

Standard Title Page - Report on State Project

Report No. VTRC 06-R20	Report Date February 2006	No. Pages 25	Type Report: Final Period Covered: July 2005 to June 2006	Project No.: 76463
				Contract No.
Title: The Benefits and Pitfalls of Strengthening Virginia's Open-Container Laws				Key Words: Open-Container Laws
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Supplementary Notes				
<p>Abstract</p> <p>This study addressed the conditions on federal highway funding imposed by the federal government in the Transportation Equity Act for the 21st Century (TEA-21) and its successor Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) relating to a state's implementation of a compliant open-container law. Although SAFETEA-LU amended TEA-21 in a number of ways, it did not change the statutory standard for open-container laws established by TEA-21. Non-compliant states have a percentage of their highway construction funds diverted to a safety fund.</p> <p>In this study, the constitutionality of such restrictions was explored and found to be acceptable given similar Supreme Court precedent. Second, the responses of other states to the federal initiatives were determined and assessed for compliance. Third, the efficacy of the federal guidelines in terms of their impact on highway safety was explored. Fourth, Virginia's current open-container law was analyzed with regard to its compliance with the federal mandate.</p> <p>Virginia's open-container law does not comply with the provisions of TEA-21. As a result, 3 percent of Virginia's highway construction funds are diverted from highway construction to safety programs. If Virginia passed a law that satisfied the federal conditions, this transfer would stop. If Virginia does not pass such a law, it cannot avoid the transfer of more than \$16 million pursuant to 23 U.S.C. § 154 for fiscal year 2006. An additional benefit of enacting a stricter open-container statute is that such a law could potentially function as a "back up" charge that might be pressed if a driver was suspected to be driving under the influence of alcohol but the violation could not be substantiated in a traffic stop. However, there is much debate as to the actual effect of TEA-21-compliant open-container laws on reducing the frequency and severity of alcohol-related traffic crashes.</p>				

FINAL REPORT

**THE BENEFITS AND PITFALLS OF STRENGTHENING
VIRGINIA'S OPEN-CONTAINER LAWS**

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(A Cooperative Organization Sponsored Jointly by the
Virginia Department of Transportation and
the University of Virginia)

Charlottesville, Virginia

February 2006
VTRC 06-R20

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ABSTRACT

This study addressed the conditions on federal highway funding imposed by the federal government in the Transportation Equity Act for the 21st Century (TEA-21) and its successor Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) relating to a state's implementation of a compliant open-container law. Although SAFETEA-LU amended TEA-21 in a number of ways, it did not change the statutory standard for open-container laws established by TEA-21. Non-compliant states have a percentage of their highway construction funds diverted to a safety fund.

In this study, the constitutionality of such restrictions was explored and found to be acceptable given similar Supreme Court precedent. Second, the responses of other states to the federal initiatives were determined and assessed for compliance. Third, the efficacy of the federal guidelines in terms of their impact on highway safety was explored. Fourth, Virginia's current open-container law was analyzed with regard to its compliance with the federal mandate.

Virginia's open-container law does not comply with the provisions of TEA-21. As a result, 3 percent of Virginia's highway construction funds are diverted from highway construction to safety programs. If Virginia passed a law that satisfied the federal conditions, this transfer would stop. If Virginia does not pass such a law, it cannot avoid the transfer of more than \$16 million pursuant to 23 U.S.C. § 154 for fiscal year 2006. An additional benefit of enacting a stricter open-container statute is that such a law could potentially function as a "back up" charge that might be pressed if a driver was suspected to be driving under the influence of alcohol but the violation could not be substantiated in a traffic stop. However, there is much debate as to the actual effect of TEA-21-compliant open-container laws on reducing the frequency and severity of alcohol-related traffic crashes.

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INTRODUCTION

Open-container laws impose a penalty for the possession of an open container of an alcoholic beverage in the passenger area of a vehicle; this penalty is typically over and above any penalty that may be imposed on the driver for operating the vehicle while intoxicated. The laws of various states differ as to whether the prohibition on open containers applies to both drivers and passengers and as to how the term *passenger area* is defined.

Since 1997, one or more versions of an open-container law have been proposed in the Virginia General Assembly every regular session (with the exception of the 2000 session). Virginia's current open-container law (Va. Code Ann. § 18.2-323.1)¹ was passed in 2002 in response to the federal government's funding incentives specified in the Transportation Equity Act for the 21st Century (TEA-21), in particular a penalty composed of transferring funding from the state's highway construction funds to its highway safety program if the state does not have a compliant open-container law.²

The federal provision requires the prohibition of possession of an open alcoholic beverage container in the passenger area of a vehicle *in addition to* prohibition of driver alcohol consumption. In contrast, the Virginia law—which merely states that an open container creates a rebuttable presumption that the driver has been consuming alcohol—does not prohibit the possession of an open alcoholic beverage; rather, it only encourages the driver to refrain from violating the prohibition against driver consumption of alcohol.

Senator Thomas Norment, the original sponsor of the 2002 bill (Senate Bill 148) did not believe that a mere rebuttable presumption would meet the criteria espoused in the federal regulations and thus proposed a bill that made the possession of an open container an independent violation.³ As SB 148 wended its way through committee hearings, however, the language of a rebuttable presumption surfaced again and eventually came to dominate the

¹See Appendix A.

²See Appendix B, which outlines the funding incentives and compliance criteria.

³<http://leg1.state.va.us/cgi-bin/legp504.exe?021+ful+SB148> (last visited 2/13/06).

legislation.⁴ Echoing Senator Norment's concerns, Governor Mark Warner suggested a substitute version of the bill that did away with the rebuttable presumption and brought the language into compliance with TEA-21. However, Warner's substitute bill failed to pass, and the weaker version of the bill that was not TEA-21 compliant prevailed.⁵

Warner's analysis appears to have been correct, as Virginia has continued to have federal funding transferred from construction into its safety program even after the passage of its current open-container law: \$5,811,049 in 2001; \$6,207,765 in 2002; and \$13,784,598 in 2003.⁶

In contrast, a law along the lines of Virginia House Bill 1496 (2005) or Virginia House Bill 8 (2006) would prohibit the possession of an open alcoholic beverage in accordance with the federal regulation and thus end the transfer of funding from highway construction funds to safety programs. In 2003, 2004, and 2005, bills similar in nature to HB 1496 were proposed, but they all died by a full vote of the House of Delegates or within a House committee.

Two broad considerations could serve as motivation and justification for strengthening Virginia's current open-container law so that it is TEA-21 compliant: (1) the availability of federal funds if such changes are made and (2) the impact of such changes on the frequency of alcohol-impaired driving.

These two considerations are related in that the goal of the federal directive is ostensibly to decrease alcohol-impaired driving and thus to decrease alcohol-related motor vehicle crashes. However, the two considerations are also independent since Virginia could make changes to its open-container law solely to maximize federal funds, even if—as an empirical matter—the recommended changes led to little or no safety benefit. Conversely, Virginia could choose not to change its current non-compliant open-container law in the name of increased highway safety despite a loss of federal funds.

PURPOSE AND SCOPE

The purpose and scope of this study were to determine the benefits and pitfalls of making Virginia's open-container laws more stringent, in particular the possibility of garnering increased federal highway funds under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). Although several safety studies are discussed, this report is not intended as an original empirical assessment of the safety impact of implementing the federally recommended changes.

⁴See <http://leg1.state.va.us/cgi-bin/legp504.exe?021+sum+SB148S> (last visited 2/13/06), providing comparison summaries of the bill language as introduced and as passed.

⁵<http://leg1.state.va.us/cgi-bin/legp504.exe?021+sum+SB148>.

⁶Accessed Jan. 5, 2006, at <http://www.nhtsa.dot.gov/nhtsa/whatsup/tea21/tea21programs/>.

METHODOLOGY

To achieve the study objective, the following steps were taken:

1. The legal databases (e.g., Westlaw) and the Virginia Legislative Information site were used to trace the evolution of Virginia's open-container law, as described in the Introduction.
2. Various informational websites sponsored by the federal government were used to map out the implications of the federal funding restrictions.
3. Lexis-Nexis was used to amass and categorize the open-container laws in other states.
4. A literature review was conducted to determine if there was a correlation between TEA-21-compliant open-container laws and increased highway safety.
5. Based on the information gathered, the benefits and pitfalls of changing Virginia's open-container law were determined.

RESULTS

Federal Initiatives to Improve Highway Safety: TEA-21 and SAFETY-LU

TEA-21: Transportation Equity Act for the 21st Century

Passed by Congress in 1998—and the successor legislation to the Intermodal Surface Transportation Efficiency Act (ISTEA) that expired in 1997—TEA-21 represented a landmark in federal transportation funding by guaranteeing more than \$198 billion to be used by the states for federal highway construction and maintenance, highway safety, and transit programs through fiscal year 2003.⁷ Building on many of the initiatives established by ISTEA, Congress attempted to use federal funding to encourage states to accomplish an assortment of objectives.

A major component of the program designed to improve driver and vehicle safety dealt specifically with the problem of alcohol-impaired driving. Congress implemented four primary methods for encouraging states to curb alcohol-impaired driving:

1. incentive grants for states to enforce a blood alcohol concentration (BAC) of 0.08 for offenses of per se driving while intoxicated
2. incentive grants for states to implement specific alcohol offense programs (such as suspension of licenses for alcohol offenses and reductions in fatalities involving impaired drivers)

⁷Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 1101, 112 Stat. 107, 111-112 (1998).

3. a penalty for states that have not enacted adequate repeat intoxicated driver laws composed of transferring funding from the state's highway construction funds to its highway safety grant program
4. a penalty for states that do not have an adequate open-container law consisting of transferring funding from the state's highway construction funds to its highway safety program.⁸

In order to carry out the open-container requirements of TEA-21,⁹ the National Highway Traffic Safety Administration (NHTSA) and the Federal Highway Administration (FHWA), under the U.S. Department of Transportation, adopted a regulation with regard to the open-container provisions of TEA-21 on August 16, 2000.¹⁰ The regulation's compliance criteria dictate that a state's open-container law must, at minimum, do the following:

- prohibit possession of any open alcoholic beverage container *and* the consumption of any alcoholic beverage in a motor vehicle
- cover the passenger area of any motor vehicle, including unlocked glove compartments and any other areas of the vehicle that are readily accessible to the driver or passengers while in their seats, except in vehicles without a trunk, where the container may be behind the last upright seat, in a locked glove compartment, or in an area not normally occupied by a driver or passenger
- apply to all open alcoholic beverage containers and all alcoholic beverages, including beer, wine, and spirits
- apply to all vehicle occupants except for passengers of vehicles designed, maintained, or used primarily for the transportation of people for compensation (such as buses, taxi cabs, and limousines) and the living area of vehicles such as motor homes
- apply to all vehicles on a public highway or the right of way (i.e., on the shoulder) of a public highway
- require primary enforcement of the law, rather than requiring probable cause that another violation had been committed before allowing enforcement of the open-container law.¹¹

The regulations further state that if a state has not enacted and is not enforcing an open-container law, "the Secretary [of Transportation] shall transfer 3 percent of the funds apportioned to the state under paragraphs (1), (3), and (4) of Section 104(b) to the apportionment of the State

⁸23 U.S.C. §§ 163, 410, 164, and 154 (2005).

⁹23 U.S.C. § 154 (See Appendix C, *supra*).

¹⁰23 C.F.R. §§ 1270.1- 1270.8 (2005) (See Appendix B, *supra*).

¹¹§§ 1270.3-1270.4.

under 23 U.S.C. 402.”¹² Funds transferred to Section 402 must be used for alcohol-impaired driving countermeasures, enforcement of driving under the influence (DUI) and other related laws, or hazard elimination activities eligible under 23 U.S.C. § 152.¹³

Although the open-container regulations are binding on states, there is a possibility that they do not represent an acceptable interpretation of 23 U.S.C. § 154. The statute declares that “each State shall have in effect a law that prohibits the possession of any open alcoholic beverage container, *or* the consumption of any alcoholic beverage, in the passenger area of any motor vehicle located on a public highway, or the right-of-way of a public highway, in the State (emphasis added).”¹⁴ One possible interpretation of this provision is that it merely requires either a prohibition of open alcoholic beverages in motor vehicles *or* a prohibition of the consumption of alcohol in motor vehicles, but not both. Under this interpretation, the operative word in the statute is “or.”

This argument was made by an interested third party in the notice and comment phase of adopting the regulations.¹⁵ In response, NHTSA offered two arguments: First, NHTSA read the statute to require states to penalize individuals for either possessing an open container or consuming alcohol in a motor vehicle.¹⁶ In other words, states must prohibit both activities independently. Second, NHTSA argued that since it had read the statute in this manner for 10 years and Congress had not changed the language of the statute in that time, the agencies must be in accord with legislative intent.¹⁷

Whether the NHTSA interpretation is inferior is not the relevant question. Under the doctrine established by the U.S. Supreme Court in *Chevron v. NRDC*, federal courts will defer to NHTSA’s interpretation if it is reasonable.¹⁸ Regardless of whether the NHTSA interpretation would be found reasonable, the federal regulations remain binding on the states unless a state mounts a successful legal challenge in federal court. As a result, this discussion proceeds under the assumption that the regulations are valid and that compliance with TEA-21 hinges on the guidelines established by the regulations.

SAFETEA-LU: Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users

Passed on August 25, 2005, SAFETEA-LU became the successor to TEA-21 in many ways for fiscal years 2005 through 2009.¹⁹ Just as its predecessor, SAFETEA-LU authorized the federal surface transportation programs for highways, highway, safety, and transit. Of particular importance for this study, it did not alter the 3 percent transfer of funding from highway

¹²§ 1270.6(b).

¹³§ 1270.7.

¹⁴23 U.S.C. § 154(b)(1) (2005).

¹⁵Open-container laws, 65 Fed. Reg. 51532, 51534 (Aug. 24, 2000) (codified at 23 C.F.R. pt. 1270).

¹⁶Open-container laws, 65 Fed. Reg. at 51535.

¹⁷Open-container laws, 65 Fed. Reg. at 51535.

¹⁸*Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

¹⁹Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. 109-59, 119 Stat. 1144 (2005).

construction programs to federal safety programs for those states that do not have an open-container law meeting the requirements of 23 C.F.R. § 1270. Although the 3 percent transfer rate remains the same, the act authorizes an increase in the overall funding.²⁰ Thus, the transfer of 3 percent represents an increase in the aggregate amount transferred under SAFETEA-LU.

In addition, SAFETEA-LU removed the references to 23 U.S.C. § 152 (Hazard Elimination Program) and replaced them with references to 23 U.S.C. § 148 (Highway Safety Improvement Program).²¹ Thus, transferred funds are no longer to be used for hazard elimination program activities and, instead, can be used for highway safety improvement program activities in addition to the other activities for which transferred funds could be used under TEA-21.

For fiscal year 2005, Virginia was projected to have \$11,453,220 transferred from highway construction and maintenance funds to safety program funds under TEA-21, which was still operable at that time.²² Under SAFETEA-LU, Virginia has been assessed to have \$16,100,456 transferred pursuant to 23 U.S.C. § 154 for fiscal year 2006.²³ As federal funding naturally increases each year, these amounts will likely increase over the span of SAFETEA-LU (which is authorized through fiscal year 2009).

The Open-Container Laws of Other States

At the time of this report, 39 states had adopted open-container laws that were TEA-21 compliant and 11 states had not.²⁴ Of the compliant states, the laws in 3 states are worth examining since they were a part of a NHTSA study that attempted to determine the effectiveness of open-container laws.²⁵ These states are Iowa, Maine, and South Dakota.

Iowa's open-container law prohibits drivers of motor vehicles from possessing an open container in the passenger area of a motor vehicle.²⁶ The passenger area is then defined:

"Passenger area" means the area designed to seat the driver and passengers while the motor vehicle is in operation and any area that is readily accessible to the driver or a passenger while in their seating positions, including the glove compartment. An open or unsealed receptacle

²⁰§ 1101, 119 Stat. at 1153-1157.

²¹§ 1401, 119 Stat. at 1225.

²²Federal Highway Administration, *Transportation Equity Act for the 21st Century—Funding Table for FY 2005*, available at <http://www.fhwa.dot.gov/tea21/>.

²³Federal Highway Administration, *Table 2—Transfers Assessed Pursuant to 23 U.S.C. 154 (Open-container requirements) for the National Highway System, Surface Transportation Program, and Interstate Maintenance Programs Authorized for FY 2006*, available at

<http://www.fhwa.dot.gov/legsregs/directives/notices/n4510564a2.htm>.

²⁴Mothers Against Drunk Driving, *Open-container law that is TEA-21 Compliant*, available at <http://www.madd.org/Laws/law>.

²⁵Jack Stuster et al., *Open-container Laws and Alcohol Involved Crashes: Some Preliminary Data* (National Highway Traffic Safety Administration, DOT HS 809 426, April 2002). Accessed December 27, 2005, at <http://www.nhtsa.dot.gov/people/injury/alcohol/OpenContainer.pdf>.

²⁶Iowa Code § 321.284 (2004).

containing an alcoholic beverage may be transported in the trunk of the motor vehicle. An unsealed receptacle containing an alcoholic beverage may be transported behind the last upright seat of the motor vehicle if the motor vehicle does not have a trunk.²⁷

The law has a separate section that prohibits passengers of motor vehicles from possessing open containers.²⁸ However, this section also includes exceptions, such as passengers being transported in a vehicle that is primarily used for transporting people for compensation and the living quarters of a motor home or a fifth wheel travel trailer.²⁹ Further, violations of this section are not included in the passenger's driving record.³⁰

Maine's law operates in a similar fashion and with similar exceptions as Iowa's law with one important difference. Although Maine's law applies to both drivers and passengers, if the passenger possesses an open container, the driver, not the passenger, is in violation of the law.³¹ This deviation does not appear to affect Maine's compliance status under TEA-21.

South Dakota's law is similar to Iowa's law with two important differences. First, South Dakota does not distinguish between passengers and drivers. It merely states that all *persons* possessing an open container in a motor vehicle are in violation.³² Second, the wording of South Dakota's exceptions is different. South Dakota has an exception for open containers that are in a locked glove compartment.³³ This exception makes it much easier for a driver or passenger to circumvent the open-container law by quickly placing the alcoholic beverage in a glove compartment and locking the glove compartment should a law enforcement officer stop the vehicle. In addition, South Dakota's law takes a stricter approach to the type of vehicles that qualify for an exception, allowing an exception only for those vehicles where the driver is hired for transportation services and the driver is properly licensed by the state.³⁴

Of the 11 states that are not compliant, some have no open-container law and some have an open-container law that is not compliant in some respect. Alaska, Louisiana, and Tennessee have open-container laws that fall short of compliance.

Alaska's law is similar to Maine's law in that it holds the driver accountable for both driver and passenger possession of an open container.³⁵ However, it is not TEA-21 compliant because it includes an exception for passengers when the passenger occupies a seat that is separated from the driver's seat by a solid partition, regardless of whether the vehicle is used primarily for the transportation of persons for compensation.³⁶ Functionally, the law may not be under-inclusive. However, there may be isolated cases where a vehicle has a solid partition, but it is not used transporting people for compensation.

²⁷*Id.*

²⁸Iowa Code § 321.284A(1) (2004).

²⁹Iowa Code § 321.284A(2) (2004).

³⁰Iowa Code § 321.284A(4) (2004).

³¹Me. Rev. Stat. Ann. tit. 29-A, § 2112-A (2005).

³²S.D. Codified Law § 35-1-9.1 (2005).

³³S.D. Codified Law § 35-1-9.3(1) (2005).

³⁴S.D. Codified Law § 35-1-9.3(3) (2005).

³⁵Alaska Stat. § 28.35.029(a) (2005).

³⁶*Compare* Alaska Stat. § 28.35.029(b)(3) (2005) *with* 23 C.F.R. 1270.4(d)(2) (2005).

Louisiana’s open-container law provides a blanket exception for passengers of motor homes without specifying whether the exception applies only to the living quarters of the motor home.³⁷ Upon adopting the regulations, NHTSA commented that the purpose of the “house coaches and house trailers” exception was to allow passengers to possess open alcoholic beverages in the living quarters of vehicles equipped with living quarters.”³⁸ Thus, it is clear that NHTSA is concerned with open containers in the area of a vehicle to which the driver has immediate access and that failing to restrict a motor home exception to the living quarters results in a non-compliant law. Although Louisiana’s law is not compliant, it may not be any less applicable to those with an open alcoholic container than it would have been had it been TEA-21 compliant because it is very easy for a passenger to move from the front of a motor home to the living quarters prior to a law enforcement officer being able to notice the open container.

Tennessee’s open-container law effectively creates an exception for passenger possession of open containers. First, a violation occurs only when the driver is in possession of an open container.³⁹ Second, the statute explicitly states that for purposes of the open-container law, a driver is in possession of an open container when the open container is *not* in the possession of any passenger.⁴⁰ In addition to the passenger exception, another non-compliant feature of Tennessee’s open-container law is that it does not apply to open alcoholic beverages located in a closed, but unlocked glove compartment.⁴¹ Unlike the non-compliant features of the laws of Alaska and Louisiana, the non-compliant features of the Tennessee law may be under-inclusive. One purpose for making an open-container law applicable to passengers would be to prevent a driver from being able to avoid responsibility by simply transferring possession of an alcoholic beverage to a passenger upon being stopped by a law enforcement officer. However, the exception in Tennessee’s law creates a loophole for drivers who are in possession of an open container. Still, whether or not the loophole is used would depend on whether drivers are aware of its existence. This issue underscores the need to examine the statistical effects of open-container laws.

Correlation Between TEA-21-Compliant Open-Container Laws and Increased Safety

The literature review did not yield any studies that examined the effects of specific exceptions and features of open-container laws. However, two studies examined the effects of open-container laws generally.

A study by Eisenberg compared the number of fatal crashes before states enacted an open-container law with the number of fatal crashes after the open-container law was enacted.⁴² The study found that the effect of adopting an open-container law was a 5.1 percent reduction in

³⁷La. Rev. Stat. Ann. § 32:300(F)(5) (2005).

³⁸Open-container laws, 65 Fed. Reg. 51532, 51536 (Aug. 24, 2000) (codified at 23 C.F.R. pt. 1270).

³⁹Tenn. Code Ann. § 55-10-416(a)(1) (2005).

⁴⁰*Compare* Tenn. Code Ann. § 55-10-416(a)(2)(B) (2005) *with* 23 C.F.R. 1270.4(b)(4) (2005).

⁴¹*Id.*

⁴²Daniel Eisenberg, *Evaluating the Effectiveness of a 0.08 Percent BAC Limit and Other Policies Related to Drunk Driving* (Stanford Institute for Economic Policy Research, Discussion Paper No. 00-23, January 2001).

the number of fatal crashes.⁴³ However, the study did not differentiate between the wording used in various open-container laws. This mode of defining “open-container law” leads to data that could be both under- and over-inclusive. For example, since possession of an open alcoholic beverage in a motor vehicle is not—in and of itself—a violation of law in Virginia,⁴⁴ data from Virginia were *not* used to determine the effect of open-container laws on fatal crash rates.⁴⁵ On the other hand, as long as a state adopted *some* form of direct-sanction open-container law prior to the study, the crash statistics from that state could be used.

Given the apparent effect of open-container laws on the fatal crash rate, one might argue that laws with broader applicability may have a greater deterrent effect and may lead to a greater reduction in fatal crashes. For example, a state that sanctions driver *and* passenger possession of an open alcoholic beverage in a motor vehicle might create more deterrence than a state that sanctions only driver possession, since under the latter type of statute it is easier for a driver to avoid repercussions by simply transferring possession to the passenger. As a result, states with laws such as Maine’s or Iowa’s may have had a *greater* than 5.1 percent reduction in fatal crashes, whereas states with laws such as the law in Tennessee may have had a *smaller* reduction in fatal crashes. However, this too may be inaccurate because it is also possible that merely having an open-container law achieves maximum deterrence and broadening the applicability of the open-container law would *not* result in any greater reduction in fatal crashes than would enacting a law. Since the Eisenberg study did not examine variations in open-container laws, it is not possible to say with any degree of certainty whether TEA-21-compliant open-container laws lead to a greater reduction in fatal crashes than non-compliant open-container laws.

NHTSA also sponsored a study that attempted to examine the effects of open-container laws.⁴⁶ The NHTSA study differed from the Eisenberg study in that it examined four states that adopted TEA-21-compliant open-container laws following enactment of TEA-21.⁴⁷ Those states are Iowa, Maine, Rhode Island, and South Dakota. In addition to “before and after” analyses, the NHTSA study compared crash data among states with a fully compliant TEA-21 open-container law, states with a partially compliant open-container law, and states with no open-container law. For purposes of this study, Virginia law was classified as partially compliant, most likely because Virginia law allows the presence of an open alcoholic container in a motor vehicle to be used as evidence of alcohol consumption by the driver.⁴⁸

With regard to the before and after analyses, all four states had some form of open-container law that did not fully conform to TEA-21 standards prior to the enactment of the TEA-21 Restoration Act.⁴⁹ One of the reasons that the laws of Iowa, Rhode Island, and Maine did not conform is that they did not sanction consumption of alcohol *and* open containers in a motor

⁴³*Id.* at 3.

⁴⁴Va. Code Ann. § 18.2-323.1(B) (2005).

⁴⁵Eisenberg at 23.

⁴⁶Jack Stuster et al., *Open-container laws and Alcohol Involved Crashes: Some Preliminary Data* (National Highway Traffic Safety Administration, DOT HS 809 426, April 2002).

⁴⁷Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 1101, 112 Stat. 107, 111-112 (1998).

⁴⁸*Id.* at 5.

⁴⁹*Id.* at 6.

vehicle.⁵⁰ Virginia's current law shares this feature since it sanctions only consumption and an open container is merely identified as *evidence* of consumption.⁵¹ Maine, Rhode Island, and South Dakota had slight reductions in the percentage of fatal crashes that involved alcohol following modification of their law to make it TEA-21 compliant.⁵² There was no change in the percentage of fatal crashes that involved alcohol in Iowa. Although the study attempted to suggest a causal relationship between open-container laws and the percentage of fatal crashes that involve alcohol, the methods have limitations in that other potential variables are not controlled. As in the previous example, it is possible that the enactment of open-container law coincided with enactments of other alcohol-impaired driving countermeasures.

With regard to the comparison of crash data among states with regard to the percentage of fatal crashes that involved alcohol, the percentage for states that fully conformed with TEA-21 standards averaged between 37 and 38.1, the percentage for states that partially conformed averaged 40.7, and the percentage for states without any law averaged 41.8. Although states with TEA-21-compliant open-container laws were likely to have a lower percentage of alcohol-involved fatal crashes, the research examined data for only 1 year. It is possible that examination of data from another year would yield different results.

CONCLUSIONS

Although there might be some discrepancy between the open-container requirements under TEA-21 and the requirements under federal regulations designed to carry out TEA-21, the regulations have not been challenged in federal court as inconsistent with the statutory requirements. Thus, the open-container requirements established by federal regulations remain binding on the states. At a minimum, to avoid a 3 percent transfer of highway construction funds to other safety programs, a state must enact an open-container law that:

- prohibits possession of any open alcoholic beverage container *and* the consumption of any alcoholic beverage in a motor vehicle
- covers the passenger area of any motor vehicle, including unlocked glove compartments and any other areas of the vehicle that are readily accessible to the driver or passengers while in their seats, except in vehicles without a trunk, where the container may be behind the last upright seat, in a locked glove compartment, or in an area not normally occupied by a driver or passenger
- applies to all open alcoholic beverage containers and all alcoholic beverages, including beer, wine, and spirits

⁵⁰*Id.*

⁵¹Va. Code Ann. § 18.2-323.1(B) (2005).

⁵²Stuster at 7.

- applies to all vehicle occupants except for passengers of vehicles designed, maintained, or used primarily for the transportation of people for compensation (such as buses, taxi cabs, and limousines) and the living area of vehicles such as motor homes
- applies to all vehicles on a public highway or the right of way (i.e., on the shoulder) of a public highway
- requires primary enforcement of the law, rather than requiring probable cause that another violation had been committed before allowing enforcement of the open-container law.

A review of statutory language in select states that do and do not comply with these requirements revealed that the requirements are fairly stringent, and any deviation that restricts the open-container law more than the regulations anticipate will be deemed out of compliance with TEA-21 standards.

At the time of this report, Virginia was not among the states with a TEA-21-compliant open-container law. Virginia's law is deficient because it does not prohibit open alcoholic beverages in the passenger area of a motor vehicle; the *Code of Virginia* creates only a rebuttable presumption that the driver is in violation of a law prohibiting consumption of alcohol in a motor vehicle. Unless Virginia adopts a law that meets the stringent federal regulations established by NHTSA and FHWA, Virginia will continue to have some of its federal highway construction funds transferred to other programs.

BENEFITS AND PITFALLS OF CHANGING VIRGINIA'S OPEN-CONTAINER LAW

The primary impact of adopting a TEA-21-compliant open-container law would be the halting of the 3 percent transportation fund transfer from highway construction to safety programs. If Virginia does not pass a law that satisfies the federal conditions, it cannot avoid the transfer of more than \$16 million pursuant to 23 U.S.C. § 154 for fiscal year 2006.⁵³ Of course, whether the halting of such transfers should be counted as a *pro* or a *con* with respect to adopting a TEA-compliant open-container law in Virginia depends on one's point of view.

There is arguably some benefit to allowing the funds to continue to be diverted into the state's safety programs. If this federal source of funding for safety-related projects were eliminated, it is doubtful that it would in practice be replenished by state sources. Although fines collected under the statute would mitigate the loss to some extent, they would not come near to off-setting the federal dollars that would go instead to infrastructure improvement.

⁵³Federal Highway Administration, *Table 2—Transfers Assessed Pursuant to 23 U.S.C. 154 (Open-container requirements) for the National Highway System, Surface Transportation Program, and Interstate Maintenance Programs Authorized for FY 2006*, available at <http://www.fhwa.dot.gov/legisregs/directives/notices/n4510564a2.htm>.

However, given the aforementioned transportation crisis and the resultant shifting of priorities within the state, it is likely that the majority of Virginians would view the elimination of the 3 percent transfer as a benefit of enacting a TEA-21-compliant open-container law. Without such federal funding, the state government would need to provide more of its own money for building and maintaining highway infrastructure in Virginia. In addition, the state would lose out on the flexibility of the money that it would receive, much of which could still go to funding safety programs. In the end, Virginia's lack of an open-container law does handicap the operation of the Virginia Department of Transportation by limiting the liquidity of its funding and foregoing federal money designated for the highway infrastructure.

An additional benefit of enacting a stricter open-container statute is that such a law could potentially function as a "back up" charge that might be pressed if a suspected violation of the DUI statute could not be substantiated in a traffic stop. Enforcing open-container laws is easier and less time-consuming than prosecuting DUIs. If such measures provide an alternative way of keeping alcohol-related crashes in check, they are arguably a much more efficient means of reaching this goal than traditional DUI stops and prosecutions.

However, as noted earlier, there is much debate as to the actual effect of TEA-21-compliant open-container laws on reducing the frequency and severity of alcohol-related traffic accidents. Telling against such a relation is the possibility that strengthening open-container laws would curb the growing practice of designated driving. Opponents of changes argue that such a law would discourage those who are acting as designated drivers from doing so because they might unfairly be found guilty of violating the open-container law when their passengers were drinking in the motor vehicle. The subsequent drop in designated drivers would, the argument continues, likely lead to an increase in the number of drunk drivers—an ironic and undesirable outcome. This hypothesis is bolstered in a report by law enforcement officials around Virginia, who found that an open-container law is the least effective means of discouraging DUI (with a score of only 4.0 on a 10-point scale).⁵⁴ In short, then, definitively gauging the direct safety benefit of enacting a TEA-21-compliant open-container law will have to await the production of additional empirical data.

⁵⁴Governor's Task Force to Combat Driving Under the Influence of Drugs and Alcohol, *Report and Recommendations*, p. 16 (July 2003).

APPENDIX A

Va. Code Ann. § 18.2-323.1

§ 18.2-323.1. Drinking while operating a motor vehicle; possession of open container while operating a motor vehicle and presumption; penalty

A. It shall be unlawful for any person to consume an alcoholic beverage while driving a motor vehicle upon a public highway of this Commonwealth.

B. A rebuttable presumption that the driver has consumed an alcoholic beverage in violation of this section shall be created if (i) an open container is located within the passenger area of the motor vehicle, (ii) the alcoholic beverage in the open container has been at least partially removed and (iii) the appearance, conduct, odor of alcohol, speech or other physical characteristic of the driver of the motor vehicle may be reasonably associated with the consumption of an alcoholic beverage.

For the purposes of this section:

"Open container" means any vessel containing an alcoholic beverage, except the originally sealed manufacturer's container.

"Passenger area" means the area designed to seat the driver of any motor vehicle, any area within the reach of the driver, including an unlocked glove compartment, and the area designed to seat passengers. This term shall not include the trunk of any passenger vehicle, the area behind the last upright seat of a passenger van, station wagon, hatchback, sport utility vehicle or any similar vehicle, the living quarters of a motor home, or the passenger area of a motor vehicle designed, maintained or used primarily for the transportation of persons for compensation, including a bus, taxi, or limousine, while engaged in the transportation of such persons.

C. A violation of this section is punishable as a Class 4 misdemeanor.

Acts 1989, c. 343; Acts 2002, c. 890.

HISTORICAL AND STATUTORY NOTES

Acts 2002, c. 890, in the section heading inserted "; possession of open container while operating a motor vehicle and presumption;"; added subsection identifiers A and C to the former first and second sentences respectively, and added subsec. B.

West (2005)

APPENDIX B

Code of Federal Regulations, 23 C.F.R. PART 1270: Open Container Laws

§ 1270.1 Scope.

This part prescribes the requirements necessary to implement Section 154 of Title 23 of the United States Code which encourages States to enact and enforce open container laws.

§ 1270.2 Purpose.

The purpose of this part is to specify the steps that States must take to avoid the transfer of Federal-aid highway funds for noncompliance with 23 U.S.C. 154.

§ 1270.3 Definitions.

As used in this part:

(a) Alcoholic beverage means:

(1) Beer, ale, porter, stout, and other similar fermented beverages (including sake or similar products) of any name or description containing one-half of 1 percent or more of alcohol by volume, brewed or produced from malt, wholly or in part, or from any substitute therefore;

(2) Wine of not less than one-half of 1 per centum of alcohol by volume; or

(3) Distilled spirits which is that substance known as ethyl alcohol, ethanol, or spirits of wine in any form (including all dilutions and mixtures thereof from whatever source or by whatever process produced).

(b) Enact and enforce means the State's law is in effect and the State has begun to implement the law.

(c) Motor vehicle means a vehicle driven or drawn by mechanical power and manufactured primarily for use on public highways, but does not include a vehicle operated solely on a rail or rails.

(d) Open alcoholic beverage container means any bottle, can, or other receptacle that:

(1) Contains any amount of alcoholic beverage; and

(2)(i) Is open or has a broken seal; or

(ii) The contents of which are partially removed.

(e) Passenger area means the area designed to seat the driver and passengers while the motor

vehicle is in operation and any area that is readily accessible to the driver or a passenger while in their seating positions, including the glove compartment.

(f) Public highway or right-of-way of a public highway means the width between and immediately adjacent to the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel; inclusion of the roadway and shoulders is sufficient.

(g) State means any of the 50 States, the District of Columbia, or the Commonwealth of Puerto Rico.

§ 1270.4 Compliance criteria.

(a) To avoid the transfer of funds as specified in § 1270.6 of this part, a State must enact and enforce a law that prohibits the possession of any open alcoholic beverage container, and the consumption of any alcoholic beverage, in the passenger area of any motor vehicle (including possession or consumption by the driver of the vehicle) located on a public highway, or the right-of-way of a public highway, in the State.

(b) The law must apply to:

(1) The possession of any open alcoholic beverage container and the consumption of any alcoholic beverage;

(2) The passenger area of any motor vehicle;

(3) All alcoholic beverages;

(4) All occupants of a motor vehicle; and

(5) All motor vehicles located a public highway or the right-of-way of a public highway.

(c) The law must provide for primary enforcement.

(d) Exceptions. (1) If a State has in effect a law that makes unlawful the possession of any open alcoholic beverage container and the consumption of any alcoholic beverage in the passenger area of any motor vehicle, but permits the possession of an open alcoholic beverage container in a locked glove compartment, or behind the last upright seat or in an area not normally occupied by the driver or a passenger in a motor vehicle that is not equipped with a trunk, the State shall be deemed to have in effect a law that applies to the passenger area of any vehicle, as provided in paragraph (b)(2) of this section.

(2) If a State has in effect a law that makes unlawful the possession of any open alcoholic beverage container or the consumption of any alcoholic beverage by the driver (but not by a passenger) in the passenger area of a motor vehicle designed, maintained, or used primarily for

the transportation of persons for compensation, or in the living quarters of a house coach or house trailer, the State shall be deemed to have in effect a law that applies to all occupants of a motor vehicle, as provided in paragraph (b)(4) of this section.

§ 1270.5 Certification requirements.

(a) Until a State has been determined to be in compliance, or after a State has been determined to be in non-compliance, with the requirements of 23 U.S.C. 154, to avoid the transfer of funds in any fiscal year, beginning with FY 2001, the State shall certify to the Secretary of Transportation, on or before September 30 of the previous fiscal year, that it meets the requirements of 23 U.S.C. 154 and this part.

(b) The certification shall be made by an appropriate State official, and it shall provide that the State has enacted and is enforcing an open container law that conforms to 23 U.S.C. 154 and § 1270.4 of this part.

(1) If the State's open container law is currently in effect and is being enforced, the certification shall be worded as follows:

(Name of certifying official), (position title), of the (State or Commonwealth) of-----, do hereby certify that the (State or Commonwealth) of-----, has enacted and is enforcing a open container law that conforms to the requirements of 23 U.S.C. 154 and 23 CFR 1270.4, (citations to pertinent State statutes, regulations, case law or other binding legal requirements, including definitions, as needed).

(2) If the State's open container law is not currently in effect, but will become effective and be enforced by October 1 of the following fiscal year, the certification shall be worded as follows:

(Name of certifying official), (position title), of the (State or Commonwealth) of-----, do hereby certify that the (State or Commonwealth) of-----, has enacted an open container law that conforms to the requirements of 23 U.S.C. 154 and 23 CFR 1270.4, (citations to pertinent State statutes, regulations, case law or other binding legal requirements, including definitions, as needed), and will become effective and be enforced as of (effective date of the law).

(c) An original and four copies of the certification shall be submitted to the appropriate NHTSA Regional Administrator. Each Regional Administrator will forward the certifications to the appropriate NHTSA and FHWA offices.

(d) Once a State has been determined to be in compliance with the requirements of 23 U.S.C. 154, it is not required to submit additional certifications, except that the State shall promptly submit an amendment or supplement to its certification provided under paragraphs (a) and (b) of this section if the State's open container law changes or the State ceases to enforce such law.

§ 1270.6 Transfer of funds.

(a) On October 1, 2000, and October 1, 2001, if a State does not have in effect or is not enforcing

the law described in § 1270.4, the Secretary shall transfer an amount equal to 1 1/2 percent of the funds apportioned to the State for that fiscal year under each of 23 U.S.C. 104(b)(1), (b)(3), and (b)(4) to the apportionment of the State under 23 U.S.C. 402.

(b) On October 1, 2002, and each October 1 thereafter, if a State does not have in effect or is not enforcing the law described in § 1270.4, the Secretary shall transfer an amount equal to 3 percent of the funds apportioned to the State for that fiscal year under each of 23 U.S.C. 104(b)(1), (b)(3), and (b)(4) to the apportionment of the State under 23 U.S.C. 402.

(c) 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 State's Department of Transportation will be given until October 30 to notify FHWA, through the appropriate Division Administrator, if they would like to change the distribution among Section 104(b)(1), (b)(3) and (b)(4).

§ 1270.7 Use of transferred funds.

(a) Any funds transferred under § 1270.6 may:

(1) Be used for approved projects for alcohol-impaired driving countermeasures; or

(2) Be directed to State and local law enforcement agencies for enforcement of laws prohibiting driving while intoxicated or driving under the influence and other related laws (including regulations), including the purchase of equipment, the training of officers, and the use of additional personnel for specific alcohol-impaired driving countermeasures, dedicated to enforcement of the laws (including regulations).

(b) States may elect to use all or a portion of the transferred funds for hazard elimination activities eligible under 23 U.S.C. 152.

(c) No later than 60 days after the funds are transferred under § 1270.6, the Governor's Representative for Highway Safety and the Secretary of the State's Department of Transportation for each State shall jointly identify, in writing to the appropriate NHTSA Administrator and FHWA Division Administrator, how the funds will be programmed among alcohol-impaired driving programs, hazard elimination programs and planning and administration costs.

(d) The Federal share of the cost of any project carried out with the funds transferred under § 1270.6 of this part shall be 100 percent.

(e) The amount to be transferred under § 1270.6 of this part may be derived from one or more of the following:

(1) The apportionment of the State under § 104(b)(1);

(2) The apportionment of the State under § 104(b)(3); or

(3) The apportionment of the State under § 104(b)(4).

(f)(1) If any funds are transferred under § 1270.6 of this part to the apportionment of a State under Section 402 for a fiscal year, an amount, determined under paragraph (e)(2) of this section, of obligation authority will be distributed for the fiscal year to the State for Federal-aid highways and highway safety construction programs for carrying out projects under Section 402.

(2) The amount of obligation authority referred to in paragraph (e)(1) of this section shall be determined by multiplying:

(i) The amount of funds transferred under § 1270.6 of this part to the apportionment of the State under Section 402 for the fiscal year; by

(ii) The ratio that:

(A) The amount of obligation authority distributed for the fiscal year to the State for Federal-aid highways and highway safety construction programs; bears to

(B) The total of the sums apportioned to the State for Federal-aid highways and highway safety construction programs (excluding sums not subject to any obligation limitation) for the fiscal year.

(g) Notwithstanding any other provision of law, no limitation on the total obligations for highway safety programs under Section 402 shall apply to funds transferred under § 1270.6 to the apportionment of a State under such section.

§ 1270.8 Procedures affecting States in noncompliance.

(a) Each fiscal year, each State determined to be in noncompliance with 23 U.S.C. 154 and this part, based on NHTSA's and FHWA's preliminary review of its certification, will be advised of the funds expected to be transferred under § 1270.4 from apportionment, as part of the advance notice of apportionments required under 23 U.S.C. 104(e), normally not later than ninety days prior to final apportionment.

(b) If NHTSA and FHWA determine that the State is not in compliance with 23 U.S.C. 154 and this part, based on the agencies' preliminary review, the State may, within 30 days of its receipt of the advance notice of apportionments, submit documentation showing why it is in compliance. Documentation shall be submitted to the appropriate National Highway Traffic Safety Administration Regional office.

(c) Each fiscal year, each State determined not to be in compliance with 23 U.S.C. 154 and this part, based on NHTSA's and FHWA's final determination, will receive notice of the funds being transferred under § 1270.6 from apportionment, as part of the certification of apportionments required under 23 U.S.C. 104(e), which normally occurs on October 1 of each fiscal year.

APPENDIX C

23 U.S.C.S. § 154 OPEN CONTAINER REQUIREMENTS

(a) Definitions. In this section, the following definitions apply:

(1) Alcoholic beverage. The term "alcoholic beverage" has the meaning given the term in section 158(c) [23 USCS § 158(c)].

(2) Motor vehicle. The term "motor vehicle" means a vehicle driven or drawn by mechanical power and manufactured primarily for use on public highways, but does not include a vehicle operated exclusively on a rail or rails.

(3) Open alcoholic beverage container. The term "open alcoholic beverage container" means any bottle, can, or other receptacle--

(A) that contains any amount of alcoholic beverage; and

(B) (i) that is open or has a broken seal; or

(ii) the contents of which are partially removed.

(4) Passenger area. The term "passenger area" shall have the meaning given the term by the Secretary by regulation.

(b) Open container laws.

(1) In general. For the purposes of this section, each State shall have in effect a law that prohibits the possession of any open alcoholic beverage container, or the consumption of any alcoholic beverage, in the passenger area of any motor vehicle (including possession or consumption by the driver of the vehicle) located on a public highway, or the right-of-way of a public highway, in the State.

(2) Motor vehicles designed to transport many passengers. For the purposes of this section, if a State has in effect a law that makes unlawful the possession of any open alcoholic beverage container by the driver (but not by a passenger)--

(A) in the passenger area of a motor vehicle designed, maintained, or used primarily for the transportation of persons for compensation; or

(B) in the living quarters of a house coach or house trailer,

the State shall be deemed to have in effect a law described in this subsection with respect to such a motor vehicle for each fiscal year during which the law is in effect.

(c) Transfer of funds.

(1) Fiscal years 2001 and 2002. On October 1, 2000, and October 1, 2001, if a State has not enacted or is not enforcing an open-container law described in subsection (b), the Secretary shall transfer an amount equal to 1 1/2 percent of the funds apportioned to the State on that date under each of paragraphs (1), (3), and (4) of section 104(b) [23 USCS § 104(b)] to the apportionment of the State under section 402 [23 USCS § 402]--

(A) to be used for alcohol-impaired driving countermeasures; or

(B) to be directed to State and local law enforcement agencies for enforcement of laws prohibiting driving while intoxicated or driving under the influence and other related laws (including regulations), including the purchase of equipment, the training of officers, and the use of additional personnel for specific alcohol-impaired driving countermeasures, dedicated to enforcement of the laws (including regulations).

(2) Fiscal year 2003 and fiscal years thereafter. On October 1, 2002, and each October 1

thereafter, if a State has not enacted or is not enforcing an open-container law described in subsection (b), the Secretary shall transfer an amount equal to 3 percent of the funds apportioned to the State on that date under each of paragraphs (1), (3), and (4) of section 104(b) [23 USCS § 104(b)] to the apportionment of the State under section 402 [23 USCS § 402] to be used or directed as described in subparagraph (A) or (B) of paragraph (1).

(3) Use for hazard elimination program. A State may elect to use all or a portion of the funds transferred under paragraph (1) or (2) for activities eligible under section 148 [23 USCS § 148].

(4) Federal share. The Federal share of the cost of a project carried out with funds transferred under paragraph (1) or (2), or used under paragraph (3), shall be 100 percent.

(5) Derivation of amount to be transferred. The amount to be transferred under paragraph (1) or (2) may be derived from one or more of the following:

(A) The apportionment of the State under section 104(b)(1) [23 USCS § 104(b)(1)].

(B) The apportionment of the State under section 104(b)(3) [23 USCS § 104(b)(3)].

(C) The apportionment of the State under section 104(b)(4) [23 USCS § 104(b)(4)].

(6) Transfer of obligation authority.

(A) In general. If the Secretary transfers under this subsection any funds to the apportionment of a State under section 402 [23 USCS § 402] for a fiscal year, the Secretary shall transfer an amount, determined under subparagraph (B), of obligation authority distributed for the fiscal year to the State for Federal-aid highways and highway safety construction programs for carrying out projects under section 402 [23 USCS § 402].

(B) Amount. The amount of obligation authority referred to in subparagraph (A) shall be determined by multiplying--

(i) the amount of funds transferred under subparagraph (A) to the apportionment of the State under section 402 [23 USCS § 402] for the fiscal year, by

(ii) the ratio that--

(I) the amount of obligation authority distributed for the fiscal year to the State for Federal-aid highways and highway safety construction programs, bears to

(II) the total of the sums apportioned to the State for Federal-aid highways and highway safety construction programs (excluding sums not subject to any obligation limitation) for the fiscal year.

(7) Limitation on applicability of obligation limitation. Notwithstanding any other provision of law, no limitation on the total of obligations for highway safety programs under section 402 [23 USCS § 402] shall apply to funds transferred under this subsection to the apportionment of a State under such section.