) Agencies requesting Short-Term Loans made under this ~~Section~~Subchapter shall be responsible for tracking all
5 Short-Term Loan amounts and providing the State Treasurer with information on the use of Short-Term Loan
6 proceeds.

7 (b) The agency requesting the Short-Term Loan shall provide to the State Treasurer on a monthly basis, for the
8 duration of the Short-Term Loan, the following information:

- 9 (1) The name, physical address and phone number of recipients of Short-Term Loan
10 proceeds in the preceding 30-day period;
- 11 (2) The amount of Short-Term Loan proceeds received by recipients in the preceding 30-day
12 period;
- 13 (3) The reason that Short-Term Loan proceeds were paid to the recipients identified in
14 subparagraph (b)(1) of this Rule;
- 15 (4) An explanation of the account codes or budget codes used by the agency who requested
16 the Short-Term Loan in order to track the payment of Short-Term Loan proceeds.

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18 *History Note: Authority G.S. 147-86.15;*

19 *Temporary Adoption Eff.*

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1 20 NCAC 01I .0105 is adopted under temporary rule procedures, with changes, as follows:

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3 **20 NCAC 01I .0105 RECORDS INSPECTION AND RETENTION**

4 (a) Any agency requesting the State Treasurer make a Short-Term Loan under this ~~section~~, Subchapter shall allow the
5 State Treasurer to inspect that agency's ledgers, books or other records (both paper and electronic) for purposes of
6 verifying the appropriate use of Short-Term Loan proceeds during the duration of the Short-Term Loan and for a
7 period of seven years thereafter.

8 (b) The State Treasurer shall submit a written request to the agency head requesting to inspect the agency's ledgers,
9 books or other records (both paper and electronic) under this Rule.

10 (c) The agency requesting the Short-Term Loan shall be responsible for maintaining all records associated with the
11 Short-Term Loan request, tracking of Short-Term Loan proceeds and repayment records pursuant to Chapter 132 of
12 the North Carolina General Statutes.

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14 *History Note: Authority G.S. 147-86.15;*

15 *Temporary Adoption Eff.*

16