ADDITIONAL GUIDANCE ON RECOVERY ACT SECTION 1201(a)
MAINTENANCE OF EFFORT CERTIFICATIONS
May 13, 2009

These questions and answers supplement guidance issued by the Secretary of the United States Department of Transportation (U.S.DOT) on February 27, 2009, and April 22, 2009, relating to the requirements of section 1201 of The American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5 (February 17, 2009)) ("Recovery Act"). Specifically, this guidance provides information in response to certain questions asked by State representatives during a National Governors Association conference call, held on April 23 to discuss the Secretary's April 22 guidance.

Please note that the May 22 deadline for filing amended section 1201(a) certifications, as described in the Secretary's April 22 guidance, remains in effect.

QUESTION: Should States include advance construction (AC) and Grant Anticipation Revenue Vehicles (GARVEE) expenditures in the amount to which they are certifying (the amount the State planned to expend from State sources as of February 17, 2009, for the period February 17, 2009 through September 30, 2010)?

ANSWER: States should include AC/GARVEE expenditures under two circumstances. For AC/GARVEE amounts that the State planned to convert during the covered ARRA period (February 17, 2009 through September 30, 2010), States should include only the equivalent of the State match amount of the AC and GARVEE expenditures in the MOE certification. For AC/GARVEE amounts that the State did not plan to convert during the covered ARRA period, States should include the entire AC/GARVEE amount as a planned State expenditure in the MOE certification.

Our expectation is that the States will convert AC and GARVEE amounts, according to schedule, during 2009-2011 in a manner consistent with past experience.

QUESTION: Should States include "soft match" in the amount to which they are certifying? What about "in-kind" contributions?

ANSWER: "Soft match credits" must be distinguished from "in kind contributions" in determining a level of State expenditures for MOE purposes. Outlays (expenditures) are defined in 49 CFR 18.3 to include in-kind contributions, but do not include soft match credits. Since in-kind contributions are applied to a project and represent a level of project expenditure, States should include in-kind contributions from States sources in the planned amount of expenditures. States are required to maintain adequate documentation to support the amount claimed as in-kind contribution for reporting purposes, and the standard verification requirements apply.

Soft match credits, such as toll credits, allow the State to take credit for meeting the non-Federal share matching requirements. A soft match credit should not be included as State expenditures for MOE purposes, because such a credit effectively increases the Federal pro-rata, while statutorily meeting the non-Federal matching requirements.

QUESTION: May States include in their MOE calculations all planned projects that would receive State funding during the February 17, 2009 through September 30, 2010 time period, rather than determining the specific planned State expenditures that would be for projects that meet the eligibility requirements of the section 1201 covered programs?

ANSWER: States are encouraged to review planned State expenditures to identify those that would meet eligibility criteria under the covered programs, and to include only those amounts in their MOE calculation. Section 1201 requires States to include all planned State funding for projects of the types funded by the Recovery Act appropriation.

However, if a State prefers instead to include all planned State expenditures regardless of project/program eligibility under the covered programs, it may do so. In making this decision, a State should recognize that the resulting MOE amount may be over-inclusive, since some planned State expenditures may be for projects that would not be eligible under the covered programs. The Recovery Act provides that a State must have actual expenditures that meet or exceed the MOE amount to which the State certified in order to avoid the penalty in section 1201(b) of the Recovery Act (prohibition against participating in the FHWA August 2011 redistribution). States will want to make certain that they are comfortable with the risk of incurring the section 1201(b) penalty that is associated with certifying to a potentially over-inclusive MOE amount.

Note that the covered programs are specified in section 1201(d)(2) of the Recovery Act. The term “project” has the same meaning under the Recovery Act as it does under the respective covered programs. For transit, for example, “capital transit projects” is defined in 49 U.S.C. §5302(a)(1). For Highway Infrastructure Investment funding under the Recovery Act, agencies should apply the definition in 23 U.S.C. §101(a)(21), which reads "an undertaking to construct a particular portion of a highway, or if the context so implies, the particular portion of a highway so constructed or any other undertaking eligible for assistance under this title." This highway program definition includes expenditures for various phases of the project (e.g. design, environmental analysis, right-of-way acquisition, and/or construction).