U.S. Department of Transportation
Federal Highway Administration

Memorandum

Subject: **Legal Interpretation of Part 200 Provisions**

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HCC-1

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BACKGROUND

The Office of Civil Rights (HCR) requested a legal interpretation of specific provisions of 23 CFR Part 200 related to State Transportation Agency (STA) responsibilities in the implementation of the Title VI program. First, HCR requested legal guidance on how to interpret the term "program area," as it appears in three separate provisions under 23 CFR § 200.9: (1) subsection (a)(4), "[t]he State program area officials and Title VI Specialist shall conduct annual reviews of all pertinent program areas to determine the effectiveness of program area activities at all levels"; (2) subsection (b)(5), "[d]evelop a program to conduct Title VI reviews of program areas"; and (3) subsection (b)(6), "[c]onduct annual reviews of special emphasis program areas to determine the effectiveness or [*sic*] program area activities at all levels." HCR seeks specific guidance regarding what program areas an STA should cover in the annual reports required under subsections (a)(4) and (b)(6).

Second, HCR requested a legal opinion on STA responsibilities under 23 CFR §§ 200.9(b)(10) and (b)(11).[1] Specifically, HCR requested legal guidance on when STAs must submit the annually required Title VI implementation plan, and whether that implementation plan must include the annually required Title VI accomplishment and goal report.

The analysis below addresses both of these issues.

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[1] 23 CFR § 200.9(b) "(10) Prepare a yearly report of Title VI accomplishments for the past year and goals for the next year. (11) Beginning October 1, 1976, each State highway agency shall annually submit an updated Title VI implementing plan to the Regional Federal Highway Administrator for approval or disapproval."

ANALYSIS

1. How should the term "program area(s)" be interpreted under 23 CFR § 200.9?

Section 200.9 of 23 CFR sets forth "State highway agency responsibilities." Section 200.9(a) pertains to "State assurances in accordance with Title VI of the Civil Rights Act of 1964," while Section 200.9(b) sets forth required "State actions." Under Section 200.9(a)(4), "[t]he State program area officials and Title VI Specialist shall conduct annual reviews of all pertinent program areas to determine the effectiveness of program area activities at all levels" (emphasis added). Section 200.9(b)(5) requires STAs to "[d]evelop a program to conduct Title VI reviews of program areas." Last, Section 200.9(b)(6) requires STAs to "[c]onduct annual reviews of special emphasis program areas to determine the effectiveness or [*sic*] program area activities at all levels" (emphasis added).

As a starting point, it is clear that when the provisions in Sections 200.9(a)(4) and 200.9(b)(6) direct STAs to "conduct annual reviews" the intention is for STAs to review how well their programs are performing with respect to the requirements of Title VI. That is, how well is the STA performing to ensure that that "no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the [STA] receives Federal financial assistance?" 42 USC 2000d.[2] Indeed, the purpose of FHWA's Title VI regulations at 23 CFR Part 200 is to provide guidelines on "[c]onducting Title VI program compliance reviews relative to the Federal-aid highway program," and Section 200.9(b)(5) directs STAs to "[d]evelop a program to conduct Title VI reviews of program areas."

The regulation, however, does not make clear what is meant by a Title VI review of "pertinent" program areas versus "special emphasis" program areas. Since different descriptors are used in each provision ("pertinent" versus "special emphasis"), we must presume that different meanings are intended. Unfortunately, 23 CFR Part 200 provides no definition of either "pertinent program areas" or "special emphasis program areas." There also is no discussion of these terms in the preamble to the final rule FHWA issued when it promulgated this regulation in 1976. *See* 41 Fed. Reg. 53982 (Dec. 10, 1976). As a result, we must look for guidance from the Title VI statutory language itself and the context of the rule as a whole.

First, the Title VI statute provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 USC § 2000d. Over time, questions arose over how to interpret the meaning of "any

[2] FHWA's Title VI regulation expands its coverage to include discrimination on the basis of sex, as required under Section 162a of the Federal-aid Highway Act of 1973 (codified at 23 USC § 324). *See* 23 CFR 200.5(p)(4).

program or activity receiving Federal financial assistance." Congress clarified its intention that the term "program or activity" should be interpreted broadly through the Civil Rights Restoration Act of 1987. In particular, Congress provided:

> For the purposes of this title, the term 'program or activity' and the term 'program' mean all of the operations of –
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> > (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
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> > (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government.

Civil Rights Restoration Act of 1987, 100 Pub. L. 259, Section 6, 102 Stat. 28 (Mar. 22, 1988) (codified at 42 U.S.C. § 2000d-4a). Significantly, this statute clarified that Title VI applies to a recipient's activities regardless of whether the specific activity is funded by federal dollars. If a recipient department receives any federal financial assistance, Title VI applies to "all of the operations" of that department.

This broad interpretation of the term "program" informs how the regulation should be interpreted. For instance, the regulation itself defines "program" broadly:

> Includes any highway, project, or activity for the provision of services, financial aid, or other benefits to individuals. This includes education or training, work opportunities, health, welfare, rehabilitation, housing, or other services, whether provided directly by the recipient of Federal financial assistance or provided by others through contracts or other arrangements.

23 CFR § 200.5(k). The regulatory definition of "program" was issued in 1976, when the final rule was promulgated, but can be viewed as applying broadly to an STA's activities. The clarification Congress provided in the Civil Rights Restoration Act of 1987 confirms, more directly and succinctly, that "program" means "all of the operations" of a recipient.

What remains is how to distinguish between "pertinent" program areas and "special emphasis" program areas. Since the regulation does not define either term, and there is no discussion of these terms in the preamble to the final rule, we look to the natural meaning of the modifying words.

The dictionary definition of the term "pertinent" is: "relating to the subject that is being thought about or discussed: relevant." *See* www.merriam-webster.com (definition of "pertinent"). In the context of FHWA's Title VI regulations, the "pertinent" or "relevant" program areas means those program areas for which Title VI compliance is required. As established above, Title VI applies to "all of the operations" of a recipient of Federal financial assistance, so an STA, as a recipient of financial assistance from FHWA, has an obligation under the regulation to assess Title VI compliance throughout its operations. In other words, an STA's annual Title VI review of "pertinent" programs

should look at not just its Title VI performance on projects funded with FHWA dollars, but all aspects of the STAs operations, whether specifically supported by FHWA dollars or not.

Given the breadth of coverage in the requirement to conduct an annual review of all "pertinent" program areas, it is less clear what the regulation intends in requiring annual Title VI reviews of "special emphasis" program areas under 23 CFR Section 200.9(b)(6). As discussed above, the term "special emphasis" is not defined in the regulation, nor is there any guidance on the meaning of this phrase in the preamble to the final rule. The term "special emphasis programs" is used in the context of Federal government employment and efforts to increase workforce diversity under regulations issued by the Office of Personnel Management, but that meaning plainly does not apply to the use of the term in Section 200.9(b)(6).

Instead, the best approach is to adopt a natural reading of "special emphasis" program areas, which would refer to those areas that receive or should receive "special consideration" or areas which an STA should "stress" or on which it should especially focus. *See* www.merriam-webster.com (definition of "emphasis"). Since the regulation does not identify specific "special emphasis" program areas, the determination of what areas should receive special attention in an STA's annual report should be determined as a matter of policy by the relevant FHWA program office, which in this case is FHWA's Office of Civil Rights.

2. When must STAs submit the annually required Title VI implementation plan, and must the implementation plan include the annually required Title VI accomplishment and goal report?

In regard to the date that the STA's annual Title VI implementation plan is due, 23 CFR § 200.9(b)(11) states that "[b]eginning October 1, 1976, each State highway agency shall annually submit an updated Title VI implementing plan" for approval or disapproval. October 1 of each year represents the beginning of the fiscal year. The most natural reading of this provision is that each STA should continue submitting its annual Title VI implementation to FHWA by October 1 of each year. An implementation plan outlines an STA's methods for administering its Title VI program for the upcoming year, so it is reasonable that such a document should be submitted to FHWA by the beginning of each fiscal year.

Although Part 200 provides a clear date by which an STA must submit its implementation plan, it does not provide a date for an STA's submission of its Title VI accomplishment report and goals for the upcoming year, nor does the regulation state that an STA must submit its goals and/or accomplishment reports with the Title VI implementation plan. Because the regulation requires annual submission of an accomplishment report and goals, but does not prescribe a specific date, it is appropriate for HCR to develop and implement a policy that ensures the annual submission of the required information. Although the regulation does not plainly require that an STA submit the accomplishment report and goals at the same time as the implementation report, HCR could establish that policy if it chooses. As long as an STA submits the required information on an annual basis, the terms of the regulation would be met.