

# State Notes

## TOPICS OF LEGISLATIVE INTEREST

### May/June 2003



#### The Federal 0.08 BAC Requirement and the Potential Loss of Highway Funding by Craig Thiel, Fiscal Analyst

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##### Introduction

Nationally, the number of people killed in motor vehicle accidents in 2000 reached 41,821. Alcohol use was involved in 16,653 of these incidents. Although only about 8% of all fatal and non fatal motor vehicle crashes involved alcohol, alcohol was a factor in 40% of all fatal crashes. The related statistics in Michigan are comparable. In 2000, there were 1,382 people killed in motor vehicle accidents in Michigan. Alcohol was involved in almost 37% of these crashes. According to national statistics, alcohol-related fatalities have dropped significantly over the 10-year period 1990 to 2000; however, alcohol remains the most important factor in motor vehicle fatalities and injuries. Various measures have been implemented to address the problem of impaired driving, including stronger, more effective laws, stepped-up enforcement, and public education and outreach. In the arena of stronger, more effective laws, considerable attention has been given by the states to 0.08 percent blood alcohol concentration (0.08 BAC) laws. Currently, 33 states are enforcing laws that make operating a motor vehicle with a BAC of 0.08 percent or greater a “*per se*” offense of driving while intoxicated or an equivalent “*per se*” offense.<sup>1</sup>

The fiscal year (FY) 2000-01 United States Department of Transportation (DOT) Appropriations Act requires the withholding of Federal-aid highway funds, beginning in FY 2003-04, from any state that has not enacted and is not enforcing a 0.08 BAC *per se* law. Under Michigan law, the threshold for driving while intoxicated is a BAC of 0.10 percent or greater.<sup>2</sup> Based on FY 2002-03 Federal-aid highway apportionments, Michigan would lose \$9.0 million of the Federal funds apportioned to it in FY 2003-04 for its failure to enact a 0.08 BAC *per se* law by September 30, 2003. The Federal sanction rate increases 2% per year, beginning with 2% in FY 2003-04 and increasing to 8% in FY 2006-07, when the sanction amount would total about \$36.7 million in Michigan.

Legislation has been introduced in the Michigan House of Representatives (House Bills 4247 and 4248) to address the issue of driving while intoxicated and to reduce the threshold for driving while intoxicated from 0.10 BAC to 0.08 BAC.<sup>3</sup> It is unknown at this time whether the proposed legislation would satisfy the Federal requirements and relieve the State of the potential sanctions. This article does not attempt to address that issue. Rather, the intent here is to describe the background and potential fiscal impact on Michigan of the Federal 0.08 BAC requirement contained in the FY 2000-01 U.S. DOT budget.

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<sup>1</sup> A 0.08 BAC “*per se*” offense of driving while intoxicated makes operating a motor vehicle with a BAC of 0.08 percent or above, in and of itself, an offense.

<sup>2</sup> The Michigan Vehicle Code considers a person to be “operating a vehicle while intoxicated” if they have a bodily alcohol content of 0.10 grams or more per 100 milliliters of blood, 210 liters of breath, or 67 milliliters of urine.

<sup>3</sup> A Senate Fiscal Agency summary of House Bills 4247 and 4248 as they passed the House, is available on the Agency’s website: [www.senate.michigan.gov/sfa/](http://www.senate.michigan.gov/sfa/)



## **Background**

The Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21), enacted in June 1998, established a \$500 million incentive grant program under 23 U.S.C. 163 to encourage states to adopt tough 0.08 BAC laws. Section 1404 of TEA-21 established the incentive grant program to allow the U.S. Secretary of Transportation to make a grant to any state that has enacted and is enforcing a law that provides that any person with a BAC of 0.08 percent or greater while operating a motor vehicle in the state is deemed to have committed a *per se* offense of driving while intoxicated or an equivalent *per se* offense. Under TEA-21, the amount available each year for the grants increased. States with 0.08 BAC *per se* laws share in the total amount available each year. States may use the incentive grants for any purpose eligible under Title 23 of the U.S. Code. As a result of its current statute governing the driving while intoxicated offense, Michigan has not received any of the Federal incentive grant funding.

Before the Section 163 grant program existed, 16 states had enacted 0.08 BAC *per se* laws. Between 1998 and October 2000, only two additional states enacted and began enforcing 0.08 BAC *per se* laws. Although some progress was made with respect to reducing drunk driving between 1998 and 2000, in 2000 the United States Congress added a “stick” to the established “carrot” to address the 0.08 BAC *per se* law issue. Specifically, Section 351 of the FY 2000-01 U.S. DOT budget included a provision under which the Federal government will withhold a portion of a state’s Federal-aid highway funds if the state fails to enact a 0.08 BAC *per se* law by September 30, 2003. Section 351 did not affect the Section 163 incentive grant program, which will continue until TEA-21 expires (September 30, 2003).

## **Federal 0.08 BAC Sanctions**

Under Section 351, beginning in FY 2003-04, a state will lose 2% of its Federal-aid highway apportionments under the National Highway System, the Surface Transportation Program, and the Interstate Maintenance programs if it fails to enact a 0.08 BAC *per se* law by the deadline.<sup>4</sup> The amount withheld will increase by 2% each year, until it reaches 8% in FY 2006-7. Section 351 also provides that if a state enacts a 0.08 BAC *per se* law before FY 2006-07, it will be eligible for a reimbursement for any Federal funding withheld. Section 351 further provides that if a state is not in compliance with Section 163 on October 1, 2007, any funds withheld will begin to lapse and no longer be available for apportionment. For example, in FY 2007-08, the 2% withheld in FY 2003-04 would lapse.

In order to avoid the withholding of Federal apportionments, a state must certify to the U.S. Secretary of Transportation that its 0.08 BAC *per se* law meets all the requirements of Section 163, as follows:

- 1) Applies to all people with no exceptions.
- 2) Sets a level of no more than 0.08% as the legal limit for BAC while operating a vehicle.

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<sup>4</sup> States receive Federal-aid highway funds in various program categories based on Federal criteria established in multiyear authorization bills, such as TEA-21.

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- 3) Makes operating a vehicle with a BAC of 0.08% or above a “*per se*” offense of driving while intoxicated. (In other words, states must establish a law that makes operating a vehicle with a BAC of 0.08% or above, in and of itself, a violation.)
- 4) Provides for primary enforcement of the law.
- 5) Provides for the 0.08 BAC *per se* law in the state’s criminal code and in its administrative license suspension law, if the state has one.
- 6) Makes it equivalent to the state’s standard driving while intoxicated offense.

Today, 38 states, plus the District of Columbia and Puerto Rico, have adopted 0.08 BAC *per se* laws that meet the Section 163 requirements. All other states, except Massachusetts, have established 0.10 BAC as the legal limit for driving while intoxicated. In Michigan, a person operating a vehicle with a BAC of 0.07% but below 0.10% is presumed impaired, but this does not constitute a *per se* offense of driving while intoxicated for the purposes of Section 163.

**Fiscal Impact**

Michigan will be subject to the Section 351 sanctions of the FY 2000-01 U.S. DOT budget if it is unable to certify to the U.S. Secretary of Transportation that it has enacted and is enforcing a 0.08 BAC *per se* law by September 30, 2003. These sanctions will begin to apply with the State’s FY 2003-04 Federal apportionments for the Surface Transportation Program, National Highway System, and Interstate Maintenance programs. Below is a table of the fiscal impact on Michigan of the Federal 0.08 BAC sanctions based on FY 2002-03 apportionments for Surface Transportation Program (\$195,166,132), National Highway System (\$140,896,093), and Interstate Maintenance (\$116,078,531). (It is worth noting that TEA-21 is scheduled to expire at the end of the current fiscal year; therefore, FY 2003-04 apportionment levels may vary considerably under new Federal transportation authorization legislation.)

**Table 1**

<b>Michigan’s Potential Federal-Aid Sanctions Under the 0.08 BAC Requirement</b>			
<b>Fiscal Year</b>	<b>Sanction</b>	<b>Sanction Amount</b>	<b>Lapse</b>
2003-04	2%	\$9,042,815	
2004-05	4%	\$18,085,630	
2005-06	6%	\$27,128,445	
2006-07	8%	\$36,171,260	
2007-08	8%	\$36,171,260	2% withheld in FY 2004

The FY 2003-04 Michigan Department of Transportation budget proposed by the Governor and the version of the budget passed by the Senate (Senate Bill 265 (S-1)) do not recognize these sanctions. Should the sanctions occur, appropriate changes will have to be made to the Federal funding included in the budget.