

Section 154/164 Q's & A's

Frequently Asked Questions Concerning Section 154 & 164 Transfer Programs

1. **Question:** *What will occur if a State does not comply with the requirements of the Open Container transfer program (Section 154), the Repeat Intoxicated Driver transfer program (Section 164), or both?*

Answer: The TEA-21 Restoration Act, enacted July 22, 1998, established two new programs to encourage the States to enact and enforce Open Container and Repeat Intoxicated Driver laws. A percentage of a State's Federal-aid highway apportionment under the Interstate Maintenance (IM), National Highway System (NHS) and Surface Transportation Programs (STP) will be transferred to the State's Section 402 highway safety program unless the State (1) has both these laws in effect and (2) has submitted to NHTSA a certification that conforms with the program's implementing regulations by October 1, 2000. These programs were continued under SAFETEA-LU and the funds transferred are to be used for one or more of the following: alcohol-impaired driving countermeasures; enforcement of laws prohibiting driving while intoxicated and other related laws or regulations; highway safety improvement projects (which may also be referred to as hazard elimination projects) eligible under 23 U.S.C. Section 148 (Highway Safety Improvement Program (HSIP)).

If a State did not meet the requirements of both of these programs by October 1, 2000, 1-1/2% of the State's Fiscal Year (FY) 2001 Federal-aid highway apportionment under IM, NHS, and STP (Sections 104(b)(1), (3) and (4) of title 23 of the United States Code) was transferred, for each law. Therefore, a State which did not comply with either law had 3% of these apportionments transferred. On October 1, 2001, the same percentages were transferred if a complying law was not in effect. In subsequent years, beginning October 1, 2002, 3% of these funds will be transferred for each law which is not in effect. Therefore, a State which does not comply with either law will have 6% of its apportionment under IM, NHS, and STP transferred.

The total amount to be transferred from a non-conforming State will be calculated based on a percentage of the funds apportioned to the State under each of Sections 104(b)(1), (b)(3) and (b)(4). However, the actual transfers need not be distributed proportionately among these three sources. The transferred funds may come from any one or a combination of the apportionments under these sections. On October 1, the transfers to Section 402 apportionments will be made based on proportionate amounts from each of the apportionments under Sections 104(b)(1), (b)(3) and (b)(4). Then, the States will be given until October 30 to notify FHWA, through the appropriate Division Administrator, if they would like to change the distribution among Sections 104(b)(1), (b)(3) and (b)(4).

2. **Question:** *Where should State laws and certifications be sent for review and approval?*

Answer: The certifications and State laws should be sent to the appropriate NHTSA regional offices. From there, they will be sent to NHTSA attorneys, who are reviewing them and making determinations concerning their compliance with Section 154 and 164 requirements.

3. **Question:** *Why does the joint notification of how money will be spent have to go to both NHTSA and FHWA? Why not just to NHTSA since State Highway Safety Offices and NHTSA administer the money?*

Answer: Joint notification of both NHTSA and FHWA is the same process that has been required by NHTSA and FHWA for other programs in which Congress authorized flexible highway safety/highway construction funding choices (for example, the Section 157 Seat Belt Use Incentive Grant program and the Section 163 .08 BAC Law Incentive program). This notification process assures that FHWA will be knowledgeable of how much transfer funding will go to FHWA projects and assures that NHTSA is aware of funding going to highway safety projects in each State.

4. **Question:** *Why does the joint notification of how money will be spent have to be signed by both the State highway safety office and the State DOT when the funds are transferred only to the State highway safety office?*

Answer: The affected State agencies should participate in the decisions concerning how the transfer funding will be used. NHTSA and FHWA require both the State Department of Transportation (DOT), which will "lose" the funds, and the State Highway Safety Office (SHSO), which will "gain" the funds, to jointly decide. Joint decision-making by the DOT and SHSO is the same process required by NHTSA and FHWA for the other programs in which Congress authorized flexible highway safety/highway construction funding choices (for example the Section 157 Seat Belt Use Incentive Grant program and the Section 163 .08 BAC Law Incentive program).

5. **Question:** *Must moneys going to hazard elimination be included in the State's HSP?*

Answer: Yes, after the funding has been transferred, the State must update its Highway Safety Plan (HSP), prepared under Section 402, to indicate how it intends to use the transfer funds. Alternatively, a State may choose to plan ahead. Knowing that there will be a transfer of funds in October, the State may include a program plan for these funds in its highway safety plan submission the preceding September. The discussion of hazard elimination activities would include the total amount to be spent by program type, but need not include specific projects and locations.

6. **Question:** *How do you give money to State DOTs when you are part of them and cannot contract with them?*

Answer: NHTSA and FHWA recognize that, in several States in which funds will be transferred, the highway safety office is a part of the State DOT organization. Projects internal to a DOT organization typically may have little paperwork to support them; no contracts or internal memos of agreement are executed; and fund transfers are most often controlled electronically. This is unlike the relationship established by a Highway Safety Office with its external grantees.

While having written agreements for transactions within the State DOT is not a typical situation, the State Highway Safety Office and the State Highway agency should develop a written internal

funding agreement to manage all of the hazard elimination transfer funds, as stated in the joint guidance issued by NHTSA and FHWA on March 31, 2000.

7. **Question:** *What are the restrictions on supplanting? How can GRs be assured that State DOTs are not supplanting?*

Answer: In accordance with OMB Circular No. A-87, the general costs of government are unallowable costs under Federal grants, including government services normally provided to the general public, such as fire and police. None of the transfer funds (i.e., funds transferred to Section 402 or to Section 148) may be used to supplant these existing government costs. As stated above, the State DOT should certify to the GR that all pertinent federal regulations and laws are being met.

8. **Question:** *Are the transferred funds which are used for hazard elimination subject to the Section 402 requirement that at least 40% of funds must be used by or for the benefit of political subdivisions of the State?*

Answer: No, Section 154 and 164 transfer funds which are used for hazard elimination programs are to be administered in accordance with Section 148 requirements. Therefore, they are not subject to the Section 402 requirements such as 40% to locals.

9. **Question:** *What can State DOTs do with hazard elimination money? Do GRs have to know since they are being held accountable for managing funds?*

Answer: The State DOTs must spend any transfer funds used for hazard elimination in accordance with the requirements of Title 23, the National Environmental Protection Act (NEPA), Section 148 Highway Safety Improvement Program (HSIP), etc. The FHWA Division Offices should continue to work with the State DOTs to assure progress on projects continues: the eligibility criteria are met, appropriate design standards are used, and NEPA clearances completed. The State DOT should certify to the GR that all the federal regulations and laws are being met as they would do to the FHWA Division office under Federal-aid.

10. **Question:** *After the initial agreement by the Governor's Representative for Highway Safety and the Secretary of the State Department of Transportation on how each State's Section 154 & 164 funds are allocated between alcohol-impaired (AL) and hazard elimination (HE), can the allocation of funds be changed between AL and HE? If so, are both parties required to approve this change?*

Answer: Yes. The Section 154 and 164 transfer funds can be reallocated. The State Highway Safety Office may shift funds between alcohol-impaired (AL) and planning and administration (PA) without a joint agreement (see answers to questions #13 and #14). However, if a State wishes to reallocate funds between AL and HE, it will require a written joint agreement from the originating parties. The revised agreement should be distributed to the same parties as the original agreement within 30 days after the change is re-negotiated, but no later than 30 days before the end of the fiscal year.

11. Question: If a State is going to use transfer funds for hazard elimination, is it the intent of Congress that hazards to be eliminated be based on a safety prioritization of those hazards rather than just going in and doing some particular area or roadway that may not be as much of a safety problem as another?

Answer: Under Section 148, a highway safety improvement project (which may also be referred to as a hazard elimination project) means a project that is consistent with the State Strategic Highway Safety Plan (SHSP) that corrects or improves a hazardous road location or feature, or addresses a highway safety problem. FHWA regulations and policy (23 CFR Part 924 Highway Safety Improvement Program - Section 924.5) allow projects which are most likely to reduce the number of, or potential for, fatalities and serious injuries.” Therefore, if the locations, sections, or features are similar to those with high crash experience, then these too are eligible. An element, location, or section does not have to have had crashes to be improved; it may just have the potential for crashes, being similar to one that does have crash experience.

12. Question: Can a State DOT begin a hazard elimination project, which it plans to fund with transfer monies, prior to the actual transfer of funds to Section 402?

Answer: Under Section 402, projects can not be started prior to the approval of funding. However, under FHWA procedures, Advance Construction (AC) provisions may be used for hazard elimination (HES) projects. AC is available for most fund categories (e.g., STP, IM, NHS), but no funds are obligated on an AC project. To set up an AC project, the State must initiate a project agreement with the FHWA Division Office and the Division must approve it. At the time of conversion (obligation of funds), any funds eligible for that project may then be used. In this case, transfer funds could be obligated on the project. However, the State cannot fund a project with STP funds and then switch to transfer funds. Once funds are obligated on a project, generally, those funds cannot later be replaced with another category of funds.

13. Question: Please clarify the requirements concerning use of transfer funds for Planning and Administration (P&A).

Answer: As Stated in the March 31, 2000, joint guidance memo, a maximum of 10% of annual 154 and 164 transfer funds may be used for planning and administration (P&A), with no matching funds required. However, the amount a State programs for 154 P&A and/or 164 P&A must be related to the costs of planning and administration for the alcohol programs and hazard elimination programs supported with transfer funds; these funds can not be used to offset the planning and administrative costs for highway safety programs in general as is the case for P&A in the regular Section 402 program. This is because Congress limited the use of Section 154 and 164 transfer funds to alcohol programs and hazard elimination programs. For example, 154 or 164 P&A funds may be used to cover the costs a highway safety office incurs in developing and implementing new accounting procedures for hazard elimination programs.

14. Question: If a State receives funds from both Sections 154 and 164, can all the P&A be put into either Section?

Answer: No. If a State receives funding for both Sections, then P&A costs incurred must be charged to the appropriate Section 154 and/or 164. The same answer holds true for this question as it did in the previous question. The amount a State allocates for 154 P&A and/or 164 P&A must be related to the costs for planning and administration of the programs supported with the specific transfer funds used.