

# Section 129 Loan Program Guidance

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# Table of Contents

<b>1</b>	<b>Background and Purpose</b> .....	<b>1</b>
1.1	Background .....	1
1.2	Purpose .....	1
<b>2</b>	<b>Section 129 Loan Program Guidance</b> .....	<b>2</b>
2.1	Administration .....	2
2.2	Project Requirements .....	2
2.3	Use of Repaid Funds.....	5
2.4	Use of State Infrastructure Bank (SIB) .....	5
2.5	Federal Oversight .....	5

## Appendix A. Format of Annual Report



# 1 Background and Purpose

## 1.1 Background

23 U.S.C. 129 establishes policies relating to Federal participation in toll facilities. Subsection (a)(8) (formerly (a)(7)) authorizes the use of Federal funds by States to make loans to public or private entities for the purpose of constructing highways, bridges, and tunnels that have a dedicated revenue source to repay the loan. By using Section 129 loans, a State may leverage its Federal funds by assisting the initial project with a loan and then using the loan repayments to fund additional projects.

## 1.2 Purpose

FHWA's Office of Innovative Program Delivery (OIPD) is responsible for ensuring that the Section 129 Loan Program is effectively administered and provides technical assistance to the States and FHWA Division Offices with respect to implementation. This document provides a summary discussion of stewardship practices for managing Section 129 Loans. The practices included in this document are based upon legislative requirements and a survey conducted of all FHWA Division Offices regarding program use by the States.

This document includes best practices related to Section 129 loans identified in a 2011 review of the program, along with some tools that may aid FHWA Division Offices and the States in carrying out their stewardship responsibilities.

## 2 Section 129 Loan Program Guidance

### 2.1 Administration

#### 2.1.1 Accounting

A State that plans to issue or has an outstanding Section 129 loan must establish fiscal controls and accounting procedures sufficient to ensure proper accounting for Section 129 loans made and payments received. The fundamental standard for financial administration is set forth in 49 CFR 18.20. Section 129 loan obligations should be recorded in the Fiscal Management Information System (FMIS) identified in the notes pages as a loan. Section 2.3 below provides details on eligible uses of repaid loan funds as required by 23 U.S.C. 129 (a)(8)(H).

#### 2.1.2 Loan Monitoring

An identified best practice for fiscal controls is to maintain a loan monitoring system. A loan monitoring system generally includes the following:

- ▶ Scheduled loan payments for each project sponsor,
- ▶ Status of each loan,
- ▶ Identification of any late payments,
- ▶ Actions taken as a result of any late payments, and
- ▶ A process for ensuring loans fund eligible project costs.

#### 2.1.3 Reporting

The State should maintain sufficient information on the status of the loan and provide such information to the FHWA Division Office to provide an annual report to OIPD at the end of each Federal fiscal year until the loan is repaid. Appendix A provides a suggested format for the report that can be completed electronically via a spreadsheet provided by OIPD.

### 2.2 Project Requirements

#### 2.2.1 Qualified Projects

In accordance with 23 U.S.C. 129 (a)(8)(A), States may make Section 129 loans to a public or private entity to construct a highway, bridge, or tunnel or approach to the highway, bridge, or tunnel that is eligible for Federal-aid funding under title 23 United States Code and that has a revenue source specifically dedicated to repay the loan. Any Federal highway program category authorized under title 23 may be used for a Section 129 loan for an eligible road, bridge, tunnel, or ferry project, provided that the project receiving the loan is eligible for funding from that category of Federal-aid funding. Transit and intermodal projects **are not eligible** for Section 129 loans. If loans are requested for such projects, States are encouraged to submit a proposal to OIPD for a test under the 'TE-045' initiative. Under FHWA's research program, the Secretary is authorized to innovate with the requirements of title 23, United States Code and Code of Federal Regulations, which relate to finance and construction on a case-by-case basis. This allows FHWA to test new and innovative procedures to determine if revisions to certain statutory or regulatory provisions might result in improvements to the program. The TE-045 (Test and Evaluation) Program focuses on innovative finance with the goal of increasing investment and accelerating projects.

## 2.2.2 Agreements with Project Sponsors

Before providing a Section 129 loan to a public or private entity, a State should enter into a written loan agreement with the project sponsor. The best practice for such an agreement is to include:

- ▶ the terms of the assistance, including interest rate(s), repayment terms, and a disbursement schedule;
- ▶ any fees, compensation, or collateral offered by the project sponsor;
- ▶ the source(s) of funds that will be used to make repayments under the agreement; and
- ▶ a statement that any loan by the State does not constitute a commitment, guarantee, or obligation of the United States.

## 2.2.3 Federal Requirements

Section 129 (a)(8)(B) requires that a project sponsor receiving a Section 129 loan must ensure that the project complies with the Federal requirements that apply to Federal-aid projects under title 23 and any other applicable Federal law, including any applicable Federal environmental law. Obligations of Federal funds applied to a Section 129 loan should be included in the metropolitan Transportation Improvement Program (TIP) [23 U.S.C. 134(j)] and the Statewide Transportation Improvement Program (STIP) [23 U.S.C. 135(g)] documents.

In accordance with 23 U.S.C. 129 (a)(8)(H), amounts repaid to a State from a loan recipient must be used to assist projects that are eligible under title 23; however, projects financed from loan repayments may be administered in the same manner as State or local funded projects and are not subject to Federal requirements (see Section 2.3). Funds derived from repaid loans can therefore be used as State match for an eligible Federal-aid project.

## 2.2.4 Process

Project Selection. The process for funding a Section 129 loan should be similar to the process for committing funds to and obtaining reimbursement for any other Federal-aid project. The State's process should include:

- ▶ identification of a candidate project and a project sponsor that may benefit from public credit assistance through a Section 129 loan;
- ▶ determination of the amount and source of Federal-aid highway funding to be committed to the loan;
- ▶ assurance that a dedicated revenue source is available to repay the loan; and
- ▶ confirmation that the project is included in the Statewide Transportation Improvement Program (STIP).

FHWA Approval. In accordance with 23 U.S.C. 106, the State will submit a Federal-aid Project Agreement to FHWA for approval, identifying the project as a Section 129 loan project. After ensuring that the project is Federal-aid eligible, the FHWA Division Office may authorize the project resulting in the obligation of Federal funds in the amount requested by the State. The project may be approved as advance construction in accordance with 23 U.S.C. 115, allowing the State to obligate Federal funds on a periodic partial conversion basis.

Federal Reimbursements. FHWA may make reimbursements to the State through the standard Federal-aid billing process when the loan funds are disbursed to the project sponsor. While FHWA reimbursements on Section 129 loans are for loan disbursements and not project expenditures, annual reimbursements that fund loan disbursements should match up with expected project expenditures, to the extent practicable (i.e., minimize reimbursements for upfront disbursements when those loan funds are not yet needed) consistent with 49 CFR 18.21 and Treasury regulations relating to cash management, 31 CFR 205. Therefore, on a

long-term project, it is considered a best practice for the loan to be funded in tranches that reasonably match annual or semi-annual project expenditures.

### 2.2.5 Loans

Use of Loan Proceeds. In accordance with 23 U.S.C. 129 (a)(8)(A), loan proceeds may only be used for eligible Federal-aid project costs. As with other Federal-aid projects, the State is responsible for ensuring loan proceeds are used for eligible project costs. FHWA may periodically review States' loan programs to determine if loan proceeds are being used for eligible project costs.

Amount. In accordance with 23 U.S.C. 129 (a)(8)(A), the amount of the loan may equal all or part of the Federal share of the cost of the project. If both Section 129 loan proceeds and regular Federal-aid funds are used on a project, then the combined amount of the loan and the other Federal funds subject to the Federal share cannot exceed the estimated cost of the Federal share of the project. The Federal share percentage is determined by the State but cannot exceed 80 percent (23 USC 120 (a) (6)). In addition to traditional State and local matching fund sources, in kind contributions and toll credits may be applied to the non-Federal share of Section 129 loan-funded projects in accordance with 23 U.S.C. 120 and Section 323. When the project is complete, any amount loaned to the project sponsor exceeding the actual Federal share of the project costs will be immediately returned to the State and applied to lower the Federal-aid funds obligated to the project.

Interest Rate. In accordance with 23 U.S.C. 129 (a)(8)(G), interest rates on the loans must be at or below market rates, as determined by the State, to make the projects benefitting from the loans feasible.

Subordination. In accordance with 23 U.S.C. 129 (a)(8)(C), Section 129 loans may be subordinated to other debt used to finance the project.

Dedicated Revenue Source. In accordance with 23 U.S.C. 129 (a)(8)(A), the project sponsor must identify a dedicated revenue source to be used as repayment for the loan. Dedicated revenue sources include tolls, excise taxes, sales taxes, real property taxes, motor vehicle use fees, incremental property taxes, and other dedicated revenue sources as determined appropriate by FHWA. Federal funds are not considered a dedicated revenue source. As lender, the State should make a determination that revenues dedicated to a project are considered sufficient to service loan payments.

Loan Disbursements. It is considered a best practice for the State to establish a reasonable loan disbursement schedule to ensure that the project sponsor has sufficient funds to pay for eligible project costs while minimizing the amount of the disbursements (i.e., minimize upfront disbursements of loan proceeds that are not currently required).

Loan Repayments. In accordance with 23 U.S.C. 129 (a)(8)(E), repayments of the loan must commence not later than 5 years after the facility has opened to traffic. In accordance with 23 U.S.C. 129 (a)(8)(F), the term of a loan must not exceed 30 years from the date on which the loan funds are obligated.

### 2.2.6 Defaults on Loan Payments

An identified best practice is for the State to ensure that remedies are set out in a loan agreement in the event that a project sponsor fails to make a scheduled loan payment on time, or otherwise fails to comply with the terms of a loan agreement. Such remedies and associated timeframes may include revising the loan payment schedule, increasing interest costs, imposing fees, requiring the receipt of collateral, or intercepting other funds for which the project sponsor qualifies. The loan may be considered to be in default and uncollectable if all reasonable efforts to collect the funds and impose the remedies outlined in the loan or credit agreement have been exhausted. FHWA Division Offices are encouraged to include default information in their annual reports to OIPD. (See Appendix A.)



### **2.3 Use of Repaid Funds**

In accordance with 23 U.S.C. 129 (a)(8)(H), when a loan is repaid, the State may obligate the funds for a title 23 eligible purpose. These projects, however, are not subject to Federal requirements, as the repayment source is a non-Federal resource. Eligible purposes include providing grants, making loans, and providing credit enhancement (such as purchasing insurance or funding a capital reserve) to improve credit market access or lower interest rate costs for a title 23 eligible project.

### **2.4 Use of State Infrastructure Bank (SIB)**

The State may use its SIB (Federally approved or State only) to administer Section 129 loans. Loan repayments may be deposited in and managed by the SIB, provided the repayment amounts are used to support projects eligible under title 23.

### **2.5 Federal Oversight**

It is considered a best practice for the FHWA Division Office to review loan agreements, monitor the administration of the Section 129 Loan Program, and conduct other reviews in accordance with FHWA's oversight program to ensure the State is complying with the Federal requirements relating to the Program.



## Appendix A. Format of Annual Report

A suggested format for an annual report is provided below which may be submitted via an electronic spreadsheet. The electronic spreadsheet provided by OIPD will include some pre-populated data on any previous Section 129 loans, but would be subject to review and correction by the Division Office.

### Section 129 Loans Annual Report [As of September 30, XXXX]

#### Instructions

- 1) Please verify data for each Section 129 loan. Provide corrections and updates where data is inaccurate.
- 2) Please provide data for any Section 129 loans not shown.
- 3) For each data item, please note the source from which you obtained the information.
- 4) For questions, please contact the Office of Innovative Program Delivery.

#### Contact Information

1	State	
2	Contact Name	
3	Contact Phone	
4	Contact Email	

Section 129 Loan Data		Data Source	Loan 1
5	What was the date of loan commitment?		
6	What was the total dollar amount of the loan?		
7	Has loan been fully disbursed?		
8	What is the total dollar amount of the loan outstanding at the end of recently completed FFY, 9/30?		
9	What is the final scheduled payment date of loan?		
10	Does the loan have a fixed interest rate or variable interest rate?		
11	What is (are) the source(s) of revenue for loan repayment?		
12	Has the loan been fully repaid?		
13	If the loan has been fully repaid, when did this occur?		
14	Did the loan default?		
15	Please identify the Federally-approved project(s) and/or program funded by the loan (Enter name of project(s) and FMIS #(s))		
16	What is the total estimated cost of the Federally-approved project(s) and/or program being funded by the loan?		