EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

GENERAL COUNSEL

June 3, 2025

Mr. Gregory Cote
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1200 New Jersey Avenue, SE
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Dear Mr. Cote,

This letter is provided in response to the recently published U.S. Government Accountability Office (GAO) opinion concerning the Department of Transportation's (DOT) administration of the National Electric Vehicle Infrastructure Formula Program (NEVI program).[1] I have reviewed GAO's opinion, as well as your letter to GAO's General Counsel dated March 12, 2025, and the two supplemental responses you provided to GAO via email on April 1, 2025.

GAO's views on this matter are wrong and legally indefensible. DOT's recording practice with respect to obligations for the NEVI program was fully compliant with the law. Additionally, DOT's temporary delay of the obligation of funds pending the issuance of new guidance and approval of State plans to ensure alignment with President Trump's agenda was permissible and did not violate the Impoundment Control Act (ICA).

In its opinion, GAO concluded that DOT: (1) violated the Recording Statute, 31 U.S.C. § 1501, by recording obligations for the NEVI program only after individual project agreements had been signed; and (2) violated the ICA, 2 U.S.C. § 681 et seq., by rescinding the previous Administration's program guidance and temporarily pausing new obligations of NEVI program funds so that DOT could reissue new program guidance consistent with the Trump Administration's policies and priorities.

Moreover, I understand GAO deviated from its regular practice of inviting agencies to provide their legal views, and instead blindsided DOT with its findings on the Recording Statute

[1] B-337137, "U.S. Department of Transportation, Federal Highway Administration—Application of the Impoundment Control Act to Memorandum Suspending Approval of State Electric Vehicle Infrastructure Deployment Plans" (May 22, 2025).

without providing the Department with an opportunity to explain its views on that matter.[2] I especially want to thank you for taking the additional time to convey your legal views on the timing of obligations question to us, which helped us comprehensively understand the legal authorities at play.

As I explain below, GAO's conclusions are based on fundamental errors of law and fact. Therefore, you should pay no heed whatsoever to GAO's conclusions, as they are incorrect. Furthermore, as you know, GAO is an instrumentality of the Legislative Branch and "Executive Branch agencies are not bound by GAO's legal advice."[3]

I. DOT's recording of obligations for the NEVI program complied with the statutory language creating the program and was consistent with longstanding DOT practice with respect to other highway formula programs

The Recording Statute requires agencies to record their legal liabilities (and any potential legal liabilities that are outside of the agencies' control) as they arise.[4] For grants, the statute provides that obligations shall be recorded only when supported by documentary evidence of "a grant or subsidy payable (A) from appropriations made for payment of . . . amounts required to be paid in specific amounts fixed by law or under formulas prescribed by law; [or] (B) under an agreement authorized by law."[5] Generally speaking, statutory formula grants fall under subparagraph (A). Obligations for such grants arise by operation of law because the amount that must be paid for each grant, and the recipient of each grant, is fixed by the statutory formula. Therefore, obligations for statutory formula grants should be recorded as soon as practicable following enactment of the appropriation for such grants. Competitive discretionary grants generally fall under subparagraph (B). Obligations for such grants are recorded only after the signing of a grant agreement because, until that point, the agency has no liability to the grantee and can elect not to proceed.

The NEVI program was clearly set up as a statutory formula grant program. The appropriations language establishing the program requires DOT to distribute the NEVI program funds so that each State is entitled to receive a statutorily prescribed amount.[6] Although each

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[2] Based on conversations with DOT's Office of the General Counsel (DOT OGC) and the materials before us, GAO's initial inquiry to DOT did not make any mention of the Recording Statute. Moreover, GAO's supplemental inquiries to DOT gave DOT little impression that GAO's initial inquiry had expanded to include a Recording Statute aspect. GAO raised only two additional questions in its supplemental inquiries: (1) "Does DOT enter into project agreements with states for NEVI pursuant to 23 U.S.C. § 106?" and (2) "Does DOT incur obligations for NEVI when those agreements are signed?" DOT answered both inquiries in the affirmative, yet GAO at no point requested DOT's legal views on whether such practice was consistent with the Recording Statute.

[3] *Whether Appropriations May be Used for Informational Video News Releases*, 29 Op. O.L.C. 74, 74 (2005).

[4] 31 U.S.C. § 1501.

[5] *Id.* § 1501(a)(5).

[6] *See* Pub. L. No. 117-58, div. J, tit. VIII (2021).

State must furnish a plan that DOT must approve before a State obligates funds, such administrative requirements do not always disturb the timing of the Government's obligation under a statutory formula grant when compliance with the requirement is entirely within the control of the awardee. Based on these principles, GAO incorrectly concluded that DOT should have recorded an obligation for the full amount appropriated for the NEVI program for each of fiscal years 2022 through 2025, as soon as the funds became available, which would have been on October 1 of each fiscal year.

GAO's opinion, however, disregards DOT OGC's argument in support of its statutory obligational requirements under chapter 1 of title 23 of the U.S. Code (likely because GAO did not take the time to seek DOT's legal views on the matter). Had GAO consulted DOT, it would have better understood the importance of the directive in the NEVI program's appropriations language that funds appropriated for the NEVI program "shall be administered as if apportioned under chapter 1 of title 23, United States Code." Chapter 1 of title 23 is where the vast majority of DOT's highway programs are authorized. Section 106 of title 23 provides that "[t]he *execution of the project agreement shall be deemed a contractual obligation of the Federal Government* for the payment of the Federal share of the cost of the project."[7] Accordingly, for all of its highway programs authorized under chapter 1 of title 23, DOT records an obligation after title 23 requirements are met, and the recordation occurs at the time it executes a project agreement, even where the program is a statutory formula grant program.

While there does not appear to be any Federal court opinion that has construed the phrase "shall be administered as if apportioned under chapter 1 of title 23," the language is well understood by DOT and its authorizing committees as applying title 23 requirements to the funds provided by Congress. It seems eminently reasonable to interpret the language to mean that a project carried out using NEVI program funding should be carried out in the exact same manner as any other project authorized under chapter 1 of title 23, including with respect to how funds for such programs are obligated. Indeed, the directive attaches directly to the "funds made available under this paragraph" for the NEVI program, which counsels against a narrower interpretation focused on more programmatic aspects of title 23.

It also appears to be a straightforward construction of 23 U.S.C. § 106(a)(3) that the provision fixes the signing of the project agreement as the point at which obligations for Federal Highway Administration (FHWA) highway programs should be recorded, especially given that title 23 includes several formula grant programs, the obligations for which would otherwise be construed to arise immediately upon apportionment. In fact, FHWA's highway regulations plainly adopt this view.[8]

[7] 23 U.S.C. § 106(a)(3) (emphasis added).
[8] *See* 23 C.F.R. § 630.106(a)-(c).

GAO does not satisfactorily explain how the NEVI program meaningfully differs from the other FHWA highway formula grant programs authorized under chapter 1 of title 23, or why Congress's directive to "administer" the funds as if they were apportioned under chapter 1 of title 23 cannot mean that they should be obligated in the same manner as other such programs. Instead, GAO dismisses the proviso relied on by DOT by saying that it is "often used to apply the contract authority in 23 U.S.C. § 118 to a particular program." But ascribing such a limited meaning to the proviso in this context makes no sense, as the NEVI program is funded by general fund appropriations that carry their own periods of availability, which GAO acknowledges several times in its own opinion. Accordingly, a different meaning must be ascribed to the proviso. As stated above, the whole point of the proviso, as borne out by DOT's consistent interpretation spanning several decades, is to ensure that FHWA programs funded with general fund appropriations are administered for all purposes as though they were authorized under chapter 1 of title 23.[9]

GAO's incorrect conclusion on the Recording Statute question also raises a significant, yet unanswered, question as to whether GAO believes that the manner in which DOT has consistently executed all of its other FHWA highway formula grant programs—including those funded with general fund appropriations and subject to the proviso discussed above—for the last 70+ years has been illegal.[10] This uncertainty could have profound consequences for DOT's ability to execute its other FHWA highway formula grant programs, particularly if GAO's opinion forms the basis for more frivolous litigation or reviews.

To be clear, DOT's decades-long, lawful practice of obligating its other FHWA highway formula grant funds at the point of project agreement, especially in light of 23 U.S.C. § 106 and 23 C.F.R. § 630.106, discussed above, is correct.

[9] GAO also points to dictionary definitions of the terms "withhold" and "withdraw," and broadly asserts that, because Congress authorized the Secretary to "withhold or withdraw, as applicable funds made available [for the NEVI program]," it must be the case that DOT's obligation attaches prior to DOT's approval of the State plans. This argument has no merit. The proviso at issue allows the Secretary to withhold or withdraw funds only if (1) a State fails to submit a required plan; or (2) the Secretary determines that a State has not taken action to carry out its plan. The proviso is entirely consistent with the view that obligations for the NEVI program should be recorded at the time of project agreement execution. The authority to "withhold" clearly corresponds to the pre-obligation action of withholding funds where a State has not furnished a required plan, while the authority to "withdraw" clearly corresponds to potential post-obligation actions of taking funds back from States that have not followed through on their plan.

[10] *See Federal-aid Highway Act of 1956—Power of President to Impound Funds*, 42 Op. Att'y Gen. 347, 353-354 (1967) ("It is not consistent with [the scheme of title 23] to contend that the States have vested rights in the funds apportioned prior to the actual approval of projects under 23 U.S.C. § 106(a). It is approval of a project under that section which constitutes the contractual obligation of the United States. No provision of the act gives any State a vested right to the apportioned funds prior to such approval").

II. DOT did not violate the ICA by rescinding the previous Administration's NEVI program guidance and temporarily pausing new obligations until new guidance could be issued

The ICA prohibits agencies from "deferring" appropriated funds except in three circumstances: (1) to provide for contingencies, (2) to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or (3) as specifically provided by law.[11] The ICA defines a deferral as "withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority."[12]

The ICA's definition of "deferral" cannot fairly be read to include any action taken by an Executive Branch official to temporarily delay the obligation or expenditure of budget authority, regardless of the reason. Such an interpretation would run counter to a number of statutes that affirmatively require or permit the delaying of agency obligations or expenditures, as well as common-sense principles of program implementation. Accordingly, for more than 20 years, OMB has taken the view that delays in obligations or expenditures occasioned by the need to comply with legal or regulatory requirements (e.g., permitting reviews), or by a desire to run a policy process to determine the most appropriate use of the funds within the discretion afforded by the relevant authorizing and appropriating statutes, fall outside the scope of the deferral provisions of the ICA.[13]

GAO's opinion on the ICA issue is plainly wrong. First, GAO asserts that DOT's decision to delay temporarily obligations on the NEVI program constituted an impermissible deferral under the ICA and not a programmatic delay because "the delay did not result from DOT's attempt to comply with the statutory requirements for the program, but rather from DOT imposing requirements on the program that are not contemplated by IIJA." In so doing, GAO completely ignores all of its other opinions that ground programmatic delay in factors other than compliance with legal requirements, including opinions that found programmatic delays, rather than deferrals, associated with actions such as setting up the program, issuing regulations for the program, and making changes to program design or scope.[14]

GAO then tries to argue that the NEVI program statute does not permit DOT to approve State plans. This argument, however, is incomprehensible, requiring one to believe that the law simultaneously provides that DOT must establish guidance for State plans, but if a State decides not to comply with such guidance, the State is still entitled to the money without any recourse to

[11] 2 U.S.C. § 684(b).
[12] *Id.* § 682(1).
[13] GAO refers to a similar concept as "programmatic delay." *See, e.g.*, B-96983, B-225110, Sept. 3, 1987.
[14] *See* B-96983, B-225110, Sept. 3, 1987; B-171630, May 10, 1976; B-221412, Feb. 12, 1986.

DOT. This outcome is antithetical to the text and structure of the statute, the protection of taxpayer money, and congressional intent. In fact, the most recent implementation guidance issued by the previous Administration makes clear that DOT review and approval of State plans is necessary, not just once, but on a rolling basis, to ensure the plans are spent consistent with the Administration's guidance.[15]

Finally, GAO construes the NEVI program's appropriations language as a "mandate to spend" and on that basis concludes that the program falls within the ICA's "fourth disclaimer," meaning that NEVI program funds are incapable of being deferred under the ICA for any purpose.[16] Even if GAO were correct on this point, which it is not, it is beside the point because any fourth disclaimer analysis necessarily assumes application of the ICA in the first instance. But the ICA is not applicable here because DOT's decision to delay temporarily obligations on the NEVI program until after new program guidance could be issued and adopted falls squarely within the discretion afforded by the appropriations language establishing the NEVI program. That language, which requires States to submit plans "*in such form and such manner as the Secretary requires*," clearly contemplates that the Executive Branch and its political leadership would set policy for the NEVI program.

The Biden Administration carried out such programmatic efforts through multiple issuances of implementation guidance, as well as by promulgating regulations for the program.[17] Of particular note, the Biden Administration included significant non-statutory policy priorities in its implementation guidance, including that State plans must include diversity, equity, and inclusion considerations, as well as several non-statutory programmatic requirements, such as a minimum number of charging ports per station, a maximum number of miles between charging stations, and geographic requirements.[18] GAO's opinion fails to explain why the Biden Administration was empowered to make discretionary programmatic decisions in setting up the program, but the Trump Administration is powerless to alter those discretionary choices in its implementation of the program.

GAO's reasoning thus sets up an untenable regime whereby the Administration in office at the time a law is enacted is legally allowed to issue guidance for such program in accordance with the policies and priorities of that Administration, yet the following Administration is legally prohibited from adjusting the original guidance, despite the fact that those policies and priorities were not required by law to be included in the first place and other policy options aligned with

[15] *See* Memorandum from Emily Biondi to Division Administrators, June 11, 2024.
[16] *See* 2 U.S.C. § 681(4).
[17] 23 C.F.R. Part 680.
[18] The first of such guidance documents was released by the Biden Administration on February 10, 2022, nearly three months after the enactment of the Infrastructure Investment and Jobs Act (IIJA). The Biden Administration did not approve the first State plans for the NEVI program until September of that year, nearly a full year after IIJA enactment.

the new President's agenda may be available. A new Administration is not required to follow blindly a prior Administration's policies where the applicable program statute clearly provides discretion to the Executive Branch to set policy. A change in Administrations and the commensurate change in policy priorities necessitates program review and alignment.

GAO recognized this fundamental principle when it concluded that the Biden Administration's pause on obligations and expenditures for southern border wall construction did not violate the ICA.[19] In that opinion, GAO concluded that it was permissible for President Biden to issue an executive order to "pause immediately the obligation of funds related to construction of the southern border wall"[20] and for the Department of Homeland Security (DHS) to subsequently terminate or repurpose billions of dollars' worth of existing border wall contracts. GAO unambiguously declared that "[a] delay in obligation of funds while DHS determines project needs in light of changed circumstances is a programmatic delay, not an impoundment," and pointed to previous opinions in which it concluded that delays associated with certain project changes are programmatic delays.[21]

What GAO did not acknowledge is that the only "changed circumstance" in the border wall case was that Biden had made a *policy decision* to terminate the national emergency at the southern border and, but for that policy decision, DHS would not have had to pause operations to comply with the statutory requirements that GAO concluded were mere "programmatic delay" and not an impoundment. To be clear, GAO's opinion on the NEVI program is entirely inconsistent with its opinion on Biden's border wall pause, which itself was inconsistent with its earlier opinion regarding the first Trump Administration's temporary pause of Ukraine funding.[22] GAO makes zero attempt to articulate why temporarily pausing spending to ensure alignment with the current President's policies and priorities was unlawful in 2020, suddenly lawful in 2021, and now unlawful again in 2025.

As a final matter, I would be remiss not to note the troubling fact that GAO apparently rushed to publish this opinion—without consulting DOT on a key issue—just two weeks after the filing of a lawsuit by a consortium of Democrat-led States to block DOT from updating its NEVI program guidance, and on the exact same day that numerous left-wing interest groups filed a motion seeking to join the suit. This timing certainly raises concerns that GAO did this to help advance the plaintiffs' lawsuit against the Trump Administration. The timing of the filings and GAO's publication of its opinion on the NEVI matter is made all the more curious in light of the fact that the NEVI program has been authorized and funded for more than 3.5 years now, and

[19] *See* B-333110, "Office of Management and Budget and U.S. Department of Homeland Security—Pause of Border Barrier Construction and Obligations" (June 15, 2021).
[20] Proclamation 10142 of January 20, 2021, Termination of Emergency with Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction.
[21] B-333110, at 14 (citing B-221412, Feb. 12, 1986).
[22] B-331564, "Office of Management and Budget—Withholding of Ukraine Security Assistance" (Jan. 16 2020).

yet more than 84% of the funds remained unobligated (or unclaimed under GAO's view) as of the date on which DOT published its notice rescinding all previous program guidance and suspending the approval of all existing State plans.

Unfortunately, as noted above, this is part of a troubling trend of partisan opinions from GAO, which holds itself out as independent and nonpartisan. GAO's actions here are consistent with its actions in racing to release its 2020 opinion in the matter involving Ukraine funds, which was wrong on the merits and timed to be published to help then-Speaker Nancy Pelosi's and the rest of the Democrat House Members' baseless and fake impeachment proceedings against President Trump.[23] It is also consistent with GAO's recent and unprecedented opinion (issued at the behest of a handful of Democrat senators) stating that EPA's issuance of a waiver to California was not a rule for purposes of the Congressional Review Act, despite the fact that EPA itself determined that the waiver constituted a rule.[24] Congress emphatically rejected GAO's last-ditch effort to save the California waiver.[25]

These examples and many others lead to the inescapable conclusion that GAO has become a partisan actor, issuing opinions based on double standards designed to undermine President Trump's historic and lawful spending reforms. Your agency, and all Executive Branch agencies, should not feel compelled to cooperate at all with GAO in its efforts to thwart President Trump's agenda, nor give any weight or deference to GAO's opinions.

Conclusion

For the reasons set forth above, OMB OGC concludes that GAO's opinion on the NEVI program is wrong on both the facts and the law. DOT violated neither the Recording Statute nor the ICA in its administration of the NEVI program. DOT need not take any action to adjust the recording of its NEVI program obligations, nor change its practices with respect to obligating funds for any of its FHWA programs in response to GAO's incorrect opinion.

Sincerely,

Mark R. Paoletta

[23] B-331564, "Office of Management and Budget—Withholding of Ukraine Security Assistance" (Jan 16, 2020).
[24] B-337179, "Observations Regarding the Environmental Protection Agency's Submission of Notices of Decision on Clean Air Act Preemption Waivers as Rules Under the Congressional Review Act" (Mar 06, 2025).
[25] *See, e.g.*, S. Capito, "Ending the Electric Vehicle Mandate" (May 27, 2025) ("Democrats got this GAO letter to obstruct the Senate from exercising its authority provided by the CRA. Nothing in the plain text of the CRA, Senate rules, or Senate precedents gives unelected staff at the GAO the authority to prevent the Senate from considering a resolution of disapproval against a rule that has been submitted to Congress.").