BATIC INSTITUTE

AN AASHTO CENTER FOR EXCELLENCE

Advance Construction

Research Brief

March 2019

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Introduction

Purpose

The Build America Transportation Investment Center (BATIC) Institute is an AASHTO Center for Excellence that promotes public sector capacity building in the analysis, understanding, and use of project finance techniques through a program of training, sharing of best practices, and technical assistance to all state departments of transportation and their local partner agencies.

One initiative of the BATIC Institute is to conduct brief research projects to address specific issues that have been raised by finance officials of the state transportation departments. The states have expressed an interest in updating the AASHTO report on the Use of Advance Construction (AC) in Financing Transportation Projects issued in 2011 with a specific focus on the states' current use of AC in light of next year's scheduled rescission of federal funds and the expiration of the Fixing America's Surface Transportation (FAST) Act.

Background

As described more fully in the 2011 report, AC has been a part of highway legislation since 1956, but has undergone numerous revisions over the years. In earlier years, AC only applied to the Interstate program and could be used only when the state lacked sufficient funds to authorize a project at the end of a federal fiscal year. Any AC authorized had to be converted (obligated) within 30 days after the beginning of the new fiscal year. Over time, the program was expanded to include most federal-aid projects and has became more flexible, allowing states to use the provision to initiate projects earlier and to better manage cash flow.

AC provides the states with no additional funding and is primarily an alternative project approval method. It provides an exception to the general rule that requires federal funds to be available for the full federal share of a project at the time a project agreement is executed. When a project agreement for an AC project is executed, the state acknowledges that no federal funds are being committed and that no future commitment of federal funds is being made to fund the AC portion of the project. This places some level of risk on the state to ensure that funds are available as necessary to pay for project costs.

The primary advantage of the program was realized more fully when federal law allowed for partial conversions of AC projects. By not having to obligate the full federal share of the project in one lump sum, states were able to align conversions to track with cash outlays on specific projects. This was critical for states to participate in the GARVEE (grant anticipation revenue vehicle) Program where federal funds are committed to pay for debt service on financing instruments that may span many years after project completion.

Federal Requirements

The AC program is authorized in section 115 of Title 23, United States Code (see Appendix A). Regulations are found in 23 Code of Federal Regulations, Part 630, Subpart G (see Appendix B).

The primary guidance relating to AC is contained in FHWA's Project Funds Management Guide for State Grants dated May 23, 2018.

State of Practice

The following charts depict the state of practice in AC usage by departments of transportation and are based on data provided by FHWA.

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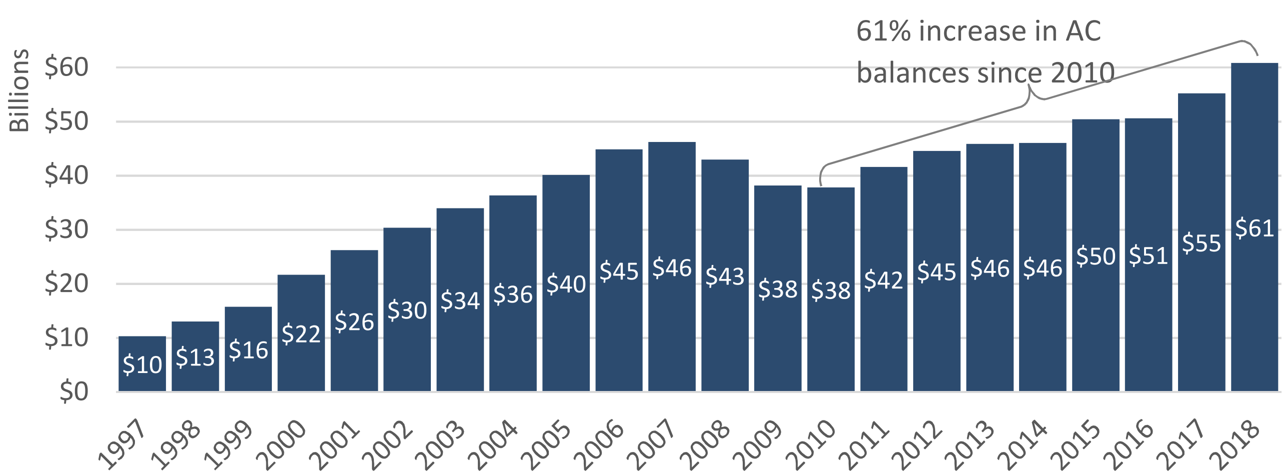
The 2011 report analyzed AC through the federal fiscal year 2010 at which point the aggregate balance of AC was trending downward. This reduction in AC was attributed to the uncertainty of future federal legislation, the use of continuing resolutions, the economic downturn, and a rescission in contract authority.

The federal authorization act, Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), expired on September 30, 2009 and was followed by a series of short-term extensions until the subsequent authorization act, Moving Ahead for Progress in the 21st Century Act (MAP-21), was enacted on July 6, 2012. SAFETEA-LU required a rescission of $8.7 billion in contract authority on September 30, 2009.

It appeared at the time that these factors were causing the states to reduce AC balances. Another factor, not mentioned in the 2011 report, that may have impacted the states' use of AC in 2009-2010 was the enactment of the American Recovery and Reinvestment Act enacted on February 17, 2009. This act provided $27 billion for roads and bridges for ready-to-go projects.

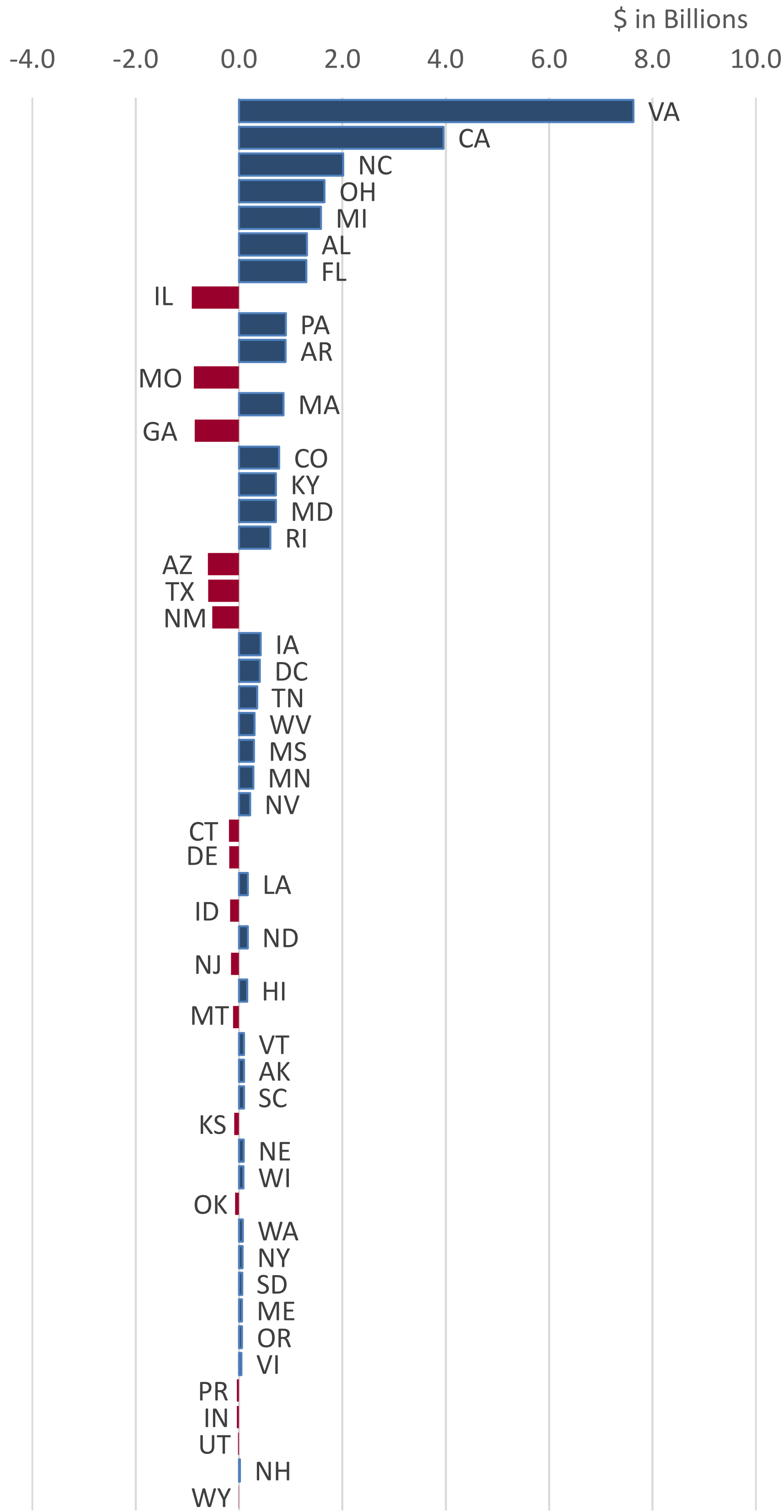
This study shows that the downturn was short-lived. The AC balances increased in 2011 and have continued to trend upward through 2018. Whatever the reasons for the reductions in the reduced AC balances in 2008-2010, it appears now that states are dealing with many of the same issues (e.g., uncertain future legislation, rescission of contract authority) by increasing their use of AC. Some states say that AC helps them to manage short-term funding acts such as continuing resolutions and better position themselves to more effectively deal with a rescission of contract authority.

Total Advance Construction Balance Nationwide (1997-2018)

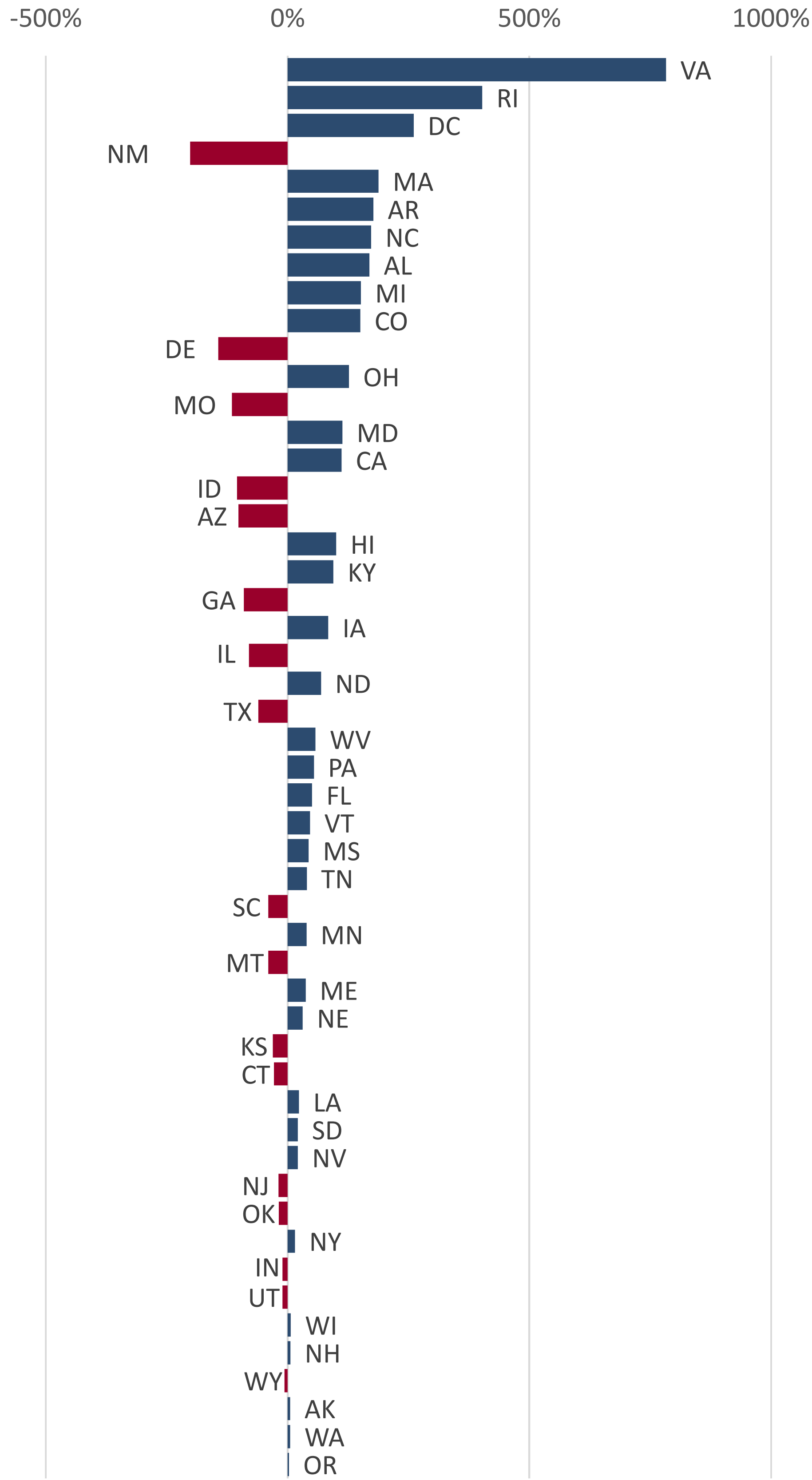


The following charts show that most states have increased their AC balances since 2010 both in actual amounts and as a percentage of obligation limitation.

Change in Advance Construction Balance (2010 to 2018)



Change in Advance Construction Balance as % of Annual Obligation Limitation (2010-2018)



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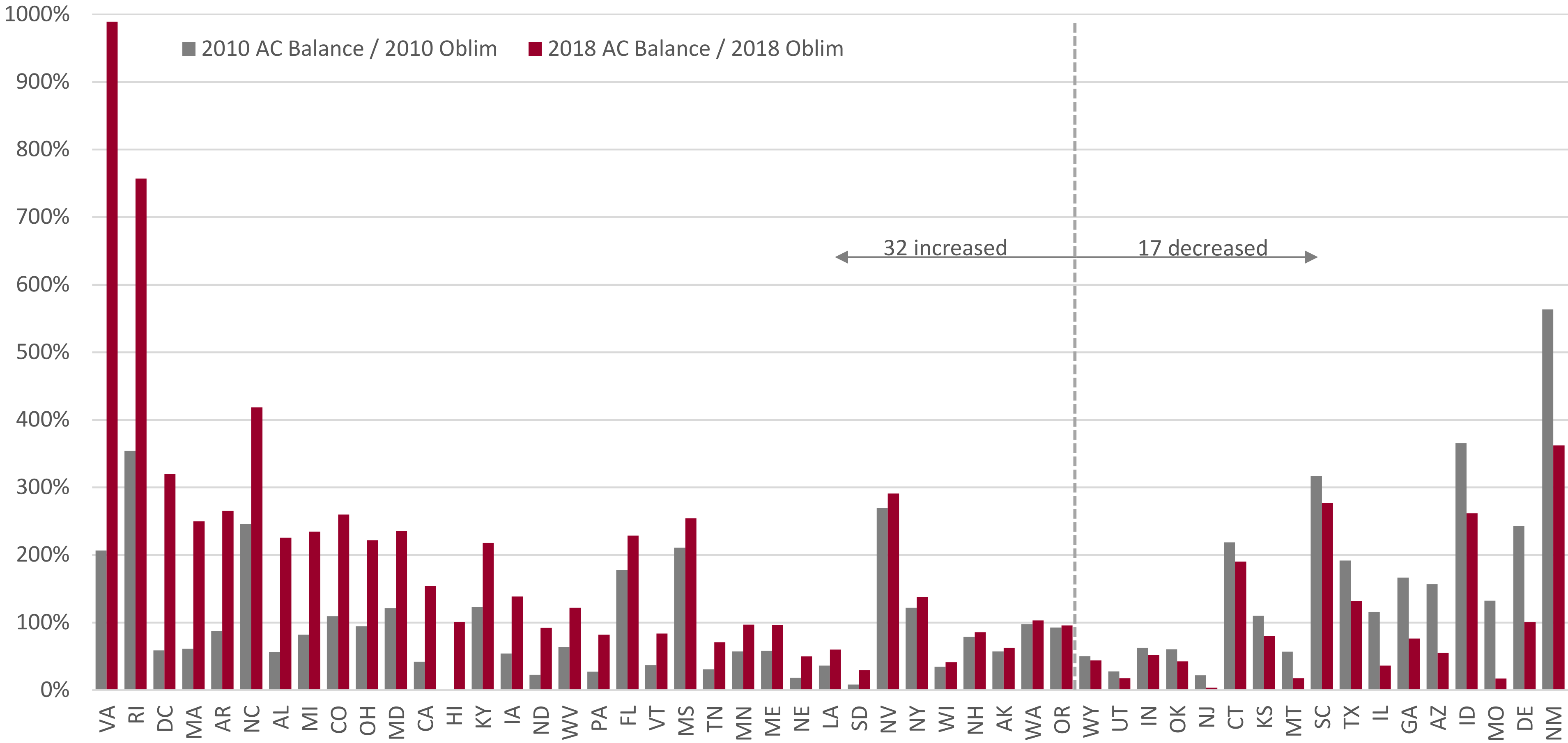
Advance Construction Balance as % of Obligation Limitation (2010 and 2018)



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State Surveys

A survey was provided to ten states based on three criteria. The first group of three states had significant increases in the amount of AC over the last eight years. The second group of four states had significant decreases in the amount of AC over the last eight years. The third group of three states had maintained a relatively large balance of AC, exceeding 200% of each state's formula distribution of obligation authority.

Summary of Survey Responses

Two states that increased their AC amounts since 2010 were looking to maximize flexibility in managing federal funds, improving their ability to compete for August redistribution. The increase in one of these states was related to an expanded GARVEE bond program and a broad use of AC on public-private projects and large statewide contracts. The increased AC in the third state related to the issuance of GARVEE bonds on a large bridge project.

The states that reduced AC amounts reported that:

- Following a large GARVEE bond issue, the state was drawing down its AC balance in preparation for another large project
- The state had fewer projects of the type that are generally authorized as AC.
- The decrease results from the repayment of GARVEE bonds following a large borrowing prior to 2010 and a decline in its construction program with most projects now funded on a pay-go basis
- The state's AC balance has declined because of its efforts to fully utilize its obligation authority.

The states maintaining a high level of AC say that it provides greater flexibility in using obligation authority, especially when federal funding is provided incrementally under continuing resolutions. AC also facilitates management of cash flow and allows for the completion of large projects with the use of GARVEE bonds.

The states view the expiration of the FAST Act on September 30, 2020 as a low to medium risk and generally expect no change in their use of AC. Two states indicated they were likely to increase the level of AC to provide more flexibility in the case of federal funds interruptions. Only one state responding to the survey believes it would face a financial hardship if authorizing legislation were to expire because it relies heavily on federal funds.

The states do not foresee any change in their AC balances as a result of the funding rescission scheduled for July 1, 2020. Some states indicated that AC authorization may be directed to programs not subject to the rescission with AC conversions focused on programs subject to rescission.

Most states reported no issues with incorporating AC projects and AC conversions into the STIP. Some states only amend the STIP annually, while others might amend four or five times a year. One state chooses to show all projects, including AC projects, as fully funded projects. One state said that including specific information on AC projects is difficult with amendments required when continuing resolutions are approved. The state suggested increased flexibility and more consistency among FHWA division offices.

FHWA offers the following guidance regarding the inclusion of AC in the STIP/TIP:

1. Prior to Federal authorization of a project as AC, the project must be included in the Federally-approved STIP [see 23 CFR 630.705]. The project will be demonstrated as supporting the fiscally constrained element of the STIP using all or some combination of State, local and private funds. The financial limit on the amount of AC is set by the State's or MPO's ability to demonstrate fiscal constraint of the STIP or TIP respectively.
2. Generally, when an AC project is converted to a federally funded project, the STIP will document the full or partial conversion of the project as an individual project or as part of a project grouping. This project or group of projects needs to meet all STIP/TIP requirements, including the indication of the Federal funding category(ies) that are intended to be used for the conversion. Fiscal constraint must be demonstrated for the individual categories of Federal-aid funds. The amount of conversion is limited by the amount of apportioned Federal-funds available in the category to be converted and the amount of obligation authority available at the time of the conversion. As with any project, it should be noted that the State is not locked into the category of funds identified in the approved STIP/TIP. However should the approved AC "conversion" substantially change the current STIP/TIP's fiscal constraint determination; the STIP/TIP may need to be amended. The fiscal constraint determination should be supported by showing the individual project or group of project conversions in the STIP/TIP or by showing the total amount and source(s) of Federal funds to be converted as part of the financial plan for the STIP/TIP.

The guidance states that conversions may be identified in the STIP as a project grouping. The guidance also states that a STIP amendment may be needed when there is a “substantial” change in the current fiscal constraint determination. It appears these provisions serve to reduce the number of necessary amendments.

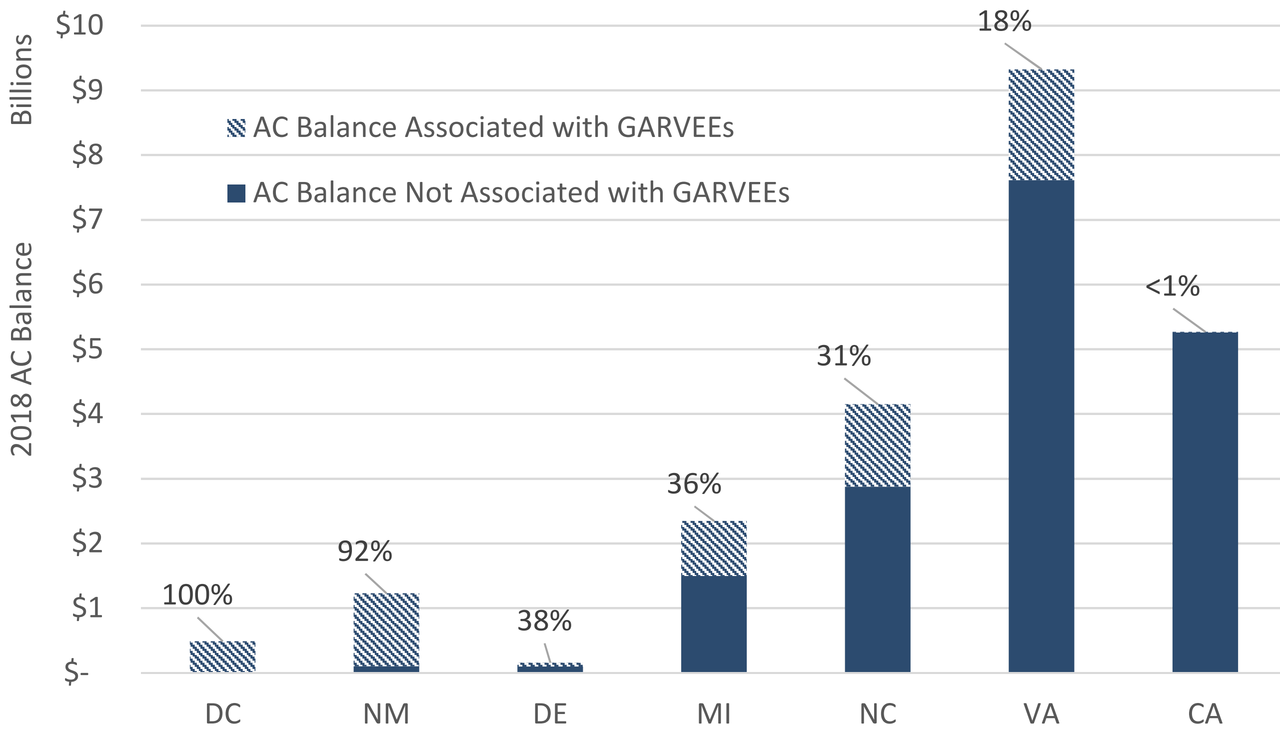
Five of the ten states are using AC to minimize the number of inactive federal projects. Inactive projects are defined as those with unexpended federal obligations for which no expenditures have been charged against the federal funds within the past 12 months. AC allows a state to obligate federal funds to more closely coincide with expenditures.

Most of the states do not use AC for local projects except in special cases – for example, in funding a large project, when obligation authority is unavailable, or when there is risk of generating an inactive project. One state requires the local entity to use its local funds first before converting AC.

Only two states indicated they have formal policies relating to the use of AC and in one state, AC is part of a broader policy regarding cash balances and cash flow. The states are satisfied with these policies. One state has an informal policy and another state does not see a policy as being useful.

The following chart shows the amount of AC associated with GARVEE bonds. AC is an important element in the issuance of GARVEE bonds because it allows a state to obligate its debt service payments in the year the payments are due. In one case, a state without GARVEE bonds used AC for state bonded projects with conversions coinciding with the debt service payments. The state saw this as a more effective way of managing its budget.

AC Associated with GARVEEs as a Percentage of 2018 Balance



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Appendix A – Section 115 of Title 23, United States Code

115. Advance construction

(a) IN GENERAL.—The Secretary may authorize a State to proceed with a project authorized under this title—

> (1) without the use of Federal funds; and
>
> (2) in accordance with all procedures and requirements applicable to the project other than those procedures and requirements that limit the State to implementation of a project—
>
> > (A) with the aid of Federal funds previously apportioned or allocated to the State; or
> >
> > (B) with obligation authority previously allocated to the State.

(b) OBLIGATION OF FEDERAL SHARE.—The Secretary, on the request of a State and execution of a project agreement, may obligate all or a portion of the Federal share of a project authorized to proceed under this section from any category of funds for which the project is eligible.

(c) INCLUSION IN TRANSPORTATION IMPROVEMENT PROGRAM.—The Secretary may approve an application for a project under this section only if the project is included in the transportation improvement program of the State developed under section 135(f).

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Appendix B – 23 Code of Federal Regulations, Part 630, Subpart G

23 CFR 630G - Advance Construction of Federal-Aid Projects

§630.701 Purpose.

The purpose of this subpart is to prescribe procedures for advancing the construction of Federal-aid highway projects without obligating Federal funds apportioned or allocated to the State.

§630.703 Eligibility.

(a) The State Department of Transportation (DOT) may proceed with a project authorized in accordance with title 23, United States Code:

(1) Without the use of Federal funds; and

(2) In accordance with all procedures and requirements applicable to the project other than those procedures and requirements that limit the State to implementation of a project—

(i) With the aid of Federal funds previously apportioned or allocated to the State; or

(ii) With obligation authority previously allocated to the State.

(b) The FHWA, on the request of a State and execution of a project agreement, may obligate all or a portion of the Federal share of a project authorized to proceed under this section from any category of funds for which the project is eligible.

§630.705 Procedures.

(a) An advance construction project shall meet the same requirements and be processed in the same manner as a regular Federal-aid project, except,

(1) The FHWA authorization does not constitute any commitment of Federal funds on the project, and

(2) The FHWA shall not reimburse the State until the project is converted under §630.709.

(b) Project numbers shall be identified by the letters “AC” preceding the regular project number prefix.

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§630.709 Conversion to a regular Federal-aid project.

(a) The State Department of Transportation may submit a written request to the FHWA that a project be converted to a regular Federal-aid project at any time provided that sufficient Federal-aid funds and obligation authority are available.

(b) Subsequent to FHWA approval the State Department of Transportation may claim reimbursement for the Federal share of project costs incurred, provided the project agreement has been executed. If the State Department of Transportation has previously submitted a final voucher, the FHWA will process the voucher for payment.

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