



THE SECRETARY OF TRANSPORTATION  
WASHINGTON DC 20590

January 27, 2011

The Honorable John L. Mica  
Chairman, Committee on Transportation  
and Infrastructure  
U.S. House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

Enclosed you will find a U.S. Department of Transportation (DOT) report titled "Recovery Act § 1201 Maintenance of Effort (MOE) Provision: Preliminary Report on Implementation and Results."

Section 1201 of the American Recovery and Reinvestment Act of 2009 required the Governor of a State to certify to the Secretary of Transportation that the State would maintain its effort with regard to State funding for the types of transportation projects funded by the Recovery Act. In addition to the requirements imposed on Governors, the provision also required recipients of Recovery Act funds to report on the use of Recovery Act transportation funds and on maintenance of effort in the expenditure of State funds for the types of transportation projects funded by the Recovery Act. If a State fails to meet the level of effort certified, it will not be eligible to participate in the August 2011 redistribution of obligation authority under the Federal-Aid Highway Program.

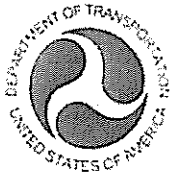
On March 3, 2010, in its report titled "Recovery Act: One Year Later, States' and Localities' Uses of Funds and Opportunities to Strengthen Accountability," the Government Accountability Office (GAO) recommended that DOT prepare and make available to Congress a report on preliminary MOE performance data from the States, the reasons States did not meet their certified MOE amounts (if any failed), and DOT's perspective on lessons learned. The enclosed report fulfills GAO's recommendation.

A similar letter has been sent to the Ranking Member of the House Committee on Transportation and Infrastructure and to the Chairman and Ranking Member of the Senate Committee on Commerce, Science and Transportation. If I can provide further information or assistance, please feel free to call me.

Sincerely yours,

Ray LaHood

Enclosure



THE SECRETARY OF TRANSPORTATION  
WASHINGTON DC 20590

January 27, 2011

The Honorable Nick J. Rahall II  
Ranking Member, Committee on Transportation  
and Infrastructure  
U.S. House of Representatives  
Washington, DC 20515

Dear Congressman Rahall:

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Sincerely yours,

Ray LaHood

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THE SECRETARY OF TRANSPORTATION  
WASHINGTON DC 20590

January 27, 2011

The Honorable John D. Rockefeller IV  
Chairman, Committee on Commerce,  
Science, and Transportation  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

Enclosed you will find a U.S. Department of Transportation (DOT) report titled "Recovery Act § 1201 Maintenance of Effort (MOE) Provision: Preliminary Report on Implementation and Results."

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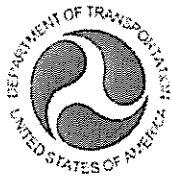
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Sincerely yours,

Ray LaHood

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Enclosure



THE SECRETARY OF TRANSPORTATION  
WASHINGTON DC 20590

January 27, 2011

The Honorable Kay Bailey Hutchison  
Ranking Member, Committee on Commerce,  
Science, and Transportation  
United States Senate  
Washington, DC 20510

Dear Senator Hutchison:

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Sincerely yours,

Ray LaHood

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Enclosure

# Recovery Act § 1201 Maintenance of Effort Provision: Preliminary Report on Implementation and Results

November 2010

## I. Introduction

Section 1201 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5 (February 17, 2009)) (Recovery Act) required the Governor of a State to certify to the Secretary of Transportation that the State would maintain its effort with regard to State funding for the types of projects funded by the Recovery Act's Title XII transportation appropriation. The provision also required recipients of Title XII funds to report on the use of Recovery Act funds and on maintenance of effort in the expenditure of State funds for the types of projects funded under Title XII programs<sup>1</sup>. The overarching purpose of the provision was to ensure that Recovery Act funds spur additional economic activity by supplementing, not replacing, State funding for transportation.<sup>2</sup> The time period covered by the maintenance of effort (MOE) certification was February 17, 2009 through September 30, 2010. Reporting is required through February 17, 2012. If a State fails to meet the level of effort certified, then it will not be eligible to participate in the August 2011 redistribution of obligation authority under the Federal-aid Highway Program.

The Government Accountability Office documented MOE issues and concerns in several of its Recovery Act reports.<sup>3</sup> In *Recovery Act: One Year Later, States' and Localities' Uses of Funds and Opportunities to Strengthen Accountability*, GAO-10-437 (March 3, 2010), GAO recommended that the U. S. Department of Transportation (USDOT) prepare and make available to Congress a report on preliminary MOE performance data from the States, reasons States did

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<sup>1</sup> Section 1201(d)(2) defines "covered program" as "funds appropriated in this Act for 'Supplemental Discretionary Grants for a National Surface Transportation System' to the Office of the Secretary of Transportation, for 'Supplemental Funding for Facilities and Equipment' and 'Grants-in-Aid for Airports' to the Federal Aviation Administration; for 'Highway Infrastructure Investment' to the Federal Highway Administration; for 'Capital Assistance for High Speed Rail Corridors and Intercity Passenger Rail Service' and 'Capital Grants to the National Railroad Passenger Corporation' to the Federal Railroad Administration; for 'Transit Capital Assistance', 'Fixed Guideway Infrastructure Investment', and 'Capital Investment Grants' to the Federal Transit Administration; and 'Supplemental Grants for Assistance to Small Shipyards' to the Maritime Administration."

<sup>2</sup> The transportation MOE provision was one of several MOE provisions in the Recovery Act. For a discussion of the various provisions, see *Recovery Act: Planned Efforts and Challenges in Evaluating Compliance with Maintenance of Effort and Similar Provisions*. Report to the Republican Leader, U.S. Senate. GAO-10-247 (November 2009).

<sup>3</sup> See *Recovery Act: States' and Localities' Current and Planned Uses of Funds While Facing Fiscal Stresses*, GAO-09-829 (July 8, 2009); *Recovery Act: Funds Continue to Provide Fiscal Relief to States and Localities, While Accountability and Reporting Challenges Need to Be Fully Addressed*, GAO-09-1016 (September 23, 2009); *Recovery Act: One Year Later, States' and Localities' Uses of Funds and Opportunities to Strengthen Accountability*, GAO-10-437 (March 3, 2010); *Recovery Act: States' and Localities' Uses of Funds and Actions Needed to Address Implementation Challenges and Bolster Accountability*, GAO-10-604 (June 8, 2010).

not meet their certified MOE amounts (if any failed), and USDOT's perspective on "lessons learned."<sup>4</sup> This report fulfills that recommendation.

## II. MOE Performance Preliminary State Results

On October 1, 2010, USDOT requested that all States provide a preliminary update of their MOE actual expenditure data in RADS by November 1, 2010. The reported data appear in Attachment A.<sup>5</sup> It is important to note that this data is preliminary. Final data is not required from States until February 17, 2011, before the implementation of the August, 2011, penalty for failure to maintain effort. All States submitted an interim report in response to the Secretary's request.

Based on the preliminary data, the 30 States<sup>6</sup> that met their planned level of State expenditures in all covered programs are California, Colorado, Connecticut, District of Columbia, Georgia, Hawaii, Illinois, Iowa, Kentucky, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming.

The 22 States that did not meet MOE requirements in all covered programs are: Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Idaho, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, New York, Oregon, Pennsylvania, Rhode Island, Virginia, West Virginia, and Puerto Rico. The shortfalls in those States, by covered program, were:

- Supplemental Discretionary Grants for a National Surface Transportation Program – Delaware, New York, and Virginia
- Supplemental Funding for Facilities and Equipment – Puerto Rico
- Grants-in-Aid for Airports – Alabama, Alaska, Arizona, Arkansas, Florida, Indiana, Maryland, Massachusetts, New York, Pennsylvania, Rhode Island, and Virginia
- Highway Infrastructure Investment – Alaska, Delaware, Idaho, Kansas, Maryland, New York, Oregon, and Puerto Rico
- Capital Assistance for High Speed Rail Corridors and Intercity Passenger Rail Service – Delaware, Missouri, New York, and Virginia

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<sup>4</sup> GAO's March recommendation read in full: "The Secretary of Transportation should gather timely information on the progress states are making in meeting the maintenance-of-effort requirements and report preliminary information to Congress within 60 days of the certified period (Sept. 30, 2010), on (1) whether states met required program expenditures as outlined in their maintenance-of-effort certifications, (2) the reasons that states did not meet these certified levels, if applicable, and (3) lessons learned from the process." USDOT agreed to encourage States to provide actual expenditure information immediately following the September 30 close of the MOE period, but noted the MOE statute did not authorize interim reporting requirements. USDOT contacted each State on October 1 to request voluntary submission of actual expenditure data for each covered program by November 1. The final reporting date is February 17, 2011, in accordance with § 1201(c)(3).

<sup>5</sup> MOE implementation guidance issued by the Office of the Secretary is available at <http://www.dot.gov/recovery/certguidance.htm>. In response to MOE questions from the States, FHWA issued additional § 1201 guidance that the Office of the Secretary deemed applicable department-wide. That guidance is available at <http://www.fhwa.dot.gov/economicrecovery/sec1202.htm>.

<sup>6</sup> For MOE purposes, "States" means the 50 States, District of Columbia, and Puerto Rico.

## Maintenance of Effort Provision: Preliminary Report on Implementation and Results

- Transit Capital Assistance - Arizona, Delaware, Florida, Maryland, Massachusetts, Mississippi, New Hampshire, New York, West Virginia, and Puerto Rico
- Fixed Guideway Infrastructure Investment – Massachusetts
- Capital Investment Grants – Indiana and Massachusetts
- Small Shipyard Grants - Louisiana

In a few cases, the margin by which a State missed its MOE requirement was relatively small. Delaware fell short of its MOE amount for the Capital Assistance for High Speed Rail Corridors and Intercity Passenger Rail Service by just over \$13,000. West Virginia failed to meet expenditure requirements for Transit Capital Assistance by less than \$60,000. More often, the shortfall was measured in the millions of dollars.

Some States, such as Delaware and Massachusetts, experienced shortfalls in several covered programs. Several States (Alabama, Arkansas, Idaho, Kansas, Louisiana, Mississippi, Missouri, New Hampshire, Oregon, Pennsylvania, Rhode Island, and West Virginia) missed their requirement in a single covered program.

### III. Reasons States Cited for MOE Failure

In addition to the update of the preliminary actual expenditure data, USDOT also requested that States provide a reason that they might not have maintained their level of effort over the covered time period. The reasons given by the States include:

- Reduction in dedicated revenues for transportation (Delaware, Maryland)
- State legislature approved a lower than expected level of transportation funding in the State budget (Kansas, Maryland)
- State budget delayed, eliminating project bidding in first quarter of the State's 2010-2011 fiscal year (New York)
- Additional obligation authority provided under the Federal-aid Highway program causes a shift from State funding of projects to Federal funding (Delaware)
- Recovery Act projects absorbed design capacity and too few projects were available that already had finished design (Delaware)
- Project bids came in lower than engineering estimates used for planning purposes, and the State was unable to initiate additional projects in time (Alaska, Idaho, New York)
- Timing of project completion and project expenditures unexpectedly delayed due to
  - legislative budget cycles (Alaska)
  - bidding cycles (Kansas)
  - weather conditions (Delaware, Maryland)
  - construction/completion schedules (Alaska, Missouri, Rhode Island)
  - project billing cycles or spending rates (Massachusetts, New Hampshire)
  - environmental reviews or permitting (Alaska)
- Transit expenditures are controlled by a party other than the State (New Hampshire)
- Mistake in calculation of MOE planned expenditure (New Hampshire)

#### IV. MOE Lessons Learned

This section outlines USDOT's perspective on lessons from its experiences with the three principal § 1201 implementation activities: § 1201(a) MOE certifications, § 1201(c)(2)(G) reporting of actual expenditures of funds from State sources, and the determination whether States met their MOE certified amounts. This information is offered as a resource for future discussions about MOE requirements for Federal transportation programs.

In general, USDOT's experiences with § 1201 demonstrate that it is difficult to craft and apply a quantitative measure that works well across multiple transportation programs involving a large number of grantees with differing organizational, financial, and legal structures. USDOT's experiences also suggest that a pass-fail MOE standard like that found in § 1201 may not be well suited to USDOT modal programs, because of the myriad factors that affect whether and when State funds are expended on a transportation project.

##### A. MOE Certification Requirements

Section 1201 required the Governor of each State to file, within 30 days after the enactment of the Recovery Act, a certification that the State would maintain its effort with regard to State funding for the types of projects funded by the Recovery Act transportation appropriation. This required States to calculate their planned expenditures of State funds based on plans in effect as of February 17, 2009, for the period from February 17, 2009 through September 30, 2010. Because of the 30-day requirement, USDOT had very little time to obtain and synthesize information on the financial structures of the States and other recipients of State transportation funds, or to ascertain how well proposed USDOT guidance on calculating planned expenditures would work in the many different contexts it would have to operate. As a result, many problems came to light only after USDOT had issued initial MOE guidance and States had submitted their first MOE certifications. In addition, USDOT found that some States failed to follow clear elements of the statute and USDOT guidance.<sup>7</sup> Throughout the Recovery Act MOE period, USDOT worked with the States to resolve issues so that States could produce certifications consistent with § 1201(a) and USDOT guidance. Those efforts included review of the MOE forms against USDOT guidance, and evaluation of the certified amounts for reasonableness.<sup>8</sup> In September 2010, USDOT posted the States' final MOE certifications on its Recovery Act web site (available at <http://testimony.ost.dot.gov/ARRAcerts/>).

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<sup>7</sup> For example, § 1201(a) required States to certify and maintain planned State expenditures, but a number of States initially prepared their estimates using planned obligations because that is the financial milestone they typically use to manage transportation program delivery. Many States also failed to correctly complete the MOE planned expenditure certification form provided in USDOT guidance. As a result, a number of certifications did not comply with the statute.

<sup>8</sup> In initial MOE guidance issued on February 27, 2009, USDOT provided States with a certification template, which broke down State planned expenditures by covered program.



1. Limited Statutory Definitions Heightened Implementation Challenges.

Many implementation issues related to how to interpret statutory terms affecting the calculation of the MOE amount. Section 1201(a) provided no definition for the phrase “State funding for the types of projects that are funded by the appropriation.” USDOT and the States struggled with questions about the intended scope of this language. A number of questions arose that had potentially significant effects on State calculations of planned expenditures.

(a) *What constitutes “State funding”?* Many issues arose concerning the scope of the term “State funding,” and of the related phrase “funding from State sources” in the § 1201(c)(2)(G) reporting provision. The amounts a State would have to include in its MOE calculation varied dramatically depending on how these were interpreted. Often times, USDOT had an extensive conversation with a particular State to help them determine how to comply with the statute and MOE guidance given their unique situation.

Some States believed that the MOE calculation should cover only the State share of Federal financially-assisted projects, not State monies applied to projects that did not have Federal participation. USDOT determined the phrase encompassed all State monies, not just the non-Federal share of federally-eligible projects.

Some States interpreted §1201(a) as calling only for inclusion of State funds provided to the State department of transportation (State DOT), not other State or local governmental entities or other organizations (such as transit operators). Of particular significance was the question whether State funding for local transportation projects should be included in the MOE certification. A number of States argued that such funds should be excluded because the State did not control how such funds would be spent. States also argued that it would be difficult or impossible to identify the portion of State funding for local communities or other entities that was attributable to activities eligible under the § 1201 covered programs (e.g., funding for highway capital projects as compared to funding for maintenance and operations). Another argument was that funding given to local governments does not include a time limitation. Often times, the amounts are so small in a given year that the local governments save the funds until they have accumulated enough State funds to undertake a project. USDOT decided that § 1201(a) required the MOE certified amount to include all State funding of transportation, regardless which State or local governmental unit or other entity would expend the State funds for a project. However, in the case of State funds administered by local governments, because of the difficulties States would have in determining the share representing capital funds and in tracking expenditures by local governments, USDOT did issue guidance authorizing States to treat State funding as expended when transferred to the control of the local community.<sup>9</sup>

States often use a number of mechanisms to generate funding for transportation, such as dedicated fuel taxes, general fund appropriations, and bonds. Several States posited that the

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<sup>9</sup>With concurrence from the Office of the Secretary of USDOT, FHWA issued the guidance on the treatment of State funding administered by local governments and other entities on September 24, 2009 (available online at <http://www.fhwa.dot.gov/economicrecovery/sec1202suppguide.htm>).

MOE certified amount should include only the primary source of transportation funding, typically fuel tax revenues. USDOT determined that MOE calculations should include all sources of State transportation funding, including bond proceeds and in-kind contributions. The inclusion of bond proceeds made a substantial difference in the MOE certified amount for some States, such as Idaho.

(b) *What is meant by the § 1201(a) phrase “types of projects that are funded by the appropriation”?* The MOE amount a State certified depended in part on the scope given to the § 1201(a) phrase “types of projects funded by the appropriation”. Some argued that this statutory language supported limiting the MOE calculation to only transportation projects that had completed all work needed to meet Federal prerequisites for funding under a covered program. Others viewed the statute’s language more broadly, as requiring inclusion in the MOE certified amount of any project receiving State funds that was the kind of project that *could* be eligible for funding under a covered program. USDOT adopted the latter view, which focused on the nature of the project activity rather than whether the project already met the full range of applicable criteria for Federal funding.

## 2. Federal and State Structures and Financial Systems Affected Certification Burden.

The MOE requirements applied to Recovery Act Title XII appropriations for transit, highway, aviation, and marine projects, and to the discretionary grant program administered by the Office of the Secretary. USDOT found that the program and organizational structures at the Federal and State levels, together with the capabilities of State financial systems, had substantial effects on the degree of burden States faced when calculating their MOE amounts for the covered programs. USDOT found it was not feasible to identify a single calculation methodology that would work across the States. As a result, subject to certain limitations needed to ensure equity, USDOT provided States with flexibility in developing a methodology that worked for the State. Even so, many States found it difficult to determine a methodology for calculating the planned expenditure amount and achieve compliant MOE certifications. Some States expressed doubts about the usefulness of trying to meet MOE certification requirements. They cited competing financial needs within the State and the burdens of compliance as compared to the likely impacts of a penalty under § 1201(b).<sup>10</sup>

(a) *Lack of State Tracking of Expenditures.* Section 1201(a) required States to certify planned State expenditures for the MOE period from February 17, 2009 through September 30, 2010. However, information provided to USDOT by the States during the MOE certification process suggested States rarely track transportation expenditures on a comprehensive basis. Many States did not have an existing means to identify planned transportation expenditures (outlays) for a specific period. Their financial and accounting systems did not capture that data or support preparation of forecasts for the MOE time period.

(b) *Obligations versus Expenditures.* Both States and their Federal counterparts typically manage transportation program and project commitments based on obligations of

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<sup>10</sup> A State that does not expend State funds satisfying its MOE certification is not eligible to participate in the August 2011 redistribution of obligation authority under the Federal-aid Highway Program.

## Maintenance of Effort Provision: Preliminary Report on Implementation and Results

funds, not expenditures (outlays). Furthermore, the actual outlay of funds typically occurs over a number of years. The timing of expenditures is difficult to predict since it is dictated by when contractors seek reimbursement and often is affected by unforeseen conditions such as permit delays or contract changes. States repeatedly requested authorization to use obligations instead of expenditures for MOE purposes, as it would be easier to identify, calculate, and report. USDOT declined those requests given the express language in § 1201(a) (“...amount of funds the State planned to expend...”), and the fact that obligation of funds typically have little relationship to when the funds go into the economy through expenditure for goods or services.

(c) *Fiscal uncertainty.* Section 1201(a) required States to use information they possessed as of February 17, 2009 to define their planned expenditures for the MOE period from February 17, 2009 through September 30, 2010. The very unsettled financial picture across the country made this problematic.

As of February 17, 2009, many States did not yet have an enacted budget for FY2010. State officials anticipated tremendous changes in funding available for transportation as the rapid decline in the economy drove down receipts in dedicated revenue accounts for transportation and as legislatures adopted reduced budgets. Many State governors were reluctant to certify that they would maintain a level of expenditures in the face of such uncertainty about their ability to meet the certified amount. The result was that the initial certifications often contained conditional language that USDOT found did not comply with the statute. For example, several States qualified their MOE certifications by stating that actual expenditures would depend upon the actual revenues generated by dedicated fuel taxes. Many States also noted in their certifications that the amounts were based on the “best information available at this time” or similar language. That disclaimer suggested both an intention to condition the certification on future events, and a misunderstanding of the requirement to base the MOE certification on information available as of the February 17, 2009 date of enactment of the Recovery Act.

The use of the February 17, 2009, milestone also meant that some States that already had moved to counteract the declining economy benefited when it came time to quantify planned expenditures. In California, as of February 17, 2009, the State had planned to shut down many bond-funded transportation projects. The State made plans to close down the projects because the State no longer thought the prospects were favorable for cost-effective bonding. However, after the determinative MOE date, the State found that the bond market was more favorable than expected and the State reinstated the bond funding program. Those bond expenditures, which ultimately may total \$20 billion, count as actual expenditures for MOE purposes. As a result, California was confident early in the MOE process that it would meet or exceed its required MOE target for highways.

Arizona similarly benefited from its early response to the changing economy. Prior to the February 17, 2009, MOE date, the State eliminated the program under which the State provided substantial State highway funding to localities. The action was taken in response to the State’s projection of a rapid decline in tax revenues dedicated to highway use. As a result, as of the determinative MOE date, Arizona planned to expend State funds only to

match Federal highway funding. This substantially reduced the State's planned investments and created a much smaller MOE amount for highways than would have been expected based on experience in prior years.

(d) *Partial Year Calculations.* State financial cycles did not align well with the MOE period. For most States, the MOE period stretched across three fiscal periods: part of FY2009, all of FY2010, and part of FY2011. The partial fiscal years required States, once they had determined how to quantify annual planned expenditures, to determine a method to allocate those planned expenditures for the partial fiscal years. Because some transportation expenditures are cyclical in nature (e.g., highway or airport construction) and others are not (e.g., bus purchases), States found it challenging to determine a reasonable allocation method.

(e) *Decentralized State Structure.* The Recovery Act Title XII appropriation relates to transportation programs that, for the most part, operate through very different types of recipient organizations. This made it difficult to find good information sources for planned transportation spending, creating barriers to the development of a statewide MOE certification.

States had limited centralized information resources on transportation funding. While State transportation improvement programs adopted pursuant to highway and transit planning requirements offered insights into planned highway and transit projects, they did not encompass all transportation projects on which State funds would be expended.

For example, transit programs most often are run by local governmental entities or other authorities. A few State DOTs administer some type of transit activities, but this typically is limited to transit programs in rural areas. The most reliable information on State transit funding appeared to reside with the transit operators rather than a centralized State office such as the State DOT. In some cases, States provide State funds for transit, but the sources were not readily identifiable as such (e.g., State appropriations whose eligible uses included transit, but were not specifically titled as transit appropriations). These factors made it challenging for some States to identify State transit funding with a comfortable degree of certainty within the 30-day certification period. Similar issues affected States' ability to identify planned State funding for rail, aviation, and marine projects.

Another example is aviation. Very few States play an active management role in aviation. While some funding may be provided to airport authorities, the more reliable information about airport expenditures would come from the airport authority, which may be a local government or quasi-governmental entity.

State highway funding typically falls into two main categories: funding for the State DOT and funding provided to local communities for local roads programs. State funds administered through the State DOT proved relatively easy for the States to identify. However, the sources and delivery mechanisms for local transportation funds vary by State. In some cases, the State DOT has a role in transferring the State funds to the local communities, in other States there is no nexus between the State DOT and the local funds. In

addition, many States permit the funding to local communities to be used for both capital and maintenance/operations purposes. As previously discussed, this caused significant problems for States trying to identify State funding includable in the MOE certified amount.

Additionally, a few States have non-transportation agencies that receive State funding for subsidiary transportation activities. For example, a State parks agency could receive funds for park roads or for use in its recreational trails program. States found it challenging to identify these sources of funding.

## **B. Reporting Actual Expenditures of Funds from State Sources**

Section 1201(c) sets forth reporting requirements for recipients of funds under the covered programs. The §1201(c)(2)(G) reporting provision relevant to MOE provides that

for each covered program report information tracking the actual aggregate expenditures by each grant recipient from State sources for projects eligible for funding under the program during the period beginning on the date of enactment of this Act through September 30, 2010, as compared to the level of such expenditures that were planned to occur during such period as of the date of enactment of this Act.

This provision triggered a number of implementation challenges.

### **1. Not All State Funding Recipients Were Subject to MOE Reporting Requirements.**

Section 1201(c)(2)(G) required recipients to report their actual expenditures of State funds. However, the universe of *State* funding recipients is not identical to the universe of Recovery Act recipients. As a result, reporting of actual expenditures only by Recovery Act recipients under-reported total expenditures of State transportation funds. To resolve this, USDOT advised the States to report on a statewide basis through the Recovery Act Data System at the Federal Highway Administration. USDOT will use this statewide report to determine the final State expenditures.

### **2. Lack of Existing Centralized Data Source for State Expenditures Was an Obstacle.**

As described in previous sections of this report, States do not typically gather State transportation funding and expenditure information on a centralized basis. Many States do not have financial systems that can accommodate such data. States had to determine how to periodically gather the needed expenditure information from all recipients of State transportation funding, including Recovery Act recipients if they also received State funding. In a few cases, States expressed concern about their legal authority to require expenditure information from the State funding recipients. A number of States expressed concerns about the resources required to gather and report the expenditure data.

3. Overlapping Recovery Act Requirements Proved Challenging.

As shown in Table 1 below, the other reporting requirements in § 1201(c) overlap substantially with, but are not identical to, the reporting requirements under § 1512 of the Recovery Act. In addition, §1201(c) requires an MOE actual expenditure report to be submitted on February 17, 2012, after MOE compliance determination will be made and the penalty administered. These requirements generated some confusion and dissatisfaction among Recovery Act recipients.

Section 1201(c)(2) Requirements	Section 1512(c) Requirements
(A) the amount of Federal funds appropriated, allocated, obligated, and outlayed under the appropriation...	(1) the total amount of recovery funds received from that agency; (2) the amount of recovery funds received that were expended or obligated to projects or activities...
(C) the number of projects for which contracts have been awarded under the appropriation and the amount of Federal funds associated with such contracts...	(3) a detailed list of all projects or activities for which recovery funds were expended or obligated, including— (A) the name of the project or activity; (B) a description of the project or activity; (C) an evaluation of the completion status of the project or activity...
(F) the number of direct, on-project jobs created or sustained by the Federal funds provided for projects under the appropriation and, to the extent possible, the estimated indirect jobs created or sustained in the associated supplying industries, including the number of job-years created and the total increase in employment since the date of enactment of this Act...	(D) an estimate of the number of jobs created and the number of jobs retained by the project or activity...

Table 1. *Comparison of Recovery Act § 1201(c) and § 1512(c) Reporting Requirements*

**C. Determining MOE Compliance**

After the § 1201(c) reporting deadline for MOE in February 17, 2011, USDOT will determine which States met their MOE requirement and which did not. Based on the statutory language of § 1201(a) and the accompanying congressional report statement<sup>11</sup>, USDOT will make the

<sup>11</sup> Section 1201(a) states in part "...for each amount that is distributed to a State or agency thereof from an appropriation in this Act for a covered program..." The House Report on H.R. 1, entitled "Making Supplemental Appropriations for Job Preservation and Creation, Infrastructure Investment, Energy Efficiency and Science, Assistance to the Unemployed, and State and Local Fiscal Stabilization, For the Fiscal Year Ending September 30, 2009, and For Other Purposes" (House Report 111-016), states "Section 1201 ensures continued State investment in

determination based on whether a State expended State funds in at least the amount certified to by the State for each covered program. MOE success will not be measured by the cumulative total of expenditures across the covered programs. In accordance with § 1201, USDOT will not take into consideration factors that may have affected a State's ability to expend funds in the required amounts. States expressed concerns about the effects of both of these measurement protocols on their ability to meet their MOE requirement.

1. Measuring by Individual Covered Program Reduced State Flexibility.

Some States were concerned that if they had to meet their MOE amount for each § 1201 covered program, they could fail due to a decision by a local agency not to expend State funds as previously planned. Those States advocated for measuring MOE success by the cumulative total of planned expenditures across all covered programs. This method would permit the State to increase expenditures in one program, such as highways, to compensate for the risk of failure in another program, such as rail or aviation. Massachusetts, for example, spent nearly \$140 million more than its MOE amount in the highway category, but fell short in other programs. If MOE success were measured by whether a State met the cumulative total of its covered programs MOE amounts, Massachusetts would not have failed to meet its MOE requirement. Other States similarly situated are Alabama, Arkansas, Florida, Indiana, Louisiana, Mississippi, Missouri, New Hampshire, Pennsylvania, Rhode Island, Virginia, and West Virginia.<sup>12</sup>

2. Absence of Any Statutory Waiver or Equitable Considerations Provision Frustrated Some States.

Section 1201(a) "froze" information that could be considered in determining planned State expenditures as of February 17, 2009. The statute contained no provision for a waiver or for later adjustment of the planned spending amounts to reflect post-February 17, 2009 conditions.<sup>13</sup> States began expressing concerns about the MOE "pass-fail" structure soon after enactment of the Recovery Act.

(a) *Decrease in State Revenue and Other Changes in Expected Expenditures.* By March 2009, many States knew that funding they had anticipated prior to enactment of the Recovery Act would not materialize. States with transportation funding that relied wholly on dedicated revenues (e.g., fuel taxes), with no general fund component, typically faced substantial decreases in receipts that the States could not forecast prior to the February 17, 2009 milestone for the MOE certified amount. States experiencing such shortfalls faced the unpalatable choice of certifying MOE with the knowledge they would fail to meet their certified amounts, or appropriating additional transportation funds in a highly constrained economic climate where basic government services are competing against each other for funding. Delaware and Maryland cited this problem in their preliminary reports.

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certain identified programs for which the State receives funding in this Act..."

<sup>12</sup> Alaska, Arizona, Delaware, Idaho, Kansas, Maryland, New York, Oregon, and Puerto Rico still would have fallen short of their MOE requirements.

<sup>13</sup> By contrast, the Recovery Act's State Fiscal Stabilization Fund gave the Secretary of Education authority to waive that title's MOE requirement if a State certified that State education expenditures would not decline as a percentage of total State revenues. See Pub. L. No. 111-5, div. A, title XIV, § 14012, 123 Stat. 115, 285-286.

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(b) *Legislative Uncertainty.* For many States, the February 17, 2009 measuring point for MOE occurred before the State had completed its budget(s) for the MOE time period. State executives were reluctant to set a planned expenditure level in the absence of a final State budget for the MOE period since the ability to achieve the MOE certified amount might be affected by legislative action on the State budget. Kansas, Maryland, and New York pointed to these types of issues in their preliminary reports.

(c) *Low Bids.* At least three States (Alaska, New York, and Idaho) found that the low construction bids received on projects during the MOE period created problems for MOE compliance. Due to economic conditions unknowable as of the February 17, 2009 MOE measuring point, contract bids during the MOE period came in substantially lower than the engineering estimates used in planning highway program funding. In Idaho's case, because of statutory limitations on the projects that could be funded under a particular Idaho bond program, the State was unable to add enough projects to the bond program to meet the level of planned bond expenditures included in the State's MOE amount. Given that the bond program constituted a large portion of the State's planned highway expenditures during the MOE period, the shortfall caused Idaho to fail to meet its MOE requirement.

### V. Conclusion

Maintenance of effort provisions can be useful tools for ensuring that net investment in transportation increases as a result of Federal funding, but USDOT experiences administering the § 1201 MOE provision show that improvement is needed. USDOT's experiences can inform development of any future legislative efforts in this area, specifically with respect to how a MOE requirement is defined, tracked, and measured.