

Use of Transferred Section 153 Funds
to Replace Highway Safety Hardware

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We have received a copy of a draft FHWA memorandum from the Associate Administrator for Safety and System Applications to the Regional Administrator in Kansas City, Missouri (copy attached). The document was transmitted for concurrence by the Director of your Office of Highway Safety to our Associate Administrator for Regional Operations. Because it raises legal concerns, it was forwarded to my attention.

The draft memorandum proposes to approve the use of Section 153 transfer funds for replacement of damaged or obsolete highway barrier ends under Kansas' Section 402 highway safety program. We do not believe that this use of the funds is legally authorized.

The transfer provision, 23 U.S.C. 153(h)(1), states that the funds are to be transferred "to the apportionment of the State under section 402 of this title." In addition, Section 153(h)(4) provides, with respect to the transferred funds, that the Secretary is to allocate an amount of obligation authority distributed for Federal-aid highways and highway safety construction programs "for carrying out only projects under section 402..." These provisions leave no doubt that Congress intended all expenditures of the transferred funds to be governed by 23 U.S.C. 402.

Among the operative provisions of Section 402 is a specific prohibition (Section 402(g)) on the expenditure of funds for "highway construction, maintenance, or design (other than design of safety features of highways to be incorporated into guidelines)." This prohibition, which has been a part of the Highway Safety Act since 1966, has been consistently applied to render ineligible any highway-related installation, maintenance, or replacement costs. The costs of guardrails, crash barriers, and the like are not distinguishable from

other highway-related costs. Since the transferred funds are to be treated as Section 402 funds, the prohibition would apply to these funds.

It is notable that Congressional attempts to broaden the eligible uses for the Section 153 transfer funds have been unsuccessful. During the 1991 reauthorization, the Senate bill (S. 1204) contained language that would make these funds available for Section 130 purposes (hazard elimination at railway-highway crossings) and certain Section 152 purposes (roadway hazard elimination, except repavement), in addition to Section 402 purposes. The House bill (H.R. 2950) contained no similar expansion, and the conference agreement expressly adopted the House language concerning the purposes for which redirected funds could be spent by the States. In our view, the Conference agreement is an unambiguous expression of Congressional intent that the transferred funds are available only for traditional Section 402 purposes--not for highway-related costs as contemplated by the draft memorandum.

As a related matter, we must take issue with the contention in the memorandum that funding for these barriers may be allowed under Section 402 in FY 1995, but should be provided under other Federal-aid funding categories in subsequent fiscal years. We do not find legal support for affording this choice of appropriations. Under generally accepted principles of appropriations law, a specific appropriation must be used to the exclusion of a more general one which might otherwise be viewed as available for the particular purpose. And, where two appropriations might reasonably be construed as available for the same purpose, an agency is charged with selecting one, to the exclusion of the other, to fund the contemplated purpose.

We believe the application of these appropriations principles compels the conclusion that funds apportioned under Section 402 may not be expended for the installation of highway barriers. In the first instance, it is not reasonable to construe these appropriations as available for the same purpose, because Federal-aid construction funds are available for construction activities, while Section 402 funds are not. Moreover, we are informed that Federal-aid construction funds have, in fact, traditionally been expended on highway barriers. Consequently, to the extent that any argument can be advanced for the need to select between similar appropriations, that selection has been made.

For the above reasons, it is our opinion that funds apportioned under Section 402 (or transferred to the Section 402 apportionment by operation of Section 153) are not available to cover the costs of construction or maintenance activities, including the installation, maintenance, or replacement of highway barriers.

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Attachment