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MEMORANDUM



**DATE:** May 19, 2003  
**TO:** House Committee on Criminal Justice  
**FROM:** William E. Hamilton  
**RE:** House Bills 4247 and 4248  
0.08 Percent BAC and Federal Funding to Michigan Highway Programs

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This memo reviews potential federal sanctions which could be imposed on Michigan for failure to pass a 0.08 BAC *per se* law. The sanctions would involve the withholding of federal-aid to state transportation programs. This memo does not express an opinion as to whether HBs 4247 and 4248 would satisfy federal requirements. In addition, this memo does not review the impacts on state or local costs which could result from proposed changes to Michigan's *driving under the influence* or *driving while impaired* standards.

**Summary**

Under the Michigan Vehicle Code a driver with a blood alcohol concentration (BAC) percentage of 0.10 is presumed to be operating a motor vehicle *under the influence of intoxicating liquor*. The percentage at which a driver is presumed to be *impaired due to the consumption of intoxicating liquor*, is currently more than 0.07 BAC but less than 0.10 BAC. In addition, under current law a BAC percentage of 0.07 or less constitutes a presumption that a person is not impaired and not under the influence of intoxicating liquor.

Section 351 of the FY 2000-01 federal transportation appropriations bill, H. R. 4475 (PL 106-346), included provisions which required the withholding of federal funds from any state that had not enacted and was not enforcing a 0.08 BAC *per se* law as defined by 23 U.S.C Section 163.

We do not express an opinion as to whether HBs 4247 and 4248 would satisfy the requirements of 23 U.S.C Section 163 with regard to 0.08 BAC *per se* laws. To the extent that they did satisfy those requirements, enactment of the bills would enable the state to certify to the Secretary of Transportation that it had enacted and was enforcing a 0.08 BAC *per se* law that conformed to the requirements of Section 163. The state would then be exempt from sanctions imposed by Section 351.

Failure to pass a 0.08 BAC *per se* law that satisfied the requirements of Section 163 could subject the state to sanctions involving the withholding of a portion of federal-aid highway funds apportioned to Michigan. The sanction amount would be approximately \$9.2 million in FY 2003-04. The sanction would increase each year the state was not in compliance until FY 2006-07 when it would amount to approximately \$36.7 million. By FY 2006-07 the cumulative amount withheld would be approximately \$91.8 million.

Note that the sanctions would be applied to federal *apportionments*. Apportionments provide for program funding according to statutory formula. The sanctions would not necessarily represent a dollar for dollar loss of authority to obligate and expend funds.

## Background

Major federal support for state transportation programs began in 1956 with the passage of the Federal-Aid Highway Act. In recent years federal aid programs for transportation have been authorized and defined by multi-year authorization acts including the *Intermodal Surface Transportation Act of 1991* (ISTEA), and its successor, the *Transportation Equity Act for the 21st Century* (TEA-21), enacted in June of 1998.

Federal funds are made available to states through various program categories. States administer these programs in accordance with federal requirements. Federal funds provide approximately one-third of the funds in the state transportation budget – an estimated \$965.3 million in FY 2003-04.

*Safety incentive grants* - Section 1404 of TEA-21 included incentives to help prevent drunk or impaired driving. This Section was codified as 23 U.S.C Section 163 and provided grants “to any state that has enacted and is enforcing a law that provides that any person with a blood alcohol concentration (BAC) of 0.08 percent or greater while operating a motor vehicle in the state shall be deemed to have committed a *per se* offense of driving while intoxicated (or other equivalent *per se* offense)”<sup>1</sup>.

A total of \$500.0 million was authorized for the Section 163 program for the six-year period FY 1997-98 to FY 2002-03. As of October 2002, 33 states plus the District of Columbia and Puerto Rico met the federal criteria for 0.08 BAC *per se* laws and qualified for federal grants under the Section 163 program<sup>2</sup>. Michigan law did not meet the federal criteria and Michigan has not been eligible to receive federal grants under this program.

*Federal sanctions* - Section 351 of the FY 2001-01 federal transportation appropriations bill, H. R. 4475 (PL 106-346), included provisions which required the withholding of federal funds from any state that had not enacted and was not enforcing a 0.08 BAC *per se* law as defined by 23 U.S.C Section 163<sup>3</sup>. Section 351 requires the withholding of certain federal-aid highway funds beginning in FY 2003-04 from any state that had not enacted and was not enforcing a law that provides that any person with a blood alcohol concentration of 0.08 percent or greater while operating a motor vehicle in the state shall be deemed to have committed a *per se* offense of driving while intoxicated or an equivalent *per se* offense. For FY 2003-04 the sanctions would be 2% of the state’s apportionments for three major federal highway programs - National Highway System, Surface Transportation Program, and Interstate Maintenance. The sanctions would increase each year the state had not enacted a qualified 0.08 BAC law - 4% in FY 2004-05, 6% in the FY 2005-06, and 8% in FY 2006-07 and subsequent years.

The Federal Register notes that “if a state comes into compliance with the requirements of Section 163 on or before September 30, 2007, funds previously withheld from apportionment would be restored to the state.”<sup>4</sup> Starting on October 1, 2007 funds would start to lapse. By the end of the 2011-12 fiscal year, all funds withheld through FY 2007-08 lapse and would no longer be available for apportionment.

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<sup>1</sup> This program is implemented through the Code of Federal Regulations 23 CFR Part 1225.

<sup>2</sup> See the Federal Register Vol. 68, No. 25, dated Thursday February 6, 2003 pages 6091 – 6100 for the Notice of Proposed Rulemaking regarding regulations to implement the provisions of Sec 351 of the FY 2001 federal transportation appropriations act.  
<http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access.gpo.gov/2003/pdf/03-2790.pdf>

<sup>3</sup> Note that unlike state appropriations acts, which generally have authority for a single fiscal year, Congress may include provisions in federal appropriations acts that affect multiple fiscal years.

<sup>4</sup> Federal Register, *ibid*.

### Section 163 Requirements

In order to avoid the sanctions prescribed by Section 351, a state would have to enact and enforce a 0.08 BAC *per se* law meeting the requirements of 23 U.S.C Section 163. Specifically the law must:

- (a) Apply to all persons;
- (b) Set a BAC of not higher than 0.08 percent as the legal limit;
- (c) Make operating a motor vehicle by an individual at or above the legal limit a *per se* offense;
- (d) Provide for primary enforcement;
- (e) Apply the 0.08 BAC legal limit to the State's criminal code and, if the State has an administrative license suspension or revocation (ALR) law, to its ALR law; and
- (f) Be deemed to be or be equivalent to the standard driving while intoxicated offense in the state.

A state would also have to certify to the Secretary of Transportation that it had enacted and was enforcing a 0.08 BAC *per se* law that conformed to the above requirements.

### Michigan's Situation

Michigan currently has a two-tiered system regarding motorist blood alcohol concentration<sup>5</sup>:

A person with more than 0.10 percent BAC or more is presumed to be under the influence of intoxicating liquor.

For a person who operates a motor vehicle with a blood alcohol level of more than 0.07 percent but less than 0.10 percent the law presumes that the ability of that person to operate a motor vehicle is *impaired* to due the influence of intoxicating liquor. In other words, under current law it is illegal to operate a motor vehicle while impaired due to the influence of alcohol. And a 0.08 percent BAC would be evidence of impairment. It would not, however, constitute a *per se* offense.

To be in compliance with the requirements of 23 U.S.C Section 163 state law would have to consider persons who have a BAC of 0.08 percent or greater while operating a motor vehicle in the state to have committed a *per se* offense of driving while intoxicated. A 0.08 "*per se*" law, would make operating a motor vehicle with a BAC of 0.08 percent or above, in and of itself, an offense.

If by September 30, 2003 Michigan is not able to certify to the Secretary of Transportation that it had enacted and was enforcing a 0.08 BAC *per se* law that conformed to the requirements of 23 U.S.C Section 163, approximately \$9.2 million in FY 2003-04 federal-aid highway funds could be withheld from amounts apportioned to Michigan. The amount withheld would increase each year Michigan continued to be out of compliance with the federal requirements. By FY 2006-07 the amount withheld would be approximately \$37.6 million per year. By FY 2006-07 the cumulative amounts withheld would total \$91.8 million. While these amounts would not immediately lapse they would begin to lapse the 2007-08 fiscal year. Lapsed funds would not longer be available for apportionment to Michigan.

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<sup>5</sup> For a more complete analysis of Michigan BAC laws see the Legislative Service Bureau, Legislative Research Division's Research Report Volume 21, No. 8, as revised December 2002, "The Blood Alcohol Concentration (BAC) Debate In Michigan", by Paul G. Connors.

**Table 1**

**Computation of Estimated Withholding of Federal Funds**  
*per Section 351 of the FY 2001 Federal Transportation Appropriations Act (PL 106-346)*

Federal Apportionments to Michigan  
*Based on FY 2001-02*

Interstate Maintenance	\$117,677,500
National Highway System	142,083,400
Surface Transportation Program	199,382,000
Total	<u>\$459,142,900</u>

Fiscal Year	Sanction %	Sanction Amount	Cumulative Sanction
FY 2004 *	2%	\$ 9,182,858	\$ 9,182,858
FY 2005	4%	18,365,716	27,548,574
FY 2006	6%	27,548,574	55,097,148
FY 2007	8%	36,731,432	91,828,580
FY 2008	8%	36,731,432	128,560,012
FY 2009	8%	36,731,432	165,291,444
FY 2010	8%	36,731,432	202,022,876
FY 2011	8%	36,731,432	238,754,308
FY 2012	8%	36,731,432	275,485,740

\* After four years, funds withheld would begin to lapse. Funds withheld in FY 2004 would lapse in FY 2008; funds withheld in FY 2005 would lapse in FY 2009, etc.