

Highway GRANTS 101

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Agenda

- ▶ Background
- ▶ What is a grant?
- ▶ How is grant funding distributed?
- ▶ How much is distributed?
- ▶ When is it distributed?
- ▶ What is a grant obligation?
- ▶ What requirements apply?



Background (Legal Framework)



- ▶ Source Law and Regulations
- ▶ Authorization Acts;
- ▶ Appropriations Acts;
- ▶ Title 23, U.S.C.;
- ▶ Implementing Regulations (23 CFR Highways)
- ▶ 23 CFR 633.102(b) Construction Contract Requirements Form 1273
- ▶ 23 U.S.C 112 (b)(2) 23 CFR Part 172 D & E
- ▶ Title 31 U.S.C. (Money and Finance)
- ▶ Uniform Requirements (Supercircular)
2 CFR 200

What is a Grant

A Federal grant (or award) is the transfer of something of value to the grant recipient the principal purpose of which is to carry out a public purpose of support or stimulation authorized by Congress. (FGCAA of 1977; 31 U.S.C. 6304).

FGCAA (1977)

- ▶ 31 U.S.C 6301-6308 (Codification of the Federal Grant and Cooperative Agreement Act; the sections describe the appropriate use of grant and cooperative agreements versus Federal procurement contracts).
- ▶ Congress sought to achieve uniformity in use of the appropriate instrument.

Two Grant Types: Formula v. Discretionary Grants

- ▶ Grants distributed by statutory formula to a recipient are often referred to as “formula grants,” as the “formula” for grant distribution is generally prescribed by Congress.
- ▶ In contrast, Congress authorizes a Federal agency to competitively award discretionary grants based upon application of discretionary criteria. NSFHP (23 U.S.C. 117); “BUILD.”

Highway Formula Grants

- ▶ Highway formula grants traditionally included weighted distribution factors such as:
 - ▶ 25% based upon total lane mileage of Federal-aid highways in a state compared to lane mileage in all states;
 - ▶ 40% based upon total vehicle miles traveled on Federal-aid highways in the State compared to all States;
 - ▶ 35% based upon estimated tax payments attributable to highway users of the State paid into the Highway Trust Fund compared to estimated tax payments of all States.

Highway Grant Programs

- ▶ Distribution of funds (not up-front cash) is based upon a State's relative share of highway funds, but those relative shares were formerly determined by weighted formulas.
- ▶ National Highway Performance Program (NHPP) (56%);
- ▶ Surface Transportation Block Grant Program (STBG) (28%)
- ▶ Highway Safety Improvement Program (HSIP) (6%);
- ▶ Congestion Mitigation and Air Quality Improvement Program (CMAQ); (6%)
- ▶ Metropolitan Planning Program (< 1%)
- ▶ National Highway Freight Program (< 3%)

When are Federal are Highway Funds distributed?

23 U.S.C. 118 provides for distribution on October 1 of the Fiscal year for which they are authorized.

How much is distributed to States via Statutory Formula?

\$41B in FY 2018

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

N4510.819 - TABLE 1

FY 2018 FEDERAL-AID HIGHWAY PROGRAM APPORTIONMENTS UNDER
FIXING AMERICA'S SURFACE TRANSPORTATION (FAST) ACT
(before post-apportionment set-asides; before penalties; before sequestration)

State	National Highway Performance Program	Surface Transportation Block Grant Program	Highway Safety Improvement Program	Railway-Highway Crossings Program	Congestion Mitigation & Air Quality Improvement	Metropolitan Planning	National Highway Freight Program	Apportioned Total
Alabama	472,656,264	236,070,540	47,031,018	4,838,120	11,780,088	3,174,344	23,042,088	798,592,462
Alaska	299,087,707	149,905,722	31,648,783	1,175,000	28,416,850	2,340,922	15,221,384	527,794,368
Arizona	427,092,448	214,447,879	44,009,970	2,859,010	53,589,810	6,041,226	22,133,009	770,153,362
Arkansas	319,815,727	159,841,620	31,138,303	3,958,166	12,715,667	1,773,785	15,736,124	544,976,392
California	1,995,175,574	1,008,006,516	202,875,230	16,074,659	479,213,980	51,654,054	110,394,042	3,863,394,035
Colorado	308,612,392	155,106,401	30,394,823	3,472,196	43,678,020	5,480,180	16,144,909	562,686,921
Connecticut	287,127,068	144,424,993	30,149,166	1,360,061	45,684,605	4,784,641	15,175,264	528,685,798
Delaware	98,687,738	49,654,541	9,654,959	1,175,000	12,042,150	1,836,651	5,103,972	178,058,011
Dist. of Col.	93,618,079	46,986,509	9,088,616	1,175,000	10,431,320	1,832,391	4,811,446	167,953,361
Florida	1,181,852,878	590,223,789	120,571,471	9,124,662	14,041,109	21,375,727	57,144,370	1,994,334,008
Georgia	770,871,160	386,339,946	76,153,672	8,441,487	70,164,746	8,021,233	39,137,660	1,359,129,884
Hawaii	99,550,294	49,950,883	9,749,616	1,175,000	10,996,602	1,805,529	5,104,233	178,031,957
Idaho	172,297,028	86,287,314	17,010,373	1,897,444	13,231,778	1,671,541	8,572,724	301,068,202
Illinois	820,171,126	412,227,610	79,085,168	10,920,132	113,886,001	17,615,997	42,833,867	1,496,539,901
Indiana	571,178,733	289,164,276	55,001,804	7,679,196	48,852,428	5,403,661	28,887,162	1,002,977,210
Iowa	303,613,999	151,742,613	27,816,762	5,501,682	11,863,664	2,047,817	14,826,458	517,312,715
Kansas	232,640,719	118,303,646	19,212,082	6,317,831	9,826,699	2,010,938	11,464,429	397,776,344
Kentucky	411,599,476	205,667,729	41,352,779	3,816,008	14,146,244	2,615,344	20,184,405	899,381,985
Louisiana	435,736,299	217,690,529	43,456,533	4,356,021	11,819,761	4,438,553	21,271,573	738,774,289
Maine	109,355,530	54,841,091	10,700,822	1,299,817	10,632,983	1,901,829	5,572,825	194,304,897
Maryland	342,132,104	172,152,918	35,107,844	2,437,616	55,447,069	7,159,191	18,113,268	632,550,930
Massachusetts	338,490,073	170,638,084	34,560,262	2,586,162	65,489,139	9,280,327	18,245,773	639,295,840
Michigan	613,783,927	308,221,850	59,411,800	7,844,839	76,419,730	10,691,032	31,790,511	1,108,283,489
Minnesota	390,284,037	195,550,297	36,563,460	6,263,983	33,277,126	4,720,499	19,745,356	668,384,756
Mississippi	298,878,987	149,372,577	29,170,256	3,628,624	11,595,038	1,755,601	14,956,844	509,087,926
Missouri	582,771,782	291,345,086	58,141,824	5,811,353	24,340,225	5,366,254	28,710,294	998,486,818
Montana	249,791,674	124,889,537	25,397,212	2,014,841	15,372,903	1,856,073	12,457,014	431,879,254
Nebraska	175,853,476	87,997,474	15,531,477	3,768,524	10,623,571	1,711,112	8,763,663	304,247,367
Nevada	207,232,936	104,253,267	21,560,672	1,175,000	33,631,893	3,389,070	10,972,843	382,221,701
New Hampshire	97,178,733	48,763,842	9,489,360	1,175,000	10,688,775	1,632,076	4,990,128	173,915,712
New Jersey	556,074,579	281,258,573	57,333,425	3,909,460	107,488,643	12,852,466	30,086,846	1,050,984,021
New Mexico	224,828,751	112,447,918	22,914,918	1,757,713	11,785,374	1,661,729	11,149,420	386,545,823
New York	930,229,918	469,168,438	95,682,088	6,401,027	189,169,210	25,782,234	50,422,818	1,766,856,733
North Carolina	625,341,414	313,293,834	61,705,746	6,919,008	52,923,950	6,005,271	31,626,904	1,097,816,127
North Dakota	149,775,636	74,999,433	12,544,862	3,891,465	10,863,479	1,733,379	7,519,565	261,327,819
Ohio	781,419,236	392,402,389	76,675,139	9,077,543	98,880,323	11,969,514	40,521,640	1,410,935,784
Oklahoma	393,842,854	196,684,815	37,711,248	5,486,985	12,138,691	2,669,400	19,261,328	667,576,430
Oregon	302,556,585	151,462,262	30,101,492	3,100,964	20,033,398	3,737,146	15,131,579	526,123,426
Pennsylvania	965,629,277	484,521,118	99,039,626	6,928,302	107,909,741	13,391,248	49,637,689	1,727,056,799
Rhode Island	130,930,517	65,603,862	13,193,271	1,175,000	10,770,388	1,917,209	6,612,379	230,202,626
South Carolina	414,801,951	207,314,568	41,028,053	4,503,146	13,526,988	3,251,917	20,323,955	704,850,576
South Dakota	170,013,938	85,138,515	16,017,973	2,539,296	12,867,087	1,824,391	8,545,900	296,647,082
Tennessee	508,561,706	255,170,084	50,871,769	5,047,360	38,250,390	4,962,959	25,622,278	889,486,516
Texas	2,182,703,130	1,093,528,606	220,002,847	19,526,252	179,290,750	26,649,473	110,224,954	3,631,926,014
Utah	210,095,715	105,179,508	21,315,155	1,740,877	13,341,201	3,345,549	10,489,966	365,507,771
Vermont	119,842,188	60,116,299	11,976,442	1,175,000	12,232,379	2,164,258	6,124,954	213,631,530
Virginia	605,718,519	303,644,740	61,748,933	4,722,411	56,710,731	7,805,219	30,800,990	1,071,151,543
Washington	401,815,592	201,499,104	39,728,837	4,366,470	38,157,729	7,559,405	20,448,889	713,575,916
West Virginia	267,204,200	133,656,075	27,299,547	2,023,351	14,789,983	1,757,369	13,274,794	480,005,319
Wisconsin	457,209,016	228,811,445	44,163,918	6,010,044	28,291,281	4,720,096	22,805,523	792,011,303
Wyoming	154,934,653	77,567,163	15,827,476	1,175,000	10,760,248	1,632,200	7,763,982	269,660,722
Apportioned Total	23,283,553,053	11,668,517,628	2,317,934,401	235,000,000	2,402,948,048	342,733,147	1,189,833,898	41,420,520,075

Requirements: Grant Obligation

A definite commitment that creates a legal liability of the Federal government, or a legal duty on the part of the United States that could mature into a legal liability by virtue of actions on the part of the grantee. A Federal agency incurs a grant obligation, when it awards a grant under a grant agreement. The standards for the proper recording of obligations are found in section 1501 of title 31, U.S.C. (and for FHWA funded capital projects 23 U.S.C. 106 (a)(3)). See also OMB Circular No. A-11.

Requirements: The Obligation Limitation (Ceiling)

The sum total of Federal Highway obligations subject to the annual congressional ceiling (obligation limitation) on obligations is \$44.2 B for FY 2018. (This excludes programs exempt from obligation ceiling, such as emergency relief).

Requirements: Contract Authority Plan AHEAD

Contract authority is a form of budget authority under which Congress authorizes a federal agency to make funds available for obligation (a legal commitment of the government), but not expenditure. 2 U.S.C 621(2)(A)(iii). The monies to pay for these legal commitments are appropriated separately (liquidation of contract authorization) and are available indefinitely. See *Train v. City of NY*, 420 U.S. 35 (1975) Footnote 2 of the decision.

Requirements: Federal Appropriations 101

- ▶ Appropriations, including highway contract authority grant funds must be obligated:
- ▶ (1) For the authorized purpose of the grant (See 31 U.S.C. 1301(a));
- ▶ (2) Within the time period of availability for obligation (See 31 U.S.C. 1502);
- ▶ (3) And, shall not exceed the amount available for obligation (See 31 U.S.C. 1341(a)(1)(A)).

Requirements: Prior Incurred Costs

- ▶ Costs incurred prior to obligation/ authorization are non participating as the costs are not associated with the grant obligation/ cost objective (statutory exception for advance construction authorization provided an authorization is entered into between the state and FHWA).
- ▶ Costs incurred not in compliance with federal and state law and regulations are non participating.
- ▶ Exceptional circumstances exception authority under 23 CFR 1.9(b).

Requirements: Recording GRANT Obligations (projects)

For FHWA funded capital projects, the entry into a project agreement with the State DOT based upon approved plans, specifications and estimates is considered a contractual obligation of the Federal government for the payment of the Federal share of the cost of the project (23 U.S.C. 106(a)(3) and 31 U.S.C 1501(a)(5)(B)-(C)).

Requirements: Timely Obligation

Appropriations that remain unobligated at the end of the time period for which they were made available for obligation, expire or “lapse” for obligational purposes (see 23 U.S.C. 118 (b)).



Requirements: Money and Finance (Transfers to Transit)

- ▶ A “transfer” is a shifting of budgetary resources from one appropriation account to another. Transfer is prohibited absent specific statutory authority. (31 U.S.C. 1532).
- ▶ 23 U.S.C. 104(f)(1)(A) authorizes transfer of highway funds for transit projects or transportation planning. Upon transfer to FTA, funding is administered by FTA under chapter 53 of title 49, U.S.C. (except for Non-Federal share, which is established by title 23).

Requirements: Highway Construction Contracts 23 CFR 633

- ▶ Form 1273 required construction requirements shall be physically incorporated into each Federal-aid highway construction contract. See <https://www.fhwa.dot.gov/programadmin/contracts/1273/1273.pdf>
- ▶ Employment; prevailing wages;
- ▶ Materials/ Supplies;
- ▶ Subletting;
- ▶ False statements; termination;

Requirements: Government-Wide Federal Grant Regulations



- ▶ Supercircular 2 CFR 200 General Requirements
- ▶ Federal Cost Principles (2 CFR 200, Subpart E)
- ▶ Audit Requirements (2 CFR 200, Subpart F)
- ▶ DOT adoption 2 CFR 1201

Requirements: Key provisions

- ▶ Financial Administration (2 CFR 200.302)
- ▶ Payment (2 CFR 200.305); 23 U.S.C. 121
- ▶ Cost Sharing (2 CFR 200.306); 23 U.S.C. 120
- ▶ Program Income (2 CFR 200.307); 23 U.S.C. 156;
23 CFR 710
- ▶ Equipment (2 CFR 200.313)
- ▶ Procurement (2 CFR 200.317; 2 CFR 1201.317); 23
U.S.C. 112
- ▶ Financial Reporting (2 CFR 200.327)
- ▶ Records Retention & Access (2 CFR 200.333-337)
- ▶ Cost Allowability (2 CFR 200.403-405)



Requirements: Uniformity for discretionary awards

- ▶ Notice of Funding Opportunity for Discretionary Awards governed by 2 CFR 200.303
- ▶ Appendix I to 2 CFR 200
- ▶ Provides a Uniform Framework for Discretionary Grants Awarded by the Federal government.

Requirements: Cost Composition



- ▶ Allowable costs are of two types, direct and indirect. Direct costs are items that are specifically identifiable and attributable to a particular final cost objective (e.g. construction of a highway segment).
- ▶ Indirect costs are costs incurred for common objectives which cannot be directly charged to any single cost objective.

Requirements: Cost Recovery and Improper Payments

The United States “has a reversionary interest in the unencumbered balances of such grants, including any funds improperly applied.” 42 Comp. Gen. 289, 294 (1962). See *also* B-198493, July 7, 1980. See also Improper Payment provisions, Section 187 of the DOT Act.

Requirements: State Sponsored Conferences

- ▶ Allowability of Federal grant costs is governed by Cost Principles in the absence of agency regulation.
- ▶ Subject to Basic Guidelines necessary and reasonable for proper administration of the grant) the following selected costs are covered:
 - ▶ Meeting and Conference Costs (2 CFR 200.432) where technical information is exchanged-- costs of meals , transportation, and “costs incidental to the meeting are allowable.” Should not double count per diem (under transportation) and also cover meal costs, but incidental costs like break costs would normally be considered incidental.
 - ▶ ALCOHOLIC Beverages (unallowable);200.423
 - ▶ Entertainment Costs (social/ event costs are unallowable); 200.438.
 - ▶ “WASHINGTON POST TEST”

Requirements: Defense of Civil Proceedings (2 CFR 200.435)

- ▶ Reasonable and necessary costs that include services of in-house, or private counsel, or others engaged to assist the non-Federal entity that is associated with a judicial or administrative proceeding and in furtherance of a grant objective (e.g. highway construction project challenged by opponents), not unallowable under 200.435(b) are allowable under 200.435(e).
- ▶ Proceedings commenced by a State or local government may be eligible if authorized in writing or a specific term of the grant award (2 CFR 200.435(d)).

Summary

- ▶ There is a legal foundation that underpins the award of Federal financial assistance.
- ▶ Highway funding provides certainty for project planning purposes given 5-6 year time horizon for each highway authorization act and via “contract authority” distribution of funding, but may be temporarily slowed by CR limits.
- ▶ The three elements of legal availability under appropriation law: time, purpose and amount apply to grants. Review program statutes and regulations and 2 CFR 200, which address these elements.
- ▶ GAO’s Redbook guidance (Chapter 10) although not legally binding on the executive branch is often persuasive. Congress will look to GAO to determine whether an agency is appropriately executing financial statutes and grants.

Questions

Cr.
Cr.



U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

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**FY 2018 FEDERAL-AID HIGHWAY PROGRAM APPORTIONMENTS UNDER
FIXING AMERICA'S SURFACE TRANSPORTATION (FAST) ACT
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California	1,995,175,574	1,008,006,516	202,875,230	16,074,659	479,213,960	51,654,054	110,394,042	3,863,394,035
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Minnesota	390,264,037	195,550,297	36,563,460	6,263,983	33,277,126	4,720,499	19,745,356	686,384,758
Mississippi	298,878,987	149,372,577	29,170,255	3,628,624	11,585,038	1,755,601	14,696,844	509,087,926
Missouri	582,771,782	291,345,086	58,141,824	5,811,353	24,340,225	5,366,254	28,710,294	996,486,818
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Nebraska	175,853,476	87,997,474	15,531,477	3,766,624	10,623,571	1,711,112	8,763,663	304,247,397
Nevada	207,232,936	104,253,287	21,566,672	1,175,000	33,631,893	3,389,070	10,972,843	382,221,701
New Hampshire	97,178,733	48,763,642	9,489,360	1,175,000	10,686,775	1,632,076	4,990,126	173,915,712
New Jersey	558,074,579	281,258,573	57,333,425	3,909,490	107,488,643	12,852,466	30,066,845	1,050,984,021
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North Dakota	149,775,636	74,999,433	12,544,862	3,891,465	10,863,479	1,733,379	7,519,565	261,327,819
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Oregon	302,556,585	151,462,262	30,101,492	3,100,964	20,033,398	3,737,146	15,131,579	526,123,426
Pennsylvania	965,629,277	484,521,118	99,039,526	6,928,302	107,909,741	13,391,246	49,637,589	1,727,056,799
Rhode Island	130,930,517	65,603,862	13,193,271	1,175,000	10,770,588	1,917,209	6,612,379	230,202,826
South Carolina	414,901,951	207,314,568	41,028,053	4,503,146	13,526,988	3,251,917	20,323,955	704,850,578
South Dakota	170,013,938	85,138,515	16,017,973	2,639,298	12,667,067	1,824,391	8,545,900	296,847,082
Tennessee	509,561,706	255,170,064	50,871,769	5,047,360	38,250,380	4,962,959	25,622,278	889,486,516
Texas	2,182,703,130	1,093,528,606	220,002,847	19,526,252	179,290,750	26,649,473	110,224,954	3,831,926,012
Utah	210,095,715	105,179,508	21,315,155	1,740,677	13,341,201	3,345,549	10,489,966	365,507,771
Vermont	119,842,198	60,116,299	11,976,442	1,175,000	12,232,379	2,164,258	6,124,954	213,631,530
Virginia	605,718,519	303,644,740	61,748,933	4,722,411	56,710,731	7,805,219	30,800,990	1,071,151,543
Washington	401,815,592	201,499,104	39,728,637	4,366,470	38,157,729	7,559,495	20,448,889	713,575,916
West Virginia	267,204,200	133,656,075	27,299,547	2,023,351	14,789,963	1,757,389	13,274,794	460,005,319
Wisconsin	457,209,016	228,811,445	44,163,918	6,010,044	28,291,261	4,720,096	22,805,523	792,011,303
Wyoming	154,934,653	77,567,163	15,827,476	1,175,000	10,760,248	1,632,200	7,763,982	269,660,722
Apportioned Total	23,263,553,053	11,668,517,528	2,317,934,401	235,000,000	2,402,948,048	342,733,147	1,189,833,898	41,420,520,075

APPROVED EFFECTIVE:

FEDERAL HIGHWAY ACTING ADMINISTRATOR