

## AUTOMOTIVE

### CAN THE NHTSA PROMULGATE VOLUNTARY GUIDELINES WHEN IT CANNOT PROMULGATE A SAFETY STANDARD?

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On February 24, 2012, the NHTSA issued its "Notice of proposed Federal guidelines"<sup>1</sup> for "Visual-Manual NHTSA Driver Distraction Guidelines for In-Vehicle Electronic Devices" in which it set forth design and performance standards for limiting the distraction of drivers when using on-board integrated electronic devices. The agency issued "guidelines" instead of "safety standards" because, among other things, "the test method developed by NHTSA in these NHTSA Guidelines in its current form would not meet the statutory requirements for establishing compliance with a FMVSS"<sup>2</sup> and because it currently lacks "a defensible estimate of the magnitude of [the] benefits and the corresponding costs" necessary to issue a rule.<sup>3</sup>

This raises the question: Can the NHTSA issue safety "guidelines" when it is admittedly unable to promulgate a safety standard under its governing statutes and regulations?

Federal agencies have been issuing "guidelines" for years. Those guidelines generally fall into two categories. The first are guidelines specifically prepared at the direction of federal statutes. Examples of guidelines required by statute are the Uniform Guidelines for State Highway Safety Programs issued pursuant to the Highway Safety Act (see 23 USC 402) and Guidelines for State Observational Surveys for Safety Belts and Motorcycle Helmet Use issued pursuant to the Intermodal Surface Transportation Efficiency Act of 1991 (see 23 USC 153(g)). These statutes require states to adopt or use methods which conform with guidelines *to be issued* by a federal department or agency. The second category is comprised of advisory guidelines like those prepared in connection with various federal programs to inform various groups or persons about their implementation and procedures and those prepared to impart public health and safety information. The NHTSA's Driver Distraction Guidelines are were not expressly directed *to be issued* by a federal statute and are not merely advisory.<sup>4</sup> Also, they are markedly different in content than a typical guideline. These proposed guidelines can most accurately be characterized as a *de facto* safety standard.

NHTSA does not identify any specific statutory directive for issuance of its Distracted Driving Guidelines in its Notice. The only law referenced in the Notice is the National Technology and Advancement Act of 1995<sup>5</sup>. The reference states:

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272) directs NHTSA to use voluntary consensus standards in its regulatory activities unless doing so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary

consensus standards bodies, such as the Society of Automotive Engineers (SAE).....

The agency is not aware of any applicable voluntary consensus standards that are appropriate for driver distraction stemming from driver interaction with in-vehicle electronic devices. However, industry-developed standards do exist. These standards were reviewed and formed the basis for the NHTSA Guidelines outlined herein.

Similar language is contained in other NHTSA rule-making Notices. It appears the NHTSA is simply noting its compliance with the referenced act by stating it found no applicable SAE standards but only found an industry standard (specifically guidelines issued by the Alliance of Automobile Manufacturers which it apparently did not consider a voluntary consensus standards body) that it used as the basis for its own voluntary guidelines. It does not appear that the NHTSA is relying on the act as the basis for issuing its guidelines and indeed the Act does not expressly authorize an agency to issue its own voluntary standards or guidelines if it finds portions of the industry standard to be lacking.<sup>6</sup> So, let's look elsewhere.

Under the Motor Vehicle Safety Act, the NHTSA has the authority to "prescribe safety standards for motor vehicles and motor vehicle equipment" and to "carry out needed safety research and development."<sup>7</sup> The Safety Act does not authorize the issuance of voluntary guidelines by NHTSA in any context. It certainly does not expressly authorize the agency to call a standard a guideline when the agency is technically and legally unable to issue it as a safety standard.

Also, it would be expected that if NHTSA had the authority to *carte blanche* issue voluntary guidelines or standards it would have developed regulations that discuss the issuance of such standards. But, a review of NHTSA regulations reveals scant reference to voluntary standards or guidelines. For example, 49 CFR 535.4 refers to "Voluntary standards." However this section simply gives a manufacturer of medium and heavy duty vehicles the option of complying with future fuel consumption standards before they become effective.<sup>8</sup> Similarly, 49 CFR 501.7(b)(3) reserves the authority of the NHTSA Administrator to issue The Uniform Guidelines for State Highway Safety Programs referenced previously. Finally, the Tread Act defines a "safety recall" in terms of "remedial action to address ...a failure to comply with an applicable safety standard or guideline."<sup>9</sup> However, the word "guideline" was included to accommodate terminology that might used by other countries in the place of "standards."<sup>10</sup>



Perhaps the Agency considers issuance of the guidelines simply to be part of carrying out its safety research and development mandate. This is a possibility. The Agency does state that “at this time, continued research is both necessary and important” before issuing a safety standard.<sup>11</sup> However, it seems somewhat incongruous to suggest that requiring the auto industry to adopt test methods and procedures, meet specified acceptance criteria and design vehicles in a specified way while monitoring industry’s compliance, all of which are typically associated with a full blown safety standard, constitutes research and development. Research and development would include developing a test procedure that yields repeatable results, which NHTSA and the industry apparently have been unable to do, not imposing on the industry as a whole a test procedure that the agency believes may not yield repeatable results. NHTSA’s actions can best be described as issuance of a trial standard where it could not properly issue a real safety standard. Of course, the industry has to bear the expense associated with complying with the guidelines. As recently noted by the Alliance of Automobile Manufacturers, the guidelines “will likely require significant and costly redesign of many vehicle systems.”<sup>12</sup> Notwithstanding, the Agency believes that “[b]ecause these Guidelines are voluntary and nonbinding, they will not require action of any kind, and for that reason they will not confer benefits or impose costs.”<sup>13</sup>

The bottom line is that if the NHTSA cannot, under its governing statutes and regulations, promulgate a safety standard on a given subject, it should not simply call the safety standard a guideline and issue it anyway. Here, NHTSA admittedly is presently unable to propose a compliant distracted driver safety standard. That should be the end of its rulemaking efforts on this subject for now.

<sup>1</sup> A search of LEXIS™ for this specific phrase in the Federal Register had no other hits. Typically, guidelines have been announced through a “Notice of Guidelines.” Whether the change was intended to add significance to these guidelines or was just a fluke is not apparent.

<sup>2</sup> 77 FR 11200, \*11206.

<sup>3</sup> Id. \*11202.

<sup>4</sup> In contrast, 23 USC 402 was amended in 2005 to require issuance of guidelines for state programs aimed at unsafe driving behavior associated with “distracted driving arising from the use of electronic devices in vehicles.” 23 USC 402(a)(6).

<sup>5</sup> PL 104-113.

<sup>6</sup> The Consumer Product Safety Act expressly requires the CPSC to rely on voluntary consumer product safety standards unless it determines the voluntary standard to be inadequate. 15 USC 2506. If no satisfactory voluntary standard exists, the CPSC can either “defer the initiation of a mandatory rulemaking proceedings and request the voluntary standards organization to revise the standard...” or develop its own mandatory safety standard or ban the product. The CPSC is not authorized to issue its own voluntary standard. 16 CFR 1031.4.

<sup>7</sup> 49 USC 30101.

<sup>8</sup> See 49 CFR 535.5(a)(4).

<sup>9</sup> 49 CFR 579.4.

<sup>10</sup> 67 FR 63295, \*63297-8.

<sup>13</sup> 77 FR 11200, \*11202.

<sup>12</sup> March 9, 2012 letter to The Honorable David Strickland Re: Alliance of Automobile Manufacturers, Petition to Extend Comment Period for Notice of Proposed Federal Guidelines; Docket No. NHTSA-2010-0053.

<sup>13</sup> 77 FR 11200, \*11202.

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