

November 2009

RECOVERY ACT

Planned Efforts and Challenges in Evaluating Compliance with Maintenance of Effort and Similar Provisions



GAO

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Highlights of [GAO-10-247](#), a report to the Republican Leader, U.S. Senate

Why GAO Did This Study

To help prevent the substitution of federal funds for state, local, or private funds, the American Recovery and Reinvestment Act of 2009 (Recovery Act) contains maintenance of effort and similar provisions requiring that recipients maintain certain levels of spending for selected programs. This report provides information on selected programs in the Recovery Act with maintenance of effort or similar provisions, the guidance federal agencies have issued to implement these requirements, and how responsible federal agencies are in determining whether recipients meet these requirements. To conduct this work, GAO identified programs in the Recovery Act that contain a new maintenance of effort or similar provision; account for at least \$4 billion in appropriations by agency; and collectively account for about \$100.5 billion of the \$106.8 billion in Recovery Act appropriations with these provisions. For these selected programs, GAO analyzed program documents and interviewed federal and state officials.

What GAO Recommends

GAO recommends that Education take further action to enhance transparency by requiring states to include an explanation of changes to maintenance of effort levels in their State Fiscal Stabilization Fund application resubmissions. All agencies agreed with GAO's findings, and Education agreed with the recommendation.

View [GAO-10-247](#) or [key components](#). For more information, contact A. Nicole Clowers at (202) 512-2834; Cornelia Ashby at (202) 512-8403; or Mathew Scire at (202) 512-8678.

RECOVERY ACT

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What GAO Found

GAO identified eight programs in the Recovery Act with new maintenance of effort provisions. These programs span the areas of education, highway, housing, rail, telecommunications, and transit, and account for about \$100.5 billion in Recovery Act appropriations. The maintenance of effort or similar provisions are designed to prevent recipients, such as state departments of transportation, public housing agencies, and private companies, from substituting planned spending for a given program with Recovery Act funds—that is, the provisions ensure that the increased federal spending will supplement rather than replace state, local, or private spending. Although the maintenance of effort or similar provisions of these eight programs share a common purpose, the specifics of each provision vary by responsible agency. These variations include whether a state must certify the amount of funding it will maintain, whether waivers are allowed, and the consequences (if any) of not meeting the provisions. For example, the Recovery Act allows the Secretary of Education to waive state maintenance of effort requirements for the State Fiscal Stabilization Fund, under certain circumstances, but other programs GAO reviewed for this study did not have such a waiver provision.

Selected Maintenance of Effort or Similar Provisions in the Recovery Act

Agency	Spending provision summary	Covered time period
Department of Transportation (DOT)	Governor of each state must certify that the state will maintain its current level of transportation spending	Feb. 17, 2009, through Sept. 30, 2010
Department of Education	Governors must provide assurances that their state will maintain support for K-12 education and public institutions of higher education at least at fiscal year 2006 levels	Fiscal years 2009, 2010, and 2011
Department of Housing and Urban Development (HUD)	HUD must institute measures to ensure Recovery Act funds will supplement, not supplant, expenditures from other sources. To meet this requirement, HUD is requiring public housing agencies to sign an amendment to their annual contributions contracts	Varies based on time frames of grants
Department of Commerce	Grant applicants must demonstrate that, but for federal assistance, the project would not have been implemented during the grant period	Varies based on time frames of grants

Source: GAO analysis of the Recovery Act.

The federal agencies responsible for these eight programs have issued guidance to states and other recipients on how to implement the maintenance of effort or similar provision requirements. For example, since February 2009, the Department of Transportation (DOT) has issued several sets of guidance to reduce the variations in how states calculate their maintenance of effort certifications. DOT anticipates issuing further guidance to clarify some requirements, including how it will evaluate whether states maintained their certified levels of effort. The Department of Education also issued guidance allowing states flexibility in defining maintenance of effort levels. However, guidance from Education does not require states to include an explanation for changes made to maintenance of effort calculations in their resubmitted application, reducing transparency in terms of what has changed from previously approved applications. Given that some states plan to decrease their fiscal year 2006 maintenance of effort funding by billions of dollars, an explanation of why this change was made would allow the public and policymakers alike the ability to better understand the action. State officials GAO spoke with said the guidance from DOT was timely and that the agency was responsive to officials' questions. Furthermore, applicants to the Department of Commerce's broadband grant program did not have questions about the program's issued guidance.

Federal and state officials have not completed key steps in the implementation of the maintenance of effort or similar provisions because of administrative and fiscal challenges associated with their implementation.

- DOT has begun to assess the highway and transit levels that states certified to maintain; however, it has not estimated a date for completing this assessment and has not finalized plans for determining states' compliance with their transit certifications. Furthermore, according to a DOT official, the department has not made a decision as to whether the Recovery Act requires states to maintain a total level of effort for covered programs or to maintain their level of effort for each covered program. According to this DOT official, DOT plans to make a decision on this issue by the end of calendar year 2009.
- Education has begun to draft a monitoring plan to oversee and enforce state compliance with maintenance of effort requirements under the State Fiscal Stabilization Fund. Because the State Fiscal Stabilization Fund is a new program under the Recovery Act, Education has yet to finalize monitoring plans and processes. In addition, Education has not issued guidance to states on how to document that they met their required maintenance of effort level.

- Department of Housing and Urban Development (HUD) officials said they are monitoring Capital Fund formula grants through ongoing efforts. Officials further stated that they are still developing a strategy for monitoring Capital Fund competitive grants—also subject to the supplement-not-supplant requirement. According to HUD officials, their focus has been on completing this award program, for which they made awards in September 2009, and on reviewing Recovery Act reporting.
- Commerce's review of broadband grant applications for funding has been delayed because of scheduling and staffing challenges. In particular, the broadband grant program involves more applications and far more funds than the agency formerly handled, raising concerns whether the department has sufficient staff resources to implement the program in accordance with Recovery Act priorities. While Commerce originally anticipated that this review would be completed by November 7, 2009, the agency now estimates that it will not complete this review process and award the first round of grants until February 2010. To address this issue, GAO recently recommended that the Department of Commerce develop a contingency plan to ensure sufficient resources for oversight of Recovery Act-funded projects (GAO-10-80). Officials from Commerce have agreed with our recommendation and plan to take all appropriate steps to address our concern.

Officials from several state departments of transportation told GAO that while they plan to meet their maintenance of effort requirements, decreasing state revenues and budgets pose a challenge to doing so. These delays and challenges coupled with the varying requirements of the maintenance of effort and similar provisions we reviewed raise questions about whether the provisions will achieve their intended purpose. Accordingly, we plan to continue to periodically evaluate this issue.

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Abbreviations

ACC	annual contributions contracts
BTOP	Broadband Technology Opportunities Program
DOT	Department of Transportation
Education	Department of Education
FHWA	Federal Highway Administration
FRA	Federal Railroad Administration
FTA	Federal Transit Administration
HUD	Department of Housing and Urban Development
IHE	institutions of higher education
NOFA	notice of funds availability
NTIA	National Telecommunications and Information Administration
Recovery Act	American Recovery and Reinvestment Act
RUS	Rural Utilities Service
SFSF	State Fiscal Stabilization Fund
STIP	Statewide Transportation Improvement Program
TIP	Transportation Improvement Program

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United States Government Accountability Office
Washington, DC 20548

November 30, 2009

The Honorable Mitch McConnell
Republican Leader
United States Senate

Dear Senator McConnell:

The nation faces what is generally reported to be the most serious economic crisis since the Great Depression. In response, the American Recovery and Reinvestment Act of 2009 (Recovery Act) was enacted to promote economic recovery, make investments, and minimize and avoid reductions in state and local government services.¹ The Recovery Act, like previous fiscal stimulus packages, is designed to stimulate the economy through direct spending by the government or spending by the recipients of tax cuts or government transfers. The Congressional Budget Office estimated that the Recovery Act's combined spending and tax provisions will cost \$787 billion over 10 years, of which more than \$580 billion will be in additional federal spending. The Recovery Act contains maintenance of effort and similar provisions to ensure that recipients maintain certain levels of spending for certain programs as a condition of receiving federal funds. Such provisions are designed to prevent recipients from substituting federal funds for funds that otherwise would have been spent for some aided programs—that is, to help ensure that increased federal spending will supplement rather than replace state, local, or private spending.²

You asked us to provide information on maintenance of effort and similar provisions in the Recovery Act. Accordingly, this report discusses programs in the Recovery Act with new maintenance of effort or similar provisions, the guidance federal agencies have issued to implement these requirements, and how responsible federal agencies are determining whether recipients meet these requirements.

To address these objectives, we reviewed the Recovery Act to identify the programs with maintenance of effort or similar provisions. We identified

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

²For a discussion on this issue, see GAO, *Federal-Aid Highways: Trends, Effect on State Spending, and Options for Future Program Design*, [GAO-04-802](#) (Washington, D.C.: Aug. 31, 2004).

eight programs—administered by the Departments of Commerce, Education, Housing and Urban Development, and Transportation—that (1) contain a new maintenance of effort provision or similar language; (2) account for at least \$4 billion in appropriations, by agency; and (3) account for a majority of the about \$106.8 billion in Recovery Act appropriations with new maintenance of effort or similar provisions. (See table 1.) The eight programs we reviewed received about 94 percent—or \$100.5 billion—of the Recovery Act appropriations for programs with new maintenance of effort or similar provisions. We also analyzed documents from and interviewed federal and state officials. These documents included federal agency guidance on the eight programs in the Recovery Act that we selected for this review and state certifications on spending levels. We also obtained information from the state departments of education in 6 states and the District of Columbia and state departments of transportation in 16 states and the District of Columbia on their use of the guidance issued by the Departments of Education and Transportation on maintenance of effort requirements—specifically, the state certification process. We spoke with state departments of education in Arizona, California, Florida, New Jersey, New York, North Carolina, and the District of Columbia and state departments of transportation in Arizona, California, Colorado, Florida, Georgia, Illinois, Iowa, Massachusetts, Michigan, Mississippi, New Jersey, New York, North Carolina, Ohio, Pennsylvania, and Texas. In addition, we gathered documents from and interviewed education and transportation officials in these 16 states and the District of Columbia on the methodology they used to calculate their spending levels and plans to monitor their compliance with the maintenance of effort requirements. We also spoke with officials from 27 public housing agencies in 10 states about supplementing, not supplanting, funds from the Department of Housing and Urban Development (HUD). These states are Arizona, Colorado, Georgia, Illinois, Iowa, Massachusetts, Mississippi, New Jersey, North Carolina, and Texas. We selected these states based on our ongoing Recovery Act reporting effort—which covers a core group of 16 states and the District of Columbia.³ Appendix I contains additional information about our scope and methodology. We conducted this performance audit from August 2009 to November 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

³In response to a mandate in the Recovery Act, we conduct bimonthly reviews that focus on 16 states and the District of Columbia, where about 65 percent of the U.S. population lives. About two-thirds of the intergovernmental federal assistance available through the Recovery Act is expected to go to these 17 entities.

findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Table 1: Selected Federal Programs Subject to a Maintenance of Effort or Similar Provision under the Recovery Act, by Agency

Dollars in billions

Agency	Program	Description	Amount
Federal Highway Administration, Department of Transportation (DOT)	Highway Infrastructure Investment	Provides resources and technical assistance to state and local governments for constructing, preserving, and improving highways	\$26.8 ^a
Federal Transit Administration, DOT	Transit Capital Assistance	Provides resources for major capital projects in growing and high-density states	8.4 ^b
	Fixed Guideway Infrastructure Investment	Provides funding for modernization for existing locally planned, implemented, and operated transit "guideway" capital investments (e.g., commuter rail)	
	Capital Investment Grants	Provides resources for new transit "guideway" capital projects eligible under the New Starts/Small Starts program	
Federal Railroad Administration, DOT	Capital Assistance for High Speed Rail Corridors and Intercity Passenger Rail Service	Establishes a federal-state partnership for intercity passenger rail investment	8
Department of Education	State Fiscal Stabilization Fund	Created under the Recovery Act, provides funding in part to help stabilize state and local government budgets by minimizing reductions in education and other essential public services	48.6
Department of Housing and Urban Development	Public Housing Capital Fund	Provides funds for the capital and management activities of public housing agencies, including modernization and development of public housing	4 ^c
National Telecommunications and Information Administration, Department of Commerce	Broadband Technology Opportunities Program	Created under the Recovery Act to provide grants to support the deployment of broadband infrastructure in unserved and underserved areas expand public computer center capacity, and for innovative programs to encourage sustainable adoption of broadband service.	4.7
Total			\$100.5

Source: GAO analysis of Recovery Act provisions.

^aThe Recovery Act appropriated \$27.5 billion to the Highway Infrastructure Investment program; however, \$690 million of this amount does not go to states.

^bThe \$8.4 billion represents the sum of Transit Capital Assistance (\$6.9 billion), Fixed Guideway Infrastructure Investment (\$750 million), and Capital Investment Grants (\$750 million).

^cThe \$4 billion for the Public Housing Capital Fund consists of \$3 billion to be distributed through HUD's regular Capital Fund formula and \$1 billion to be distributed through competitive grants.

Background

Enacted on February 17, 2009, to jump-start the economy and encourage long-term economic growth, the Recovery Act makes more than \$780 billion available in supplemental appropriated funds to eligible state, local, and sometimes private recipients. These funds are intended to create and save jobs, spur economic activity, and promote high levels of accountability and transparency in government spending, among other things. We reported that as of September 23, 2009, the Department of the Treasury had outlayed about \$48 billion of the estimated \$49 billion in Recovery Act funds projected for use in states and localities in federal fiscal year 2009, which ran through September 30, 2009.⁴

To ensure that Recovery Act funds supplement rather than replace other spending, the Recovery Act contains requirements that the federal funds not be substituted for state, local, and private support for some aided programs. State and local governments are to be held accountable for how the Recovery Act funds are used to support those programs, and the federal agencies that oversee the programs will be responsible for reviewing states' compliance with the requirements. These spending requirements include the following.⁵

- *Maintenance of effort.* This requirement prohibits recipients from replacing their own spending with federal dollars. In particular, a maintenance of effort provision requires a state or its agency to maintain certain levels of state spending for a certain program.
- *Supplement-not-supplant.* This requirement does not hold recipients responsible for maintaining their level of effort in supporting a program, but it does require that funds provided for certain programs serve only to supplement expenditures from other federal, state, or local sources or from funds independently generated by the recipient.

⁴GAO, *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 (Washington, D.C.: Sept. 23, 2009).

⁵For this report, we did not review maintenance of eligibility provisions for the Medicaid program in the Recovery Act. In order to qualify for Recovery Act Funds for Medicaid, states generally may not apply eligibility standards, methodologies, or procedures that are more restrictive than those in effect under their state Medicaid plans or waivers on July 1, 2008. This maintenance of eligibility provision is different from maintenance of effort provisions in that it does not require a set level of state spending; the increase in the federal share for Medicaid may reduce the funds that states would otherwise have to use for their Medicaid programs.

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- *But-for test.* This requirement ensures appropriate use of Recovery Act funds by requiring recipients to explain how a certain project would not have been implemented during the grant period without the federal grant. This requirement is described as the “but-for test” because, but for the funds, the project would not be supported.

Efforts to Implement and Evaluate Compliance with Maintenance of Effort and Similar Provisions Are Ongoing and Proving to Be Challenging

Requirements for the programs that are subject to Recovery Act provisions designed to guard against the substitution of federal funds for state funds vary by responsible agency.⁶ In general, the supplement-not-supplant requirements for HUD and the “but-for test” for the Department of Commerce are different from the maintenance of effort requirements for the Departments of Education and Transportation. However, only recipients of funds administered by the Department of Education can seek a waiver from the maintenance of effort requirements. (See table 2.) The federal agencies responsible for these programs have issued guidance to recipients on how to implement the maintenance of effort or similar provision requirements. In addition, the Department of Transportation (DOT) continues to issue further guidance to clarify some requirements. To determine whether recipients comply with maintenance of effort and similar provisions, agencies are finalizing state certifications, reviewing applications, and developing plans to review recipients’ compliance with the provisions. However, some agencies and states face challenges in implementing these provisions. For example, the Department of Commerce’s review of applications to ensure that proposed projects would not be feasible without federal funding has been delayed by scheduling and staffing challenges. In addition, officials from several state departments of transportation told us that while they plan to meet their maintenance of effort requirements, decreasing state revenues and budgets pose a challenge to doing so.

⁶We reviewed the Recovery Act programs with new maintenance of effort or similar provisions that had appropriations of \$4 billion or more. This allowed us to cover about 94 percent of the Recovery Act appropriations that fund programs containing these provisions. For more detailed information on how we selected the eight programs, see appendix I.

Table 2: Requirements of Recovery Act Maintenance of Effort or Similar Provisions for Selected Programs

Agency	Program	Spending provision	State certification	Responsible party	Waiver	Recovery Act consequences for recipients
Federal Highway Administration, DOT	Highway Infrastructure Investment	Maintenance of effort	Yes	State	No	Yes
Federal Railroad Administration, DOT	Capital Assistance for High Speed Rail Corridors and Intercity Passenger Rail Service	Maintenance of effort	Yes	State	No	Yes
Federal Transit Administration, DOT	Transit Capital Assistance	Maintenance of effort	Yes	State	No	Yes
Federal Transit Administration, DOT	Fixed Guideway Infrastructure Investment	Maintenance of effort	Yes	State	No	Yes
Federal Transit Administration, DOT	Capital Investment Grants	Maintenance of effort	Yes	State	No	Yes
Department of Education	State Fiscal Stabilization Fund (SFSF)	Maintenance of effort	Yes ^a	State	Yes	No ^b
HUD	Public Housing Capital Fund	Supplement-not-supplant	No	Public housing agency	No	No ^c
National Telecommunications and Information Administration, Department of Commerce	Broadband Technology Opportunities Program	But-for test	No	Public and private entities	No	No ^d

Source: GAO analysis of the Recovery Act.

^aEducation required states to assure that they would meet maintenance of effort requirements or waiver provisions in the state applications for SFSF funding.

^bConsequences for not meeting MOE requirements under SFSF are covered by the General Education Provisions Act (20 U.S.C. §§ 1221 *et seq.*).

^cAccording to HUD, it will use its existing authorities to take actions against public housing authorities found to have violated the supplement-not-supplant requirement. See PIH Notice 2009-12 and 24 C.F.R. Parts 902, 941, and 968.

^dNTIA's "but-for" provision is vetted through the grant approval process, therefore this would be resolved prior to when the grant is made.

DOT Is Finalizing Plans for Determining State Compliance, and Some States Are Concerned about Meeting Maintenance of Effort Requirements

DOT maintenance of effort provision: The Recovery Act provided about \$43.9 billion for highway, transit, and rail projects. This funding is administered through DOT's operating administrations—the Federal Highway Administration (FHWA), Federal Transit Administration (FTA), and Federal Railroad Administration (FRA). To be eligible for these funds, the Recovery Act specifies that the governor of each state must certify that the state will maintain its current level of highway, transit, and rail spending, among other things.⁷ The certification must include a statement of the amount of funds the state plans to spend from state sources from the date of enactment—February 17, 2009—through September 30, 2010, for the types of projects that are funded by that appropriation. The Recovery Act required that the Governor of each state submit this certification no later than 30 days after enactment, or March 19, 2009. The Recovery Act does not provide any waivers or exemptions for the states—for changes in economic conditions, for example—from the maintenance of effort provision. The consequence for a state of not maintaining the certified level of effort is that the state will be prohibited from participating in the redistribution of federal-aid highway obligation authority that will occur after August 1, 2011.⁸ According to a DOT official, the department has not made a decision as to whether the Recovery Act requires states to maintain a total level of effort for covered programs or to maintain their level of effort for each covered program. For example, a state might not maintain its certified level of effort for transit but might exceed its certified level of effort for highways, thereby equaling or exceeding its total certified level for transportation. How this question is interpreted has significance for state flexibility in meeting maintenance of effort requirements and for decisions about whether states will be eligible for redistributed federal-aid highway obligations. According to this DOT official, DOT plans to make a decision on this issue by the end of calendar year 2009.

⁷Pub. L. No. 111-5, div. A, title XII, §1201(a), 123 Stat. 115, 212. In addition, the governor must certify to the Secretary of Transportation that the state or local government to which funds have been made available has completed a full review and vetting required by law and determined that projects are an appropriate use of taxpayer funds. Pub. L. No. 111-5, div. A, title XV, §1511, 123 Stat. 115, 287.

⁸As part of the federal-aid highway program, FHWA assesses the ability of each state to have its apportioned funds obligated by the end of the federal fiscal year (Sept. 30) and adjusts the limitation on obligations for federal-aid highway and highway safety construction programs by reducing for some states the available authority to obligate funds and increasing the authority of other states.

DOT guidance to states: Ten days after the enactment of the Recovery Act on February 17, 2009, DOT issued guidance to the states on the FHWA, FTA, and FRA programs, among others, with maintenance of effort provisions. This guidance included the principal requirements for a governor's certification that a state will maintain its highway, transit, and rail funding efforts, among others. Specifically, this guidance included a sample form that states could complete to satisfy the Recovery Act's certification requirement. In March 2009, as required by the Recovery Act, all states submitted their certifications; however, many states submitted explanatory certifications—such as a statement that the certification was based on “the best information available at the time”—or conditional certifications, indicating that the certification was subject to conditions or assumptions, future legislative action, future revenues, or other conditions. In response, on April 22, 2009, DOT issued guidance requiring such states to correct those problems through recertification.

All states that submitted conditional certifications submitted a second maintenance of effort certification to DOT without conditions. Since April, DOT has issued supplemental guidance to reduce the variations in how states calculate their maintenance of effort certifications. This additional guidance is as follows:

- On May 13, 2009, DOT issued guidance in response to questions asked by state representatives during a conference call.⁹ The majority of this guidance addresses the types of expenditures to include in their maintenance of effort calculation. For example, states should include in-kind contributions from state sources in the planned amount of the expenditures.
- In June and July 2009, FHWA posted several sets of frequently asked questions to continue to provide states with information on the types of expenditures to include in their maintenance of effort calculations—and therefore reduce the variation in how states calculated their maintenance of effort certifications. For example, states should include planned expenditures from state sources regardless of which agency or political subdivision in the state is responsible for overseeing the expenditure of those funds. However, the maintenance of effort calculation does not include any locally generated funds (i.e., funds produced by local taxes).

⁹DOT's Office of the Secretary of Transportation approved FHWA's June, July, and September 2009 guidance and indicated that this guidance applies to the other modes with Recovery Act maintenance of effort provisions.

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- In September 2009, DOT issued guidance that requires states to include grants-in-aid to local governments as part of their maintenance of effort calculation, which states generally did not count in their previous calculations. This guidance will require some (if not many) states to complete another certification.

Of the 17 departments of transportation we spoke with, officials from 13 stated that they had received timely guidance from DOT on maintenance of effort certification and that DOT has generally been responsive to their questions.¹⁰ For example, Mississippi transportation officials told us that they had spoken and met with DOT officials regularly since the enactment of the Recovery Act to discuss Mississippi's maintenance of effort certification.

DOT plans for determining compliance with maintenance of effort provision: DOT continues to work with state governments to finalize their maintenance of effort certifications. As we reported in September 2009, DOT has concluded that the form of the revised state certifications is consistent with its April 22, 2009, guidance, but it is currently evaluating whether the states' method of calculating the amounts they planned to expend for the covered programs is in compliance with DOT guidance. As of November 30, 2009, FHWA, FTA, and FRA had reached different stages in their reviews.

- In June 2009, FHWA began to review each state's maintenance of effort calculation to ensure that the state included the correct planned expenditures for highway investment. For example, FHWA division offices evaluated, among other things, whether the amount certified (1) covered the period from February 17, 2009, through September 30, 2010, and (2) included in-kind contributions, as required. FHWA division staff then determined whether the state certification needed (1) no further action, (2) further assessment, or (3) additional information. In addition, according to FHWA officials, their assessments indicated that FHWA needed to clarify the types of projects funded by the appropriations and the types of state expenditures that should be included in the maintenance of effort certifications. As a result of these findings, DOT issued the June,

¹⁰This includes 16 state departments of transportation and the District of Columbia department of transportation. Of the 4 remaining departments of transportation, officials from 2 stated that the guidance from DOT was not timely, while officials from the other 2 departments of transportation did not answer this question.

July, and September 2009 guidance and plans to issue additional guidance on these issues.

Our review of FHWA division assessments for the 16 states and the District of Columbia included in this study showed that 6 states needed further assessment. In August 2009, FHWA staff in headquarters reviewed the FHWA division staff findings for each state and proceeded to work with each FHWA division office to make sure their states submit revised certifications that will include the correct planned expenditures for highway investment—including aid to local agencies. FHWA officials said that of the 16 states and District of Columbia that we reviewed for this study, they currently expect to have 12 states submit revised certifications for state highway spending, while an additional 2 states are currently under review and may have to revise their certifications. DOT officials stated that they have not determined when they will require the states to submit their revised consolidated certification. According to these officials, they want to ensure that the states have enough guidance to ensure that all programs with Recovery Act maintenance of effort provisions have completed their maintenance of effort assessments and that the states have enough guidance to ensure that this is the last time that states have to amend their certifications.

- FTA officials told us the agency plans to review each state’s maintenance of effort calculation to ensure that states included the correct planned expenditures for transit projects covered under the Recovery Act. According to FTA officials, FTA has begun this review, but it is not complete. In October 2009, FTA officials compared each state’s certified transit maintenance of effort with the state funding levels in that state’s plans, specifically the Statewide Transportation Improvement Program (STIP) and Transportation Improvement Program (TIP). FTA found discrepancies between states’ transit maintenance of effort certifications and their STIPs and TIPs, and determined that these state plans did not provide the best mechanism for comparison as it was unclear what types of expenditures were included in the states’ STIP and TIP funding numbers. According to FTA officials, they will work directly with these states to determine the methodology the states used to calculate their transit maintenance of effort amount and, subsequently, decide whether amended certifications are needed. According to FTA officials, they have not established a timeline for completing these reviews.
- FRA officials told us that the agency plans to review states’ maintenance of effort calculations to ensure that states included the correct planned expenditures for rail projects covered under the Recovery Act. However, the officials said they are still determining the logistics and timeline for

this process. Whereas FRA received certifications that 12 states planned to spend state funds on rail projects, FHWA received certifications from 50 states and the District of Columbia that planned to spend state funds on highway projects and FTA received certifications from 38 states and the District of Columbia that planned to spend state funds on transit projects. However, FRA plans to work with other states to determine whether they should have certified that they planned to spend state funds for rail projects. FRA officials said they expect to complete their review by February 2010.

FHWA has begun to monitor states' compliance with their certifications, while FTA and FRA are developing monitoring plans. As of September 2009, FHWA was tracking every state's spending of state funds for the kinds of projects funded under the Highway Infrastructure Investment appropriation, while FTA and FRA were determining how they would track state spending on covered transit and rail projects. Many of the state departments of transportation we spoke to told us that they are tracking their state expenditures on a monthly basis to determine if their maintenance of effort requirements are being met; however, most said they do not expect to determine whether they met their maintenance of effort levels until sometime between September and October of 2010. Following are examples illustrating these points:

- FHWA officials stated that FHWA has been using information from Recovery Act reporting requirements to get a sense of whether states are on track to meet their highway certifications. Ninety days after the enactment of the Recovery Act, states were required to report the amounts outlaid under each covered program.¹¹ Then, states submitted an update to this report 180 days after enactment and are required to submit additional reports 1 year, 2 years, and 3 years after the date of enactment. These reports track the actual aggregate expenditures by each state, among other things. Using the 180 day report, FHWA has been tracking each state's certified highway maintenance of effort levels against its reported actual expenditures.¹² According to FHWA officials, this exercise provides FHWA with an estimate of each state's rate of spending on highway investment and has allowed the agency to identify states that appeared to have abnormally high or low spending rates. FHWA officials have worked with such states to understand whether the reasons are

¹¹Pub. L. No. 111-5, div. A, title XII, §1201(c)(2) and (3), 123 Stat. 115, 212.

¹²When we completed our review, FHWA used the certified amounts as of August 31, 2009, but because some states are recertifying, we expect these amounts to change.

acceptable. For example, from this spreadsheet, FHWA officials were able to determine that California's spending rate on highway investment appeared to be much higher than would have been expected based on the percentage of the maintenance of effort time period that had elapsed. Upon further investigation, including discussions with California, FHWA determined that the state's rate was higher because improvements in the bond market had allowed California to issue bonds it had not planned to issue as of the February 17, 2009, maintenance of effort calculation date. The expenditure of these bond proceeds on projects caused a higher expenditure rate than expected. FHWA concluded that California's explanation of its post-February 17, 2009, decision to issue the bonds was acceptable and it provided a reason for a relatively higher spending rate. In addition to using the Recovery Act reports, FHWA officials stated that FHWA division staff will continue to work closely with states to understand spending rates on highway investment and help states address any potential problems states might have in complying with their certified highway spending levels. FHWA officials stated they will not be able to make a final determination as to whether states have fully complied with their highway maintenance of effort levels until after the maintenance of effort period concludes on September 30, 2010.

- FTA and FRA officials told us they do not know when they will begin to determine states' compliance with their transit and rail maintenance of effort certifications. According to FTA and FRA officials, to determine state compliance, they first need to assess each state's transit and rail maintenance of effort certifications. FTA and FRA officials told us that by September 30, 2010, they will work with each state to determine its spending on eligible transit and rail projects and thus determine if each state has complied with its transit and rail certifications.

State challenges in meeting DOT maintenance of effort requirement:

Most states we spoke with are committed to trying to meet their maintenance of effort requirements, but some states are concerned about meeting the requirements. As we have previously reported, states face drastic fiscal challenges, and most states are currently estimating that their fiscal year 2009 and 2010 revenue collections will be well below previously estimated amounts. In the face of these challenges, some states told us that meeting the maintenance of effort requirements over time poses significant challenges. In addition, according to the DOT Deputy Assistant Secretary for Transportation Policy, the department recognizes that many states may not be able to maintain the level of effort specified in their certifications, given the continual decline in their economy. If a state is not able to maintain its certified level of effort, it will not be allowed to

participate in the redistribution of federal-aid highway obligations that will occur after August 1, 2011.

In August 2008, states received about \$1.2 billion through the federal-aid highway redistribution. By way of context, this sum represents about 5 percent of the nearly \$27 billion states received through the Recovery Act, or about 3 percent of the roughly \$35 billion states receive annually through the regular Federal Aid Highway Program. However, of the 17 departments of transportation we spoke with, officials from 15 stated that this prohibition on participating in the fiscal year 2011 redistribution provides an incentive for their state to meet its certified maintenance of effort level.¹³ For example, Ohio officials stated they have received an average of \$43 million in redistributed obligation authority over the past 3 years, and they intend to meet the maintenance of effort levels and receive additional funding. In addition, according to Georgia officials, the potential addition of \$40 million in redistributed funds is an incentive for the state to meet its requirements.

Although the states we spoke with are committed to trying to meet the maintenance of effort requirements, 7 state departments of transportation told us the current decline in state revenues creates major challenges in doing so. For example, Iowa, North Carolina and Pennsylvania transportation officials said that a decline in state gas tax and other revenues, used for state and state-funded local highway projects, may make it more difficult for them to maintain their levels of transportation spending. In addition, Georgia officials stated that the current decline in the state's gas tax revenues is a challenge to meeting its certified level of effort. Lastly, Mississippi and Ohio transportation officials stated that if their state legislatures reduce their respective department's budget for fiscal year 2010 or 2011, the department may have difficulty maintaining its certified spending levels.

¹³We spoke with 16 state departments of transportation and the District of Columbia's department of transportation. Of the 2 remaining departments of transportation, officials from 1 stated that this prohibition on participating in the fiscal year 2011 redistribution does not provide an incentive for their state to meet its certified maintenance of effort level, while the officials from the other department of transportation did not answer this question.

Education's Guidance Allows States Flexibility in Defining Maintenance of Effort Levels, and the Department Is Developing Plans to Monitor and Enforce State Compliance

Education maintenance of effort provision: The Recovery Act created the State Fiscal Stabilization Fund (SFSF), which included approximately \$48.6 billion to award to governors by formula and another \$5 billion to award to states or school districts as competitive grants.¹⁴ The Recovery Act requires that each state meet maintenance of effort requirements for elementary and secondary (K-12) education and public institutions of higher education (IHE) as a condition of receiving SFSF funds.¹⁵ The Department of Education (Education) required governors in their SFSF application to provide assurances that their state will meet maintenance of effort requirements or that it will be able to comply with waiver provisions. Specifically, in order to meet maintenance of effort requirements, a state must maintain state support for K-12 education and IHEs at least at fiscal year 2006 levels in fiscal years 2009, 2010, and 2011. After maintaining state support at no less than fiscal year 2006 levels, states must use education stabilization funds to restore state funding to the greater of fiscal year 2008 or 2009 levels for state support to K-12 school districts and IHEs in fiscal years 2009 through 2011.¹⁶

Education guidance to states: Education disseminated several guidance documents to states in the spring and summer of 2009 to assist them in defining their maintenance of effort amounts. In determining, for maintenance of effort purposes, the state level of support for K-12 education in fiscal year 2006, Education guidance said states must include funding provided through their primary formulas for distributing funds to school districts. However, Education also allowed states some flexibility in choosing the basis they use to measure maintenance of effort, as well as in what they include or exclude in their maintenance of effort definition. For example, state support for education can be measured on the basis of either aggregate or per-pupil expenditures. Measuring on a per-pupil basis gives more flexibility to states with forecasts of declining student enrollment because they can reduce aggregate state support for education but still meet maintenance of effort requirements on a per-pupil basis. Also, states have the flexibility to include or exclude additional state funding such as state appropriations to local governments that support K-

¹⁴States must use 81.8 percent of their SFSF formula grant funds to support education (these funds are referred to as education stabilization funds) and use the remaining 18.2 percent for public safety and other government services, which may include education. (These funds are referred to as government services funds.)

¹⁵Pub. L. No. 111-5, div. A, title XIV, § 14005(d)(1), 123 Stat. 115, 282-283.

¹⁶Pub. L. No. 111-5, div. A, title XIV, § 14002(a)(2), 123 Stat. 115, 280.

12 education or other support that is not provided through primary funding formulas. By not including education spending beyond funding distributed through primary funding formulas in their definitions of maintenance of effort, states maintain flexibility to reduce expenditures on other categories of education spending and not affect their ability to comply with the maintenance of effort requirement. For IHEs, states have some discretion in how they establish the state level of support, with the provision that they cannot include support for capital projects, research and development, or amounts paid in tuition and fees by students.

If states fail to meet the maintenance of effort requirements for K-12 education or IHEs, Education's guidance directed states to certify that they will meet requirements for receiving a waiver—that is, that total state revenues used to support education would not decrease relative to total state revenues.¹⁷ Because the measure used to determine eligibility for a waiver from maintenance of effort requirements—state revenues used to support education—can be defined differently from the maintenance of effort measure—state support for education—states may have to track both measures to make sure they can meet their assurances. States that need a waiver are directed to submit a separate waiver application to Education.

While states generally are required to maintain state spending at or above fiscal year 2006 levels of state support for education, we found that five states and the District of Columbia reported in the approved applications we reviewed that they would maintain state support above that level in fiscal years 2009 and 2010. This gives them flexibility to reduce state support in fiscal year 2010 to an amount below the fiscal year 2009 level or in fiscal year 2011 below the fiscal year 2009 or 2010 level and still meet the maintenance of effort requirement. Arizona, for example, reported it would maintain state support in 2009 at about \$500 million above the fiscal year 2006 levels. Because Florida reported it could not meet maintenance of effort requirements in fiscal year 2009, the state has applied for a waiver. While New York did not provide estimates of state support for fiscal year 2009, 2010, or 2011 in its application, its governor provided an assurance that the state would maintain state support for education at or

¹⁷Waivers are granted based on a state's total level of support for education as a percent of state revenue, while maintenance of effort levels are based on a selected measure of state spending for education.

above its fiscal year 2006 maintenance of effort level.¹⁸ Table 3 shows, for the states we reviewed and the District of Columbia, the level of state support for elementary and secondary education as required by the state's maintenance of effort calculation. Specifically, the table provides the fiscal year 2006 maintenance of effort level for the states we reviewed and the anticipated amount of state support for education for fiscal years 2009 and 2010 included by states in their application for SFSF.

Table 3: States and the District of Columbia Fiscal Year 2006 Maintenance of Effort Amount and Fiscal Year 2009 and 2010 Anticipated State Support for K-12 Education

Dollars in billions, except for per-pupil amounts

	Fiscal Year 2006 state support for education (state's maintenance of effort level)	Fiscal Year 2009 anticipated state support for education	Fiscal Year 2010 anticipated state support for education
Arizona	\$3.46	\$3.98	\$3.93
California	\$5,527 per pupil	\$5,783 per pupil	\$5,548 per pupil
District of Columbia	\$7,307 per pupil	\$8,585 per pupil	\$8,660 per pupil
Florida ^a	\$9.13	\$8.56	\$8.51
New Jersey	\$8.75	\$9.63	\$9.45
New York ^b	\$19.86	not available	not available
North Carolina	\$5.34	\$6.36	\$5.98

Source: GAO analysis of approved state SFSF applications.

^aFlorida applied for a waiver for 2009 because state support for K-12 education was below the maintenance of effort level.

^bNew York did not provide estimates for state support for education in its application.

Most of the states we reviewed reported additional education spending beyond what was included in maintenance of effort requirements. For example, North Carolina officials told us that in fiscal year 2009 the state spent about \$2 billion on K-12 education programs above its state support for K-12 education based on maintenance of effort calculations. Since these funds do not count as state education support for maintenance of effort determinations, states can reduce these funds without affecting their compliance with SFSF maintenance of effort requirements. However, these other funds would be factored into a state's revenues to support education as a percentage of total state revenues if the state needs to request a waiver from maintenance of effort requirements.

¹⁸Estimates were not required to be included in the SFSF application, and Education officials told us they would collect these numbers when they were available.

Education officials reported they have already received several revised SFSF applications and they expect that the majority of all states will resubmit their SFSF application because most states used their governor's budget proposal, as allowed, in their original application, which often differs from final enacted spending levels. While every state, as part of its initial application for SFSF, had to assure it would either meet the maintenance of effort levels or waiver requirements, Education directed states to amend their SFSF applications to reflect any final budget changes and, in the amended applications, provide a final assurance that they will meet maintenance of effort levels. Specifically, according to Education guidance, a state must amend its SFSF application if there are changes to the reported levels of state support for education that were used to determine the maintenance of effort amount or to calculate the amounts needed to restore state support for education to the fiscal year 2008 or 2009 level. Education officials reported they are continually reviewing the resubmissions to ensure they contain the required assurances from the governor and comply with other requirements. Of the 6 states and the District of Columbia we reviewed, 6 have either resubmitted or plan to resubmit their SFSF application because their level of support for fiscal year 2006 or 2009 had changed.

Two states we reviewed have lowered their calculated fiscal year 2006 level of education support for maintenance of effort purposes. For example, North Carolina officials told us they revised their fiscal year 2006 level of support for maintenance of effort determination from nearly \$7 billion down to about \$5.3 billion, based on guidance from Education, to reflect a change made in the definition of the state's primary funding formula in the state's fiscal year 2010 budget legislation, so that the state has comparable measures of support in both years. California amended its application in May 2009 because the state had originally included about \$2 billion in one-time funds that were actually appropriated in fiscal year 2007 and reduced its maintenance of effort level of support for fiscal year 2006 by this amount. California amended its application again in August 2009 to change its maintenance of effort level from an aggregate measure to a per-pupil basis. California's resubmitted application did not state why the change to a per-pupil basis was made. Officials from California did not offer an explanation of the changes.

Education officials told us they are allowing states to revise their fiscal year 2006 maintenance of effort support levels and will review them to see that they are in compliance with Recovery Act requirements and Education's guidance. However, current guidance from Education does not direct states to include an explanation for changes made to state fiscal

year 2006 maintenance of effort support levels and calculations in their resubmitted application. Rather, states are directed to provide information about what is included in its measure of state support for education. Consequently, revised applications report maintenance of effort support levels and provide information about how states are defining state support, but it may not be readily apparent what funds have been added or removed from one application to the next. For example, California's August revision shows that maintenance of effort is defined on a per-pupil basis, but there is no explanation why they changed this basis or how it compares to its previous maintenance of effort measure.

Education officials said adjustments are being made to fiscal year 2006 maintenance of effort levels because, as state fiscal year 2009 budgets become final, states are attempting to develop equivalent information for both their fiscal year 2006 levels of support calculation and their calculations for fiscal year 2009. Also, according to Education officials, states were initially unsure of precisely what information to include in their maintenance of effort calculations because SFSF is a new program, and, now, given more time, they are making adjustments to their maintenance of effort calculations. Education officials told us that once states submit their final audited fiscal year 2009 figures, they will not be allowed to change their fiscal year 2006 maintenance of effort calculations again.

Education officials told us that four states—Florida, New Jersey, Rhode Island, and South Carolina—have requested maintenance of effort waivers for fiscal year 2009. Florida has requested Education waive maintenance of effort requirements for elementary and secondary education, and New Jersey has requested Education waive maintenance of effort requirements for public IHEs.¹⁹ Education officials told us states will get final waiver approval in the form of a written letter of approval after the states submit final maintenance of effort amounts to Education. Education officials also told us they will work closely with states on a case-by-case basis to ensure that the information submitted complies with the waiver criteria under the Recovery Act.²⁰

¹⁹Rhode Island and South Carolina were not included in the states we reviewed, but Department of Education officials reported that these states are requesting a waiver of maintenance of effort requirements for fiscal year 2009.

²⁰Pub. L. No. 111-5, div. A, title XIV, § 14012, 123 Stat. 115, 285-286.

While four of the six states and the District of Columbia we reviewed reported maintaining state support for education above the required fiscal year 2006 maintenance of effort level,²¹ a recent Alert Memorandum by Education's Inspector General shows that some states have lowered state support for education while continuing to meet maintenance of effort requirements.²² The report noted that Education agreed with this finding and took steps to discourage states from reducing such support. For example, in the proposed application requirements for the Race to the Top program—a competitive grant program under the Recovery Act providing up to \$4.35 billion in funding to states for education reform efforts—Education said that, in making award determinations, it would take into consideration whether states reduced their percentage of total revenues used to support public education for fiscal year 2009 as compared to fiscal year 2008. The Education Inspector General's recommendations to Education included that it should implement a process to track state support for elementary and secondary education, as well as for public IHEs, to determine the extent to which state funding of public education is being reduced.

Education plans for determining compliance with maintenance of effort provision: Education has begun to draft a monitoring plan to oversee and enforce state compliance with maintenance of effort requirements under SFSF. Because SFSF is a new program established under the Recovery Act, Education has yet to finalize monitoring plans and processes. Education officials said they are developing an approach to monitor SFSF maintenance of effort that will include site visits to states to review state documentation of compliance with maintenance of effort requirements. In the interim, Education officials said they are taking several steps both to monitor information they are receiving from states and to provide technical assistance to states. For example, according to Education officials, prior to approving SFSF awards, Education reviewed each state's application to ensure the state complied with statutory requirements to receive the funds.

²¹The level of New York's fiscal years 2009 and 2010 education support is not available. See table 3.

²²U.S. Department of Education, Office of Inspector General, Alert Memo, *American Recovery and Reinvestment Act of 2009, Potential Consequences of the Maintenance of Effort Requirements under the American Recovery and Reinvestment Act State Fiscal Stabilization Fund*, ED-OIG/L03J0011 (Washington, D.C., Sept. 30, 2009).

Education has not yet released guidance to states on the information states need to collect to prove they have met their required maintenance of effort level. Education officials told us that once the monitoring plan is finalized, the guidance will be released to states. However, previously released guidance to states on maintenance of effort instructed that states must maintain adequate documentation that substantiates the levels of state support the state has used in making maintenance of effort calculations. Officials in most states we reviewed for this report told us they plan to document that the state met its maintenance of effort requirements through its state budget and accounting procedures. They said these data would be available when accounting for fiscal year 2009 is closed or finalized.

Education has authority under the General Education Provisions Act²³ to take various actions against states that fail to meet maintenance of effort requirements—even in future years. For example, Education could recover funds if a state is found to be out of compliance with the maintenance of effort requirements. However, Education officials told us they have been working closely with states to ensure compliance with maintenance of effort provisions in an effort to ensure that no state is out of compliance.

HUD Plans to Determine Compliance with Supplement-Not-Supplant Provision through Ongoing Monitoring Efforts

HUD supplement-not-supplant provision: The Recovery Act provided \$4 billion for the Public Housing Capital Fund, a program administered by HUD for the capital and management activities of public housing agencies—\$3 billion to be allocated by formula and \$1 billion to be awarded by competition. HUD allocated nearly \$3 billion to public housing agencies using the same formula for amounts made available in fiscal year 2008 and obligated these funds to housing agencies in March 2009. Then, in September 2009, HUD awarded nearly \$1 billion to public housing agencies based on competition for priority investments, including investments that leverage private sector funding or financing for renovations and energy conservation retrofitting. The Recovery Act requires that these funds be used to supplement and not supplant expenditures from other federal, state, or local sources or funds independently generated by the grantees.²⁴ In contrast to the DOT and Education programs that distribute Recovery Act funds to the states, the

²³20 U.S.C. §§ 1221 *et seq.*

²⁴123 Stat. 214.

Public Housing Capital Fund distributes grants directly to public housing agencies. As a result, the Recovery Act does not have state certification, waiver, or noncompliance provisions as part of the Public Housing Capital Fund's supplement-not-supplant provision.

HUD information to housing agencies: Public housing agencies were to sign an amendment to their annual contributions contracts (ACC), which includes a supplement-not-supplant provision, in order to receive the Recovery Act formula funds. All but 13 of the 3,134 housing agencies offered formula grants under the Recovery Act signed their ACC amendments, enabling HUD to obligate the formula grant funds to them. HUD provided information to housing agencies through a notice and questions included in two sets of frequently asked questions to clarify the supplement-not-supplant provision in the Recovery Act. According to this information, public housing agencies with Public Housing Capital Fund formula grants are to avoid using Recovery Act funds to supplant funds from other sources that have already been obligated when, for example, an agency is accelerating or expanding a project that is already under way. One HUD official stated that the distinction between funds that have already been obligated and funds that have not yet been obligated should be clear to housing agencies. If they had already obligated non-Recovery Act funds for a project, they could not replace those funds with Recovery Act funds.

In addition, the applications for competitive grants included a certification by the housing agencies that they would not use Recovery Act grant funds to supplant other federal, state, or local funds, including tax credit equity, loans, or other nonpublic housing funds. The notice of funding availability also instructed applicants to provide sufficient detail in their project description about how they planned to ensure that Public Housing Capital Funds received as competitive grants would not supplant funds from other sources. In order to receive the competitive grant funds, HUD also had public housing agencies sign a separate ACC amendment that included a supplement-not-supplant provision.

HUD plans for determining compliance with supplement-not-supplant provision: HUD officials stated that monitoring compliance with the supplement-not-supplant provision was included in ongoing monitoring efforts for formula funds provided under the Recovery Act. Specifically, HUD is implementing strategies for monitoring all public housing agencies that received Capital Fund formula grants under the Recovery Act. HUD field staff are using checklists that contain questions about supplementing and not supplanting other sources of funds. These staff are conducting

remote reviews (that is, reviews that do not involve visits to the agency) of all 3,121 housing agencies that received Recovery Act funds using these checklists, as well as on-site reviews of 172 housing agencies designated as troubled performers and of 533 nontroubled housing agencies identified through a risk-based strategy.²⁵ Remote reviews are to focus on grant initiation activities, the annual statement, environmental compliance, procurement, and Recovery Act grant performance, including compliance with the supplement-not-supplant provision. Specifically, the remote review questions related to supplement-not-supplant bring attention to projects that use both Recovery Act funds and other funds and flag them for further review to ensure Recovery Act funds are supplementing the other funds. On-site reviews, which HUD teams conduct on the premises of housing agencies, are to include following up on outstanding items from the remote review. In addition, on-site reviews are to assess whether the housing agency is appropriately and effectively administering its Recovery Act Capital Fund grant. HUD officials stated that all remote reviews of troubled housing agencies have been completed, as have on-site reviews of troubled agencies deemed high risk and medium risk. On-site reviews of troubled agencies deemed low risk are ongoing and will be completed by December 31, 2009, according to HUD officials. HUD officials stated that remote and on-site reviews of nontroubled housing agencies are under way. They said the remote reviews will be completed by January 15, 2010, and the on-site reviews will be completed by February 15, 2010. The results of the reviews of both troubled and nontroubled housing agencies are to be evaluated and summarized in the coming months.

In addition to these monitoring strategies, HUD officials pointed to other opportunities to oversee housing agencies' compliance with the

²⁵HUD developed the Public Housing Assessment System to evaluate the overall condition of public housing agencies and to measure performance in major operational areas of the public housing program. These areas include the financial condition, management operations, and physical condition of the housing agencies' public housing programs. Housing agencies that are deficient in one or more of these areas are designated as troubled performers by HUD and are statutorily subject to increased monitoring. The Recovery Act provided HUD with the authority to decide whether to provide troubled housing agencies with Recovery Act funds. Although HUD determined that troubled housing agencies have a need for Recovery Act funding, it acknowledged that troubled housing agencies would require increased monitoring and oversight to meet Recovery Act requirements. These troubled housing agencies were placed on a "zero threshold" for obligations and expenditures—which means these housing agencies must submit all award documents (i.e., solicitations, contracts, or board resolutions, where applicable) to their HUD field office for approval prior to obligating funds and obtain HUD approval before drawing down funds.

supplement-not-supplant requirement. For example, public housing agencies submitted annual statements outlining their planned uses of Recovery Act funds before being granted access to the funds, which HUD reviewed and approved. In addition, HUD officials told us that development projects are the types of projects that may rely on financing from multiple sources, increasing the risk that a portion of the financing might be supplanted by Recovery Act funds. However, housing agency plans that include funds for development activities trigger a special review by HUD staff, which requires additional levels of approval. As part of that review, the staff examine the plans for funding from outside the Capital Fund to ensure the housing agency is not using Recovery Act funds to supplant other funds. HUD's Office of Inspector General is also conducting reviews of housing agencies' capacity for administering Recovery Act funds.²⁶ One recent report raised questions about whether one housing agency had used Recovery Act funds to supplant other funds.²⁷ HUD officials that administer the Capital Fund stated they are investigating this case to make a separate determination.

HUD officials said they are currently developing a strategy for monitoring the competitive grants that were awarded in September 2009. Monitoring compliance with the supplement-not-supplant provision will be part of that effort. According to HUD officials, in reviewing applications, HUD staff were to examine applicants' plans for ensuring they would not supplant other funds. The monitoring strategy will follow up on the specific commitments each housing agency made in its application, including compliance with what each housing agency said it would do to ensure it was not supplanting other funds. HUD officials said they are currently reviewing the different projects to be funded by Capital Fund Recovery Competition grants to ensure that the appropriate HUD offices are involved in developing and implementing the monitoring strategy.

HUD officials told us they will determine consequences for housing agencies found to be supplanting funds on a case-by-case basis. Possible consequences include recapturing funds, requiring reimbursement of

²⁶According to a HUD Office of Inspector General official, these reviews include determining whether housing agencies supplanted Recovery Act funds.

²⁷HUD Office of Inspector General, *The Puerto Rico Public Housing Administration, San Juan, Puerto Rico, Mismanaged Its Capital Fund Financing Program and Inappropriately Obligated \$32 Million in Recovery Act Funds*, Audit Report No. 2009-AT-1015 (Washington, D.C.: Sept. 30, 2009).

Recovery Act funds from sources that were supplanted, and halting work on projects. Several housing agency officials noted that the potential consequences of failing to comply with the supplement-not-supplant provision were severe enough for them to take care in selecting projects rather than be found in violation of the provision.

Housing agency officials we spoke with at 27 agencies generally did not see supplanting as a major challenge for their housing agency and have not had trouble abiding by the requirement. Officials at several housing agencies noted that because they had many more projects that needed to be done than could be completed with only their regular Capital Fund grants, it was not difficult to identify projects that did not have any other funding. For example, the Boston Housing Authority selected some projects from the second year of its 5-year plan that could now be started earlier than previously planned. Officials from the Housing Authority of LaSalle County in Illinois stated that the Recovery Act funds allowed them to complete more projects from their 5-year plan in less time than they would have completed with regular Capital Fund dollars alone.

In addition, some housing agency officials told us they were keeping track of their Recovery Act funds separately from their regular Capital Fund grants in order to make clear that the Recovery Act funds were not supplanting other funds that had already been obligated. Furthermore, Atlanta Housing Authority officials said they went so far as to closely examine their capital improvement plans and documents for 2008 and 2009 looking for evidence that they had previously planned to use other funds for any of the proposed Recovery Act projects. They found two projects they thought might raise questions and decided to pay for them with other funds. Other housing agency officials stated that annual statements and 5-year plans are reviewed multiple times—by the public, by the housing agency’s board, and by HUD—and that these layers of review serve as a check to ensure that supplanting does not occur.

NTIA Faces Scheduling and Staffing Challenges in Reviewing Applications to Determine If Projects Meet the “But-For” Test

NTIA “but-for” provision: The Recovery Act provided \$4.7 billion for the Broadband Technology Opportunities Program (BTOP), administered by the Department of Commerce’s National Telecommunications and Information Administration (NTIA). BTOP provides grants for infrastructure projects to support the deployment of broadband infrastructure to unserved and underserved areas, to enhance broadband capacity at public computer centers, and to encourage sustainable adoption of broadband service. To be eligible for a BTOP grant, an applicant must, among other things, pass the “but-for test,” meaning that

the applicant must demonstrate that, but for federal assistance, the project would not have been implemented during the grant period.

NTIA guidance to applicants: NTIA provided guidance to applicants on how to comply with this provision through their applications for BTOP. Applications and supporting documentation were due by August 20, 2009, for the first round of funding. NTIA's Notice of Funds Availability (NOFA) for BTOP grants, issued on July 9, 2009, requires grant applicants to provide documentation demonstrating that the project would not have been implemented during the grant period without federal grant assistance.²⁸ This documentation includes, but is not limited to, a denial of funding from a lending institution or the Rural Utilities Service (RUS), a current fiscal year budget that shows a lack of sufficient funding for the project, or a business case that shows the project's viability depends on grant financing. In addition, the July 31, 2009, grant guidelines for BTOP reiterate that grantees must submit the above documentation to demonstrate that the project would not have been implemented during the grant period without federal assistance. Furthermore, NTIA and RUS held 10 informational workshops, throughout the country to explain the program and the application process and to answer questions. At each of these events, NTIA highlighted the "but-for" requirement for attendees. Also, NTIA's Web site includes a list of frequently asked questions about BTOP grants that does not provide information on the "but-for test"; according to NTIA officials, this information does not appear because applicants did not frequently inquire about it.

NTIA plans for determining compliance with "but-for" provision: NTIA originally planned to award the \$4.7 billion in BTOP grant funding through three rounds of applications. However, the agency has combined the second and third rounds in order to expedite the process of awarding grants, as well as give applicants and the agency additional time to prepare and review proposals for the second round. The agency has begun the second phase of a two-step rolling process for reviewing applications for its first round of funding; this second phase includes determining whether applicants have adequately documented that the project would not have been implemented without Recovery Act funds. In the first step of the review process, NTIA will evaluate and score applications based on the criteria set forth in the July 9 Notice of Funds Availability, such as project purpose and project viability. During this initial step, the agency will

²⁸74 Fed. Reg. 33104, July 9, 2009.

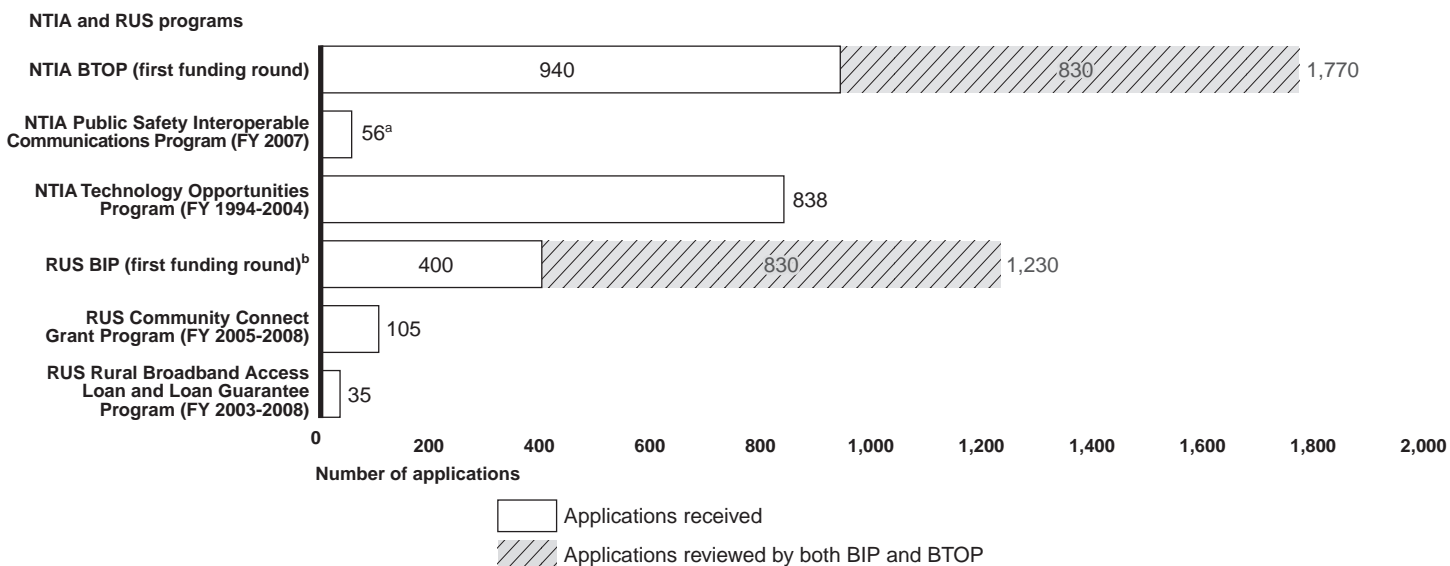
review BTOP applications and will select those applications that will proceed to the second step. The second step—due diligence—involves requesting extra documentation from applicants to confirm and verify information contained in an application, including documentation of the “but-for” test. This two-step process is designed both to reduce the burden of providing unnecessary documentation for applicants that do not meet the basic project purpose and viability criteria and to meet NTIA’s need to efficiently evaluate applications.

We recently reported that NTIA and RUS face scheduling and staffing challenges that have delayed the agency’s review of applications.²⁹ In order to award the \$4.7 billion appropriated for BTOP by September 30, 2010, NTIA and RUS must, within 18 months, establish their respective programs, solicit and evaluate applications, and award funds. In addition under BTOP, NTIA will for the first time award grants to commercial entities. The compressed time frame is complicated by the fact that NTIA and RUS also face an increase in the number of applications that they must review and evaluate in comparison to similar programs. BTOP involves more applications and far more funds than the agency formerly handled through other programs (see fig. 1). For example, the 1,770 applications that NTIA intends to review in the first application round for BTOP far exceeds the annual average of 838 applications for the largest grant program the agency previously administered—the Telecommunications Opportunities Program. Furthermore, the \$4.7 billion that NTIA must award for BTOP is more than three times as much as the about \$1.5 billion that the agency has heretofore awarded annually for all other grant programs combined. NTIA’s initial risk assessment indicated that a lack of experienced and knowledgeable staff was a key risk to properly implementing the program in accordance with the priorities of the Recovery Act. Due to limited staff, NTIA may have an inability to thoroughly review applications and therefore the agency risks funding projects that might not meet the objectives of the Recovery Act’s “but-for” test. In its fiscal year 2010 budget request to Congress, NTIA estimated that it would need 30 full-time-equivalent staff in fiscal year 2009 and an additional 40 staff for fiscal year 2010 to review applications and administer BTOP. To address this issue, we recently recommended that the Departments of Commerce and Agriculture develop contingency plans

²⁹GAO, *Recovery Act: Agencies Are Addressing Broadband Program Challenges, but Actions Are Needed to Improve Implementation*, [GAO-10-80](#) (Washington, D.C.: Nov. 16, 2009).

to ensure sufficient resources for oversight of Recovery Act-funded projects beyond fiscal year 2010, among other things.³⁰ Officials from both departments have agreed with our recommendation and plan to take all appropriate steps to address our concern.

Figure 1: Average Annual Applications for NTIA Telecommunications and RUS Broadband Programs



Source: GAO analysis of NTIA and RUS data.

^aIn 2007, through the Public Safety Interoperable Communications grant program, NTIA coordinated with Department of Homeland Security's grants office to review 56 grant applications from states and territories, representing about 301 individual projects, and awarded almost \$1 billion in grant funds to assist public safety agencies in enhancing communications interoperability nationwide.

^bBroadband Initiatives Program.

While NTIA originally anticipated that it would begin announcing awards on or about November 7, 2009, the agency now estimates that it will begin in December 2009 and will not finish awarding the first round of grants until February 2010. NTIA is taking several steps to address these challenges. According to NTIA officials, the two-step application review process conserves scarce staff resources by screening applications and eliminating those that do not meet the program's criteria, thereby reducing the number of applications subject to a comprehensive review. NTIA has also enlisted the aid of contractors and independent experts to review

³⁰GAO-10-80.

applications and announced that it will award all funds in two rounds of applications, rather than three rounds as originally anticipated. We recently reported that, while these steps address some challenges, the upcoming deadline for awarding funds may pose risks to the thoroughness of the application evaluation process.³¹ In particular, NTIA may lack time to apply lessons learned from the first funding round and to thoroughly evaluate applications for the remaining rounds.

Conclusions

Maintenance of effort and similar provisions are important mechanisms for helping ensure that federal spending achieves its intended effect. Without such spending provisions, recipients may simply substitute federal funds for some of their planned spending for a given program. Therefore this would not increase the overall spending for the program. While these spending provisions are important, our review illustrates the administrative and fiscal challenges in implementing them, both from federal and state perspectives. More than 9 months have elapsed since the passage of the Recovery Act, but federal and state officials have not completed key steps in the implementation of the maintenance of effort or similar provisions, including finalizing state transportation certifications and ensuring transparency of state education support levels, for the covered programs under the Recovery Act with maintenance of effort provisions. These challenges, coupled with the varying requirements of the maintenance of effort and similar provisions we reviewed, raise questions as to whether the provisions will achieve their intended purpose.

The SFSF funds provided under the Recovery Act are intended to play a critical role in helping state and local governments stabilize their budgets by minimizing budgetary cuts in education. The maintenance of effort requirement written into the Recovery Act requires states to maintain a minimum level of state spending on education while addressing educational reforms. The Department of Education has taken important steps to ensure that states are maintaining their maintenance of effort levels. For example, the department provides technical assistance and reviews state applications to ensure compliance with legal requirements. Education does not currently require states to explain why their maintenance of effort levels change—even when states change their fiscal year 2006 maintenance of effort levels, which serve as the states' baseline level for the maintenance of effort requirement in the law. Given that

³¹ [GAO-10-80](#).

states' changes to their fiscal year 2006 maintenance of effort levels affect how much funding states are required to provide to education, providing explanations of why the changes occurred enhances transparency. Since some states have planned to decrease their fiscal year 2006 maintenance of effort funding by over a billion dollars, the public and policymakers alike would benefit from knowing why the decreases occurred and what funding was impacted by the change. Although Education reviews maintenance of effort changes with state officials, it is difficult to monitor changes effectively without explanations. Given the large investment in funding involved, efforts to reinforce transparency could play a crucial role in ensuring that states fulfill their responsibility to maintain state spending on Education.

Recommendation for Executive Action

We recommend that the Secretary of Education take further action to enhance transparency by requiring states to include in their State Fiscal Stabilization Fund applications an explanation of the changes and why they want to change their 2006 maintenance of effort calculations or levels when they resubmit these applications to the Department of Education.

Agency Comments

We provided copies of our draft report to DOT, Education, HUD, and Commerce for review and comment. All four agencies provided e-mail comments.

DOT agreed with our findings and provided technical comments on our discussion of FHWA's plans for finalizing state compliance with maintenance of effort levels. We incorporated DOT's technical comments where appropriate.

Education agreed with our recommendation that it take further action to enhance transparency by requiring states to include an explanation for why they want to change their fiscal year 2006 maintenance of effort calculations or levels when they resubmit applications for the SFSF. Education noted that it has already asked each state amending its SFSF application with regard to level of support to provide a description of the reasons it is changing its level of support for any year covered, and a table showing the revisions across years. In addition, Education officials reported they are revising guidance on amending an application and applying for a maintenance of effort waiver to indicate that a state is expected to provide such a description of its reasons for changing its data on the level of support for any year covered by the SFSF maintenance of effort requirements.

As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies to the appropriate congressional committees, the Director of the Office of Management and Budget, and the Departments of Commerce, Education, Housing and Urban Development, and Transportation. In addition, we are sending sections of the report to the officials in the 16 states and the District of Columbia covered in our review. The report is also available at no charge on the GAO Web site at <http://www.gao.gov>.

If you or your staff have any questions about issues in this report related to the U.S. Departments of Commerce or Transportation, please contact A. Nicole Clowers at (202) 512-2834 or clowersa@gao.gov; for questions about U.S. Department of Education issues, please contact Cornelia Ashby at (202) 512-8403 or ashbyc@gao.gov; and for questions about U.S. Department of Housing and Urban Development issues, please contact Mathew Scirè at (202) 512-8678 or sciremj@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made major contributions to this report are listed in appendix II.

Sincerely yours,

A handwritten signature in black ink that reads "Gene L. Dodaro". The signature is written in a cursive, flowing style with a large, prominent initial "D".

Gene L. Dodaro
Acting Comptroller General of the United States

Appendix I: Objectives, Scope, and Methodology

To determine the programs in the American Recovery and Reinvestment Act of 2009 (Recovery Act) with maintenance of effort or similar requirements, we searched the Recovery Act for maintenance of effort and similar provisions. From this search, we identified 16 programs in the Recovery Act with such provisions. These programs received a total of about \$106.8 billion in appropriations. (See table 4.) We did not include any program with a pre-existing maintenance of effort or similar requirement, and we did not factor in language applying to programs that fall under a maintenance of eligibility clause.¹ Twelve federal agencies administer these 16 programs.

Table 4: Programs and Appropriations, by Agency, with Maintenance of Effort or Similar Provisions in the Recovery Act

Dollars in millions

Agency	Program	Amount appropriated
Department of Education	State Fiscal Stabilization Fund	\$48,600
Federal Highway Administration, Department of Transportation (DOT)	Highway Infrastructure Investment	26,800 ^a
Office of the Secretary, DOT	Supplemental Discretionary Grants for a National Surface Transportation System	1,500
Federal Transit Administration, DOT	Transit Capital Assistance	8,400 ^b
	Fixed Guideway Infrastructure Investment	
	Capital Investment Grants	
Federal Railroad Administration, DOT	Capital Assistance for High Speed Rail Corridors and Intercity Passenger Rail Service	8,000
National Telecommunications and Information Administration, Department of Commerce	Broadband Technology Opportunities Program	4,700
Department of Housing and Urban Development (HUD)	Public Housing Capital Fund	4,000 ^c
Department of Health and Human Services	Payments to States for Child Care and Development Block grants	2,000
National Railroad Passenger Corporation (Amtrak)	Capital Grants	1,300

¹For this report, we did not review maintenance of eligibility provisions for the Medicaid program in the Recovery Act. In order to qualify for Recovery Act Funds for Medicaid, states generally may not apply eligibility standards, methodologies, or procedures that are more restrictive than those in effect under their state Medicaid plans or waivers on July 1, 2008. This maintenance of eligibility provision is different from maintenance of effort provisions in that it does not require a set level of state spending; the increase in the federal share for Medicaid may reduce the funds that states would otherwise have to use for their Medicaid programs.

Appendix I: Objectives, Scope, and Methodology

Agency	Program	Amount appropriated
Federal Aviation Administration, DOT	Grants-in-aid for Airports	1,300^d
	Supplemental Funding for Facilities and Equipment	
Department of Labor	Trade Adjustment Assistance for Communities: Community College and Career Training Grant Program	100^e
	Trade Adjustment Assistance for Communities: Sector Partnership Grant Program	
Maritime Administration, DOT	Supplemental Grants for Assistance to Small Shipyards	100
Total		\$106,800

Source: GAO analysis of the Recovery Act.

Notes: The amounts appropriated in bold text represent the eight programs we selected for review and account for about 94 percent—about \$100.5 billion—of the Recovery Act appropriations to programs with maintenance of effort or similar provisions.

^aThe Recovery Act appropriated \$27.5 billion to the Highway Infrastructure Investment program; however, \$690 million of this amount does not go to states.

^bThe Recovery Act appropriated \$6.9 billion to the Transit Capital Assistance program and \$750 million each to the Capital Investment Grants and Fixed Guideway Infrastructure Investment programs.

^cThe \$4 billion for the Public Housing Capital Fund consists of \$3 billion to be distributed through HUD's regular Capital Fund formula and \$1 billion to be distributed through competitive grants.

^dThe Recovery Act appropriated \$1.1 billion to the Grants-in-aid for Airports program and \$200 million to the Supplemental Funding for Facilities and Equipment program.

^eThe Recovery Act appropriated \$500,000 to the Community College and Career Training Grant Program and \$500,000 to the Sector Partnership Grant Program.

To identify those agencies that received a significant amount of Recovery Act appropriations and whose programs are subject to a maintenance of effort or similar provision, we selected the agencies that received Recovery Act appropriations totaling \$4 billion or more. This threshold captures about 94 percent of the total Recovery Act appropriations—about \$100.5 billion—for programs with maintenance of effort or similar provisions. Eight programs—administered by the Departments of Commerce, Education, Housing and Urban Development, and Transportation—met our selection criteria and in total received Recovery Act appropriations of about \$100.5 billion. Within the Department of Transportation (DOT), four agencies—the Federal Highway Administration (FHWA), the Federal Railroad Administration, and the Federal Transit Administration—administer five of these programs. To describe the maintenance of effort or similar provisions that apply to these eight programs, we reviewed and analyzed the Recovery Act.

To describe the steps that agencies have taken to implement these requirements, we reviewed guidance from the six agencies, including notices published by the Departments of Commerce and Housing and

Urban Development (HUD) on funding availability, guidance issued by DOT in February, May, and September 2009 on maintenance of effort requirements to governors and FHWA division offices, and the Department of Education's guidance to states on the State Fiscal Stabilization Fund program's maintenance of effort requirements. In addition, we interviewed officials at these departments about their guidance and plans, if any, to issue supplemental guidance on maintenance of effort or similar requirements.

To determine how responsible federal agencies are determining whether recipients meet maintenance of effort or similar requirements, we reviewed documents on actions taken by the Departments of Commerce, Education, Housing and Urban Development, and Transportation to monitor state certifications and grant applications. Specifically, we reviewed all 50 states' and the District of Columbia's certification applications to the Secretary of Transportation; State Fiscal Stabilization Fund applications from 6 states and the District of Columbia; and nonprofit organizations' grant applications to the Broadband Technology Opportunities Program. In addition, we reviewed the procedures that these departments used to ensure that the state certifications and grant applications met the maintenance of effort or similar requirements. We also interviewed officials from these departments about their plans for implementing and overseeing states', public housing agencies', and other grantees' compliance with the maintenance of effort or similar requirements in the Recovery Act. Additionally, we interviewed these agencies about their plans to address noncompliance with these requirements.

We also obtained information from selected state departments of education and transportation on their use of the guidance issued by the Departments of Education and Transportation on maintenance of effort requirements—specifically, the state certification process. In addition, we gathered documents from and interviewed state education and transportation officials on the methodology they used to calculate their spending levels and plans to monitor their compliance with the maintenance of effort requirements. We selected the states based on our ongoing Recovery Act bimonthly reporting effort. This effort includes a core group of 16 states and the District of Columbia that we plan to follow over the next few years to provide an ongoing longitudinal analysis of the use of funds provided in conjunction with the Recovery Act. These 16 states and the District of Columbia 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.² From these 16 states and the District of Columbia, we obtained information from 17 departments of transportation, 7 departments of education, and 27 public housing agencies in 10 states.³ These states were selected from our 16 states based on the time constraints of our ongoing Recovery Act bimonthly reporting effort.

²For more information on how we selected these states, see, GAO, *Recovery Act: As Initial Implementation Unfolds in States and Localities, Continued Attention to Accountability Issues Is Essential*, [GAO-09-580](#) (Washington D.C.: Apr. 23, 2009).

³We selected a sample of 47 agencies in our sample of 16 states and the District of Columbia. We selected these locations to obtain a mix of large, medium, and small housing agencies, housing agencies designated as troubled performers by HUD, those to which HUD allocated significant amounts of Recovery Act funding, and housing agencies that had drawn down funds at the time of our selection. See, GAO, *Recovery Act: States' and Localities' Current and Planned Uses of Funds While Facing Fiscal Stresses*, [GAO-09-829](#) (Washington, D.C.: July 8, 2009).

Appendix II: GAO Contacts and Staff Acknowledgments

GAO Contacts

A. Nicole Clowers, (202) 512-2834 or clowersa@gao.gov (U.S. Departments of Commerce and Transportation issues); Cornelia Ashby at (202) 512-8403 or ashbyc@gao.gov (U.S. Department of Education issues); and Mathew Scirè at (202) 512-8678 or sciremj@gao.gov (U.S. Department of Housing and Urban Development issues).

Staff Acknowledgments

In addition to the contacts named above, Sara Vermillion, Assistant Director; Donald Brown; Jay Cherlow; Alexander Galuten; Byron Gordon; Sonya Harmeyer; Cheryl Harris; David Hooper; John McGrail; Sara Ann Moessbauer; Paul Schmidt; and Carrie Wilks made key contributions to this report.

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