

GAO

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RECOVERY ACT

States' Use of Highway Infrastructure Funds and Compliance with the Act's Requirements

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Physical Infrastructure Issues



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Highlights of [GAO-09-926T](#), a testimony before the Committee on Transportation and Infrastructure, House of Representatives

Why GAO Did This Study

The American Recovery and Reinvestment Act of 2009 (Recovery Act) included more than \$48 billion for the Department of Transportation's (DOT) investment in transportation infrastructure, including highways, rail, and transit. This testimony—based on GAO report GAO-09-829, issued on July 8, 2009 and updated with more recent data, in response to a mandate under the Recovery Act—addresses (1) the uses of Recovery Act transportation funding including the types of projects states have funded, (2) the steps states have taken to meet the act's requirements, and (3) GAO's other work on transportation funding under the Recovery Act.

In GAO-09-829, GAO examined the use of Recovery Act funds by 16 states and the District of Columbia (District), representing about 65 percent of the U.S. population and two-thirds of the federal assistance available through the act. GAO also obtained data from DOT on obligations and reimbursements for the Recovery Act's highway infrastructure funds.

What GAO Recommends

In GAO-09-829, GAO recommended that the Secretary of Transportation develop clear guidance on identifying and giving priority to economically distressed areas. DOT agreed with this recommendation and is consulting with the Department of Commerce to develop additional guidance on criteria to classify distressed areas for Recovery Act funding.

[View GAO-09-926T or key components.](#)

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RECOVERY ACT

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What GAO Found

A substantial portion of Recovery Act highway funds have been obligated, with most funded projects focusing on pavement improvements. In March 2009, \$26.7 billion was apportioned to 50 states and the District for highway infrastructure and other eligible projects. As of July 17, 2009, \$16.8 billion of the apportioned funds had been obligated for over 5,700 projects nationwide. About half of the funds has been obligated for pavement improvements such as reconstructing or rehabilitating roads; 17 percent has been obligated for pavement-widening projects; and about 12 percent has been obligated for bridge projects. Remaining funds were obligated for the construction of new roads and safety projects, among other things.

States have generally complied with the act's three major requirements on the use of transportation funds: (1) Fifty percent of funds must be obligated within 120 days of apportionment. All states have met this requirement. (2) Priority for funding must be given to projects that can be completed within 3 years and are located in economically distressed areas, as defined by the Public Works and Economic Development Act. Officials from almost all of the states included in GAO's review said they considered project readiness, including the 3-year completion requirement, when making project selections. However, due to the need to select projects and obligate funds quickly, many states first selected projects based on other factors and only later identified whether these projects fulfilled the economically distressed area requirement. Additionally, some states identified economically distressed areas using data or criteria not specified in the Public Works or Recovery Act. In each of these cases, states told us that DOT's Federal Highway Administration (FHWA) approved the use of alternative criteria but it is not clear under what authority it did so as FHWA did not consult with or seek the approval of the Department of Commerce. (3) State spending on transportation projects must be maintained at the level the state had planned to spend as of the day the Recovery Act was enacted. With one exception, the states have certified that they will maintain their level of spending.

GAO will continue to monitor states' use of Recovery Act funds for transportation programs and their compliance with program rules. In the next report, in September 2009, GAO plans to provide information on the use of Recovery Act funds for transit programs and for highway programs. Previous GAO work on the act has addressed other transportation issues. For instance, GAO's work on discretionary transportation grants found that DOT followed key elements of federal guidance in developing selection criteria for awarding these grants, and GAO's work on intercity rail funding found that although DOT's strategic plan for high-speed rail generally outlines how the act's funds may be invested for high-speed rail development, the plan does not establish clear goals or a clear role for the federal government.

Mr. Chairman and Members of the Committee:

I am pleased to be here to discuss our work examining selected states' use of funds made available for highway infrastructure projects under the American Recovery and Reinvestment Act of 2009 (Recovery Act).¹ Congress and the administration have fashioned a significant response to what is generally considered to be the nation's most serious economic crisis since the Great Depression. The Recovery Act's combined spending and tax provisions are estimated to cost \$787 billion, including more than \$48 billion in spending by the Department of Transportation (DOT) for investments in transportation infrastructure such as highways, passenger rail, and transit. The Recovery Act specifies several roles for GAO, including conducting ongoing reviews of selected states' and localities' use of funds made available under the act. We recently completed our second review, which examined a core group of 16 states, the District of Columbia (District), and selected localities.²

My statement today is based largely on our recently completed work in this area and addresses (1) the uses of Recovery Act transportation funding including the types of projects states have funded, (2) the steps states have taken to meet the act's requirements, and (3) GAO's other work on transportation funding under the Recovery Act. The states selected for our review contain about 65 percent of the U.S. population and are estimated to receive collectively about two-thirds of the intergovernmental federal assistance funds available through the Recovery Act. We selected these states and the District on the basis of federal outlay projections, percentage of the U.S. population represented, unemployment rates and changes, and a mix of states' poverty levels, geographic coverage, and representation of both urban and rural areas. We also obtained data from DOT on obligations and reimbursements for the Recovery Act's highway infrastructure funds. We conducted performance audits for our second review from April 21, 2009, to July 2, 2009, in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence

¹Pub. L. No. 111-5, 123 Stat. 115 (Feb. 17, 2009).

²GAO, *Recovery Act: States' and Localities' Current and Planned Uses of Funds While Facing Fiscal Stresses* GAO-09-829 (Washington, D.C.: July 8, 2009).

obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

In March 2009, \$26.7 billion of Recovery Act funding was apportioned to all 50 states and the District for activities allowed under the Federal-Aid Highway Surface Transportation Program, including restoration, repair, and construction of highways, and for other eligible surface transportation projects. The act requires that 30 percent of these funds be suballocated for projects in metropolitan and other areas of the state. Highway funds are apportioned to the states through federal-aid highway program mechanisms, and states must follow the requirements of the existing program.³ Under the Recovery Act, the maximum federal fund share of highway infrastructure investment projects is 100 percent, whereas the federal share under the existing federal-aid highway program is generally 80 percent.

States Have Used a Substantial Portion of Highway Funds, with Funded Projects Focusing on Pavement Improvements

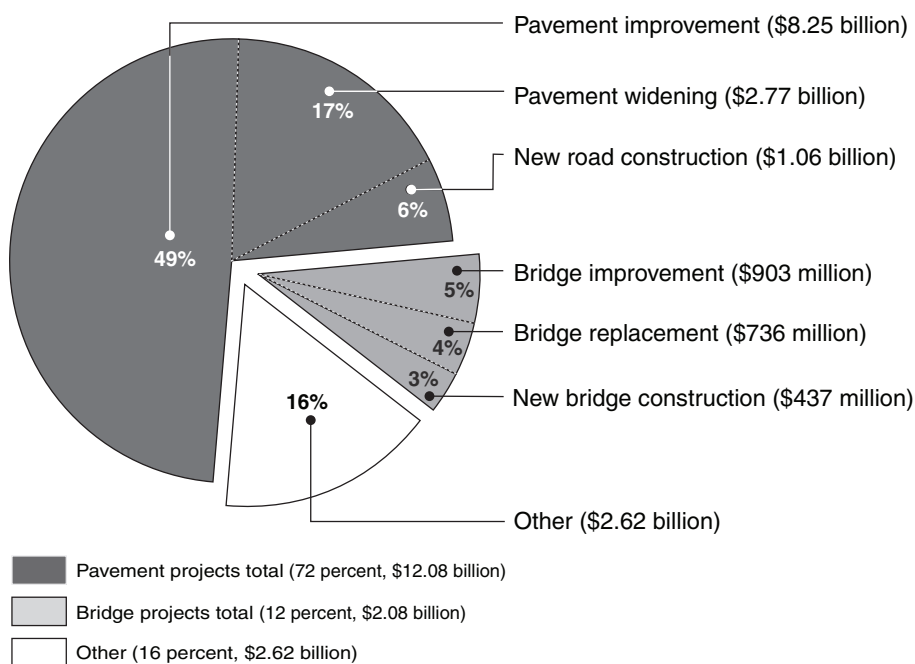
As of July 17, 2009, \$16.8 billion of the apportioned funds had been obligated⁴ for over 5,700 projects nationwide, including \$9.8 billion that had been obligated for over 2,900 projects in the 16 states and the District that are the focus of our review. About half of Recovery Act highway obligations nationwide have been for pavement improvements. Specifically, \$8.2 billion is being used for projects such as reconstructing or rehabilitating deteriorated roads. Many state officials told us they selected a large percentage of resurfacing and other pavement improvement projects because they did not require extensive environmental clearances, were quick to design, could be quickly obligated and bid, could employ people quickly, and could be completed within 3 years. In addition, about \$2.8 billion, or about 17 percent of Recovery Act funds nationally, has been obligated for pavement-widening

³These requirements include ensuring the project meets all environmental requirements associated with the National Environmental Policy Act (NEPA), paying a prevailing wage in accordance with federal Davis-Bacon requirements, complying with goals to ensure disadvantaged businesses are not discriminated against in the awarding of construction contracts, and using American-made iron and steel in accordance with the Buy America program.

⁴The U.S. Department of Transportation has interpreted the term obligation of funds to mean the federal government's contractual commitment to pay for the federal share of the project. This commitment occurs at the time the federal government signs a project agreement.

projects, and around 12 percent has been obligated for the replacement and improvement of existing bridges, and the construction of new bridges. Figure 1 shows obligations by the types of road and bridge improvements being made.

Figure 1: Percentage of Highway Obligations Nationwide by Project Improvement Type as of July 17, 2009



Source: GAO analysis of FHWA data.

Note: "Other" category includes safety projects such as improving safety at railroad grade crossings, transportation enhancement projects such as pedestrian and bicycle facilities, engineering, and right-of-way purchases.

As of July 17, 2009, \$401.4 million had been reimbursed nationwide by the Federal Highway Administration (FHWA), including \$140.8 million that had been reimbursed for projects in the 16 states and the District.⁵ DOT officials told us that although funding has been obligated for more than

⁵The Federal Aid Highway Program is not a "cash up-front" program. No cash is actually disbursed until states incur costs. Projects are approved and work is started, then the federal government makes payments—also called reimbursements—to the states for costs as they are incurred on projects. The amount of cash paid to the states reflects only the federal share of the project's cost.

5,000 projects, it may be months before contractors mobilize and begin work. States make payments to these contractors for completed work and then can request reimbursement from FHWA. Nevertheless, this is a notable increase in reimbursements since we issued our report on July 8, 2009. At that time we reported that, according to June 25 data, FHWA had reimbursed \$233 million nationwide, including \$96.4 million that had been reimbursed to the 16 states and the District. This is an increase of about 72 percent and 46 percent respectively over a period of about three weeks, compared with increases in obligations in the 6 percent range. We will continue to monitor these trends in the weeks ahead.

According to state officials, because an increasing number of contractors are looking for work, bids for Recovery Act contracts have come in under estimates. State officials told us that bids for the first Recovery Act contracts were ranging from around 5 percent to 30 percent below the estimated cost. Several state officials told us they expect this trend to continue until the economy substantially improves and contractors begin taking on enough other work.

States Have Generally Complied with Program Requirements

Funds appropriated for highway infrastructure spending must be used as required by the Recovery Act. States are required to do the following:

- Ensure that 50 percent of apportioned Recovery Act funds are obligated within 120 days of apportionment (before June 30, 2009) and that the remaining apportioned funds are obligated within 1 year. The 50 percent rule applied only to funds apportioned to the state and not to the 30 percent of funds required by the Recovery Act to be suballocated, primarily based on population, for metropolitan, regional, and local use. The Secretary of Transportation is to withdraw and redistribute to other states any amount that is not obligated within these time frames.⁶
- Give priority to projects that can be completed within 3 years and to projects located in economically distressed areas, as defined by the Public Works and Economic Development Act of 1965, as amended.⁷ According to this act, to qualify as an economically distressed area, an area must meet one or more of three criteria, two of which related to income and unemployment based on the most recent federal or state data, and the

⁶Recovery Act, div. A, title XII, 123 Stat. 115, 206.

⁷*Id.*

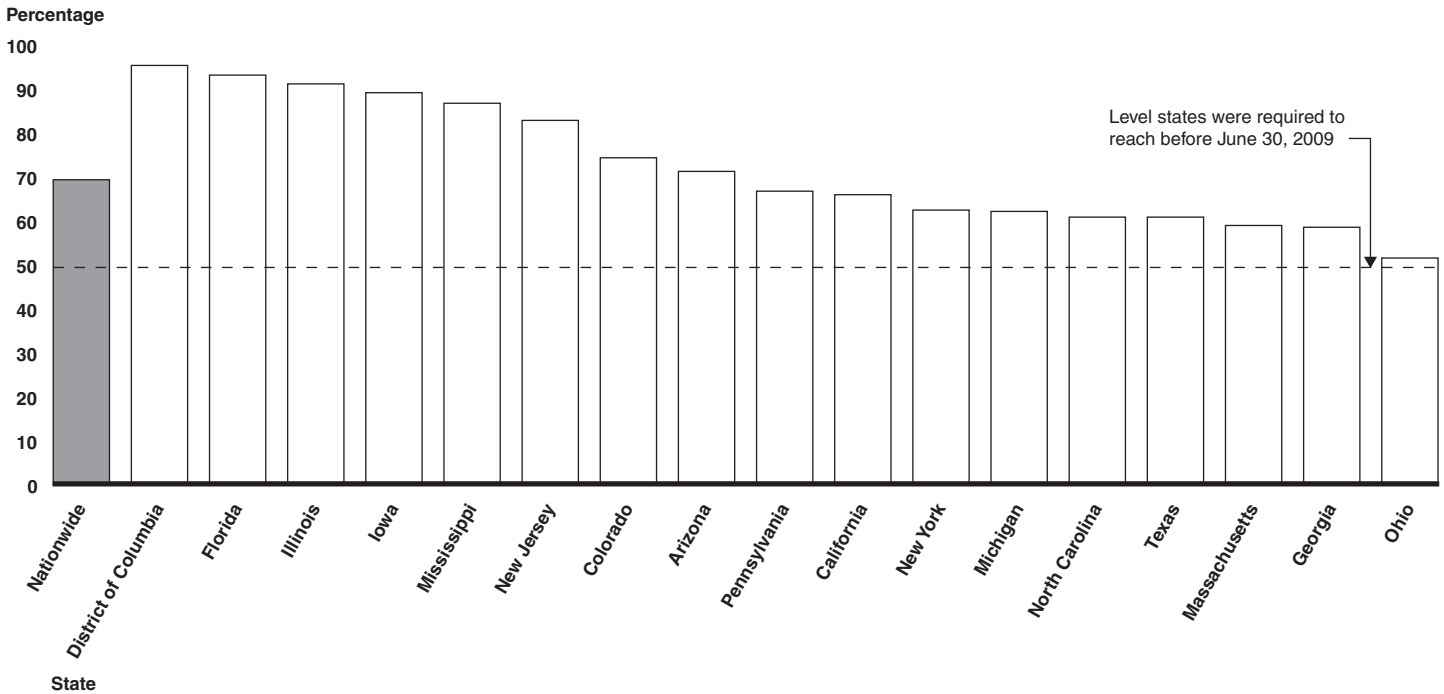
third of which is based on a Department of Commerce determination of special need.

- Certify that the state will maintain the level of spending for the types of transportation projects funded by the Recovery Act that it planned to spend the day the Recovery Act was enacted. As part of this certification, the governor of each state is required to identify the amount of funds the state plans to expend from state sources from February 17, 2009, through September 30, 2010.⁸

All states have met the first Recovery Act requirement that 50 percent of their apportioned funds are obligated within 120 days. Of the \$18.7 billion nationally that is subject to this provision, 69 percent was obligated as of June 25, 2009. The percentage of funds obligated nationwide and in each of the states included in our review is shown in figure 2.

⁸Recovery Act, div. A, title XII, § 1201.

Figure 2: Percentage of Recovery Act Highway Funds Obligated as of June 25, 2009



Source: GAO analysis of Federal Highway Administration data.

Note: This figure does not include obligations that are not subject to the 120-day redistribution requirement (including funds suballocated to localities) and obligations associated with apportioned funds that were transferred from FHWA to the Federal Transit Administration (FTA) for transit projects. Generally, FHWA has authority pursuant to 23 U.S.C. § 104(k)(1) to transfer funds made available for transit projects to FTA.

The second Recovery Act requirement is to give priority to projects that can be completed within 3 years and to projects located in economically distressed areas. While officials from almost all of the states said that they considered project readiness, including the 3-year completion requirement, when making project selections, there was substantial variation in the extent to which states prioritized projects in economically distressed areas and how they identified these areas.

Due to the need to select projects and obligate funds quickly, many states first prioritized projects based on other factors and only later identified whether these projects fulfilled the requirement to give priority to projects in economically distressed areas. According to the American Association of State Highway and Transportation Officials, in December 2008, states had already identified more than 5,000 “ready-to-go” projects as possible

selections for federal stimulus funding, 2 months prior to enactment of the Recovery Act. Officials from several states also told us they had selected projects prior to the enactment of the Recovery Act and that they only gave consideration to economically distressed areas after they received guidance from DOT. States also based project selection on other priorities, such as geographic distribution, the potential for job creation or other economic benefits, and state planning criteria or funding formulas.⁹

DOT and FHWA have yet to provide clear guidance regarding how states are to implement the requirement that priority be given to economically distressed areas. In February 2009, FHWA published replies to questions from state transportation departments on its Recovery Act Web site stating that because states have the authority to prioritize and select federal-aid projects, it did not intend to develop or prescribe a uniform procedure for applying the Recovery Act's priority rules. Nonetheless, FHWA provided a tool to help states identify whether projects were located in economically distressed areas. Further, in March 2009, FHWA provided guidance to its division offices stating that FHWA would support the use of "whatever current, defensible, and reliable information is available to make the case that [a state] has made a good faith effort to consider economically distressed areas" and directed its division offices to take appropriate action to ensure that the states gave adequate consideration to economically distressed areas.

We also found some instances of states developing their own eligibility requirements for economically distressed areas using data or criteria not specified in the Public Works and Economic Development Act. According to the act, to qualify for this designation, an area generally must (1) have a per capita income of 80 percent or less of the national average or (2) have an unemployment rate that is, for the most recent 24-month period for which data are available, at least 1 percent greater than the national average unemployment rate. For areas that do not meet one of these two criteria, the Secretary of Commerce has the authority to determine that an area has experienced or is about to experience a special need arising from actual or threatened severe unemployment or economic adjustment problems resulting from severe short-term or long-term changes in

⁹For example, according to officials in North Carolina, the state used its statutory Equity Allocation Formula to determine how highway infrastructure investment funds would be distributed. Similarly, in Texas, state officials said they first selected highway preservation projects by allocating a specific amount of funding to each of the state's 25 districts, where projects were identified that addressed the most pressing needs.

economic conditions.¹⁰ In each of the cases we identified, the states informed us that FHWA approved the state's use of alternative criteria. However, FHWA did not consult with or seek the approval of the Department of Commerce, and it is not clear under what authority FHWA approved these criteria. For example:

- Arizona based the identification of economically distressed areas on home foreclosure rates and disadvantaged business enterprises—data not specified in the Public Works Act. Arizona officials said they used alternative criteria because the initial determination of economic distress based on the act's criteria excluded three of Arizona's largest and most populous counties, which also contain substantial areas that, according to state officials, are clearly economically distressed and include all or substantial portions of major Indian reservations and many towns and cities hit especially hard by the economic downturn. The state of Arizona, in consultation with FHWA, developed additional criteria that resulted in these three counties being classified as economically distressed.
- Illinois based the classification of economically distressed areas on increases in the number of unemployed persons and the unemployment rate,¹¹ whereas the act bases this determination on how a county's unemployment rate compares with the national average unemployment rate. According to FHWA, Illinois opted to explore other means of measuring recent economic distress because the initial determination of economic distress based on the act's criteria was based on data not as current as information available within the state and did not appear to accurately reflect the recent economic downturn in the state. Using the criteria established by the Public Works Act, 30 of the 102 counties in Illinois were identified as not economically distressed. Illinois's use of alternative criteria resulted in 21 counties being identified as economically

¹⁰42 U.S.C. § 3161(a). Eligibility must be supported using the most recent federal data available or, in the absence of recent federal data, by the most recent data available through the government of the state in which the area is located. Federal data that may be used include data reported by the Bureau of Economic Analysis, the Bureau of Labor Statistics, the Census Bureau, the Bureau of Indian Affairs, or any other federal source determined by the Secretary of Commerce to be appropriate (42 U.S.C. § 3161(c)).

¹¹The state based its classification of economically distressed areas on (1) whether the 2008 year-end unemployment rate was at or above the statewide average, (2) whether the change in the unemployment rate between 2007 and 2008 was at or above the statewide average, or (3) whether the number of unemployed persons for 2008 had grown by 500 or more.

distressed areas that had not been so classified following the act's criteria.¹²

- California based its economically distressed area determinations on the January 2009 monthly unemployment rates developed by the California Employment Development Department. While the use of state data is allowed under the act, the data must cover a 24-month period. California officials stated that county-level unemployment data from December 2006 through November 2008 were not sufficiently representative of the current unemployment situation in California.

Our July 2009 report recommended that the Secretary of Transportation develop (1) clear guidance on identifying and giving priority to economically distressed areas that is in accordance with the requirements of the Recovery Act and the Public Works and Economic Development Act of 1965, as amended, and (2) more consistent procedures for FHWA to use in reviewing and approving states' criteria. In its response to this recommendation, DOT said that it has already provided clear and consistent guidance to assist states and localities in identifying economically distressed areas and prioritizing projects in these areas, and that it has also conducted extensive outreach with state and local governments. However, we believe DOT's existing guidance is insufficient because, while it emphasizes the importance of giving priority to these areas, it does not define what giving priority means, and thus does not ensure that the act's priority provisions will be consistently applied. DOT also stated that it is consulting with the Department of Commerce to develop additional guidance on criteria that may be used to classify areas as economically distressed for the purpose of Recovery Act funding. We will review the additional guidance when it becomes available and plan to continue to monitor this issue in the weeks ahead for our future reports.

Finally, the states are required to certify that they will maintain the level of state effort for programs covered by the Recovery Act. With one exception, the states have completed these certifications, but they face challenges. Maintaining a state's level of effort can be particularly important in the highway program. We have found that the preponderance of evidence suggests that increasing federal highway funds influences

¹²Illinois's criteria resulted in 21 counties being classified as economically distressed areas that were not so classified by FHWA and 8 counties not being classified as economically distressed areas that were so classified by FHWA, for a net difference of 13 counties. The map tool that FHWA developed to help states identify which projects are located in economically distressed areas is based on the criteria in the Public Works Act.

states and localities to substitute federal funds for funds they otherwise would have spent on highways.¹³ As we previously reported, substitution makes it difficult to target an economic stimulus package so that it results in a dollar-for-dollar increase in infrastructure investment.¹⁴

Most states revised the initial certifications they submitted to DOT. As we reported in April, many states submitted explanatory certifications—such as stating that the certification was based on the “best information available at the time”—or conditional certifications, meaning that the certification was subject to conditions or assumptions, future legislative action, future revenues, or other conditions.¹⁵ The legal effect of such qualifications was being examined by DOT when we completed our review. On April 22, 2009, the Secretary of Transportation sent a letter to each of the nation’s governors and provided additional guidance, including that conditional and explanatory certifications were not permitted, and gave states the option of amending their certifications by May 22. Each of the 16 states and District selected for our review resubmitted their certifications. According to DOT officials, the department has concluded that the form of each certification is consistent with the additional guidance, with the exception of Texas. Texas submitted a revised certification on July 9, 2009. According to DOT officials, as of July 28, 2009, the status of Texas’ revised certification remained unresolved. For the remaining states, while DOT has concluded that the form of the revised certifications is consistent with the additional guidance, it is currently evaluating whether the states’ method of calculating the amounts

¹³In 2004, we estimated that during the 1983 through 2000 period, states used roughly half of the increases in federal highway funds to substitute for funding they would otherwise have spent from their own resources and that the rate of substitution increased during the 1990s. The federal-aid highway program creates the opportunity for substitution because states typically spend substantially more than the amount required to meet federal matching requirements. As a consequence, when federal funding increases, states are able to reduce their own highway spending and still obtain increased federal funds. The federal share under the existing federal-aid highway program is generally 80 percent and the matching requirement for states is usually 20 percent. In 2004, we reported that in 2002, states and localities contributed 54 percent of the nation’s capital investment in highways, while the federal government contributed 46 percent (in 2001 dollars). GAO, *Federal-Aid Highways: Trends, Effect on State Spending, and Options for Future Program Design*, GAO-04-802 (Washington, D.C.: Aug. 31, 2004).

¹⁴GAO, *Physical Infrastructure: Challenges and Investment Options for the Nation’s Infrastructure*, GAO-08-763T (Washington, D.C.: May 8, 2008).

¹⁵GAO, *Recovery Act: As Initial Implementation Unfolds in States and Localities, Continued Attention to Accountability Issues Is Essential*, GAO-09-580 (Washington, D.C.: April 23, 2009).

they planned to expend for the covered programs is in compliance with DOT guidance.

States face drastic fiscal challenges, and most states are estimating that their fiscal year 2009 and 2010 revenue collections will be well below estimates. In the face of these challenges, some states told us that meeting the maintenance-of-effort requirements over time poses significant challenges. For example, federal and state transportation officials in Illinois told us that to meet its maintenance-of-effort requirements in the face of lower-than-expected fuel tax receipts, the state would have to use general fund or other revenues to cover any shortfall in the level of effort stated in its certification. Mississippi transportation officials are concerned about the possibility of statewide, across-the-board spending cuts in 2010. According to the Mississippi transportation department's budget director, the agency will try to absorb any budget reductions in 2010 by reducing administrative expenses to maintain the state's level of effort.

GAO Has Ongoing and Related Work on Transportation Programs Funded under the Recovery Act

We will continue to monitor states' and localities' use of Recovery Act funds for transportation programs and their compliance with program rules. In our next report, in September 2009, we plan to provide information on action taken by states and DOT in response to our recommendation on economically distressed areas and follow up on the progress states and metropolitan areas have made in obligating Recovery Act funds for highway infrastructure programs. We also plan to examine the use of Recovery Act funds for the Federal Transit Administration's Transit Capital Assistance program—the transit program receiving the most recovery act funding—in selected states. We expect that subsequent reports will include information on states' use of Recovery Act funds for other transit programs, such as the Fixed Guideway Modernization program.

In addition to the two reports we have issued to date, we have also reported or testified on the following issues related to other transportation programs receiving Recovery Act funding:

- *Discretionary transportation infrastructure grants.* We reported that DOT followed key elements of federal guidance in developing selection criteria for awarding grants under this \$1.5 billion dollar program.¹⁶ These

¹⁶GAO, *Recovery Act: The Department of Transportation Followed Key Federal Requirements in Developing Selection Criteria for Its Supplemental Discretionary Grants Program*, [GAO-09-785R](#) (Washington, D.C.: June 30, 2009).

key elements include communicating important elements associated with funding opportunities and using selection criteria that support a framework for merit-based spending and follow transportation infrastructure investment principles.

- *High-speed passenger rail projects.* We examined the factors that can lead to economically viable projects and whether the Federal Railroad Administration's (FRA) strategic plan to use the \$8 billion of Recovery Act funds provided for high-speed and other intercity passenger rail projects incorporates those factors.¹⁷ We found that factors such as costs, ridership projections, and determination of public benefits affect which projects are likely to be economically viable. We also found that FRA's strategic plan for high-speed rail outlines, in general terms, how the federal government may invest Recovery Act funds for high-speed rail development but that it does not establish clear goals or a clear role for the federal government in high-speed rail. We are beginning follow-up work aimed at, among other things, identifying how project sponsors and others have surmounted the challenges of instituting new rail service and how FRA is positioned to develop, implement, and oversee its new high-speed rail program. We hope to have this work completed by next spring.

We will continue to monitor these and other areas in which the committee might be interested.

Mr. Chairman, this concludes my prepared statement. I would be pleased to respond to any questions that you or other Members of the Committee might have.

GAO Contact and Staff Acknowledgments

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¹⁷GAO, *High Speed Passenger Rail: Effectively Using Recovery Act Funds for High Speed Rail Project*, [GAO-09-786T](#) (Washington, D.C.: June 23, 2009).

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