May 14, 2021 -- Corrected Version

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Comments on Agency/Docket No. FHWA-2020-0001
RIN 2125-AF85
National Standards for Traffic Control Devices; the Manual on Uniform Traffic Control Devices for Streets and Highways; Revision

Introduction

I am writing to express my personal concerns about the Federal Highway Administration's (FHWA) Notice of Proposed Amendments (NPA) (FHWA-2020-0001) to the Federal Manual on Uniform Traffic Control Devices (MUTCD) and additional regulations in Title 23 of the Code of Federal Regulations.

I know you are hearing from a lot of people and organizations about the MUTCD and I agree with the overall tenor of many of the comments you have received already from America Walks, NACTO, Toole Design and other organizations -- the MUTCD needs to be reframed and re-envisioned. I provide detailed comments below, but my own overarching concerns are that the MUTCD, as currently written:

> (1) exceeds FHWA's legal authority and leads transportation professionals to act inconsistently with their own legal authority under state and/or local law, which sometimes results in the violation of my and other pedestrians' legal rights under state and/or local law;
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> (2) similarly leads to violations of the rights of pedestrians under the United States Constitution, especially the right to due process; and
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> (3) creates danger.

I do not know if these outcomes are intentional on FHWA's part (I hope not), but in my view it is FHWA's responsibility to address them and change course.

My Background

I live in Washington, DC. Walking and public transit are my primary means of travel. I only rarely ride in cars. I spent most of my career as a lawyer for the U.S. Department of Labor, working on issues unrelated to pedestrian safety, but always walking as part of my commute and at other times. As an almost full-time pedestrian, I have always been interested in problems affecting my right to walk and my safety when walking.

Around 2010-11, I became more active on pedestrian rights and safety issues and continued that unpaid work after I retired in 2013. I have served since 2012 on the District of Columbia Pedestrian Advisory Council (DCPAC), which advises the Mayor,

D.C. Council and DC agencies on pedestrian safety and accessibility. In the course of my service on the DCPAC, I have had numerous opportunities to discuss the MUTCD with staff at the DC Department of Transportation (DDOT), as well as other transportation professionals, so I have become fairly familiar with the Manual. I also served as a Walking College mentor for America Walks for two years and currently am one of America Walks's representatives to the International Federation of Pedestrians (IFP).

Please note that I provide the foregoing information only as background on my skills and experience. My comments below represent only my own personal views, not those of the DCPAC, America Walks, IFP, DDOT (or any other organization).

My Comments

<u>Comment 1</u>: The MUTCD should clearly state that, where vehicular signals cannot be accessed by pedestrians, accessible pedestrian signals must be provided. Failing to place traffic signals where pedestrians can access them violates the right to due process. FHWA also should strengthen the MUTCD's discussion of accessible pedestrian signals to be consistent with 23 U.S.C. 217(g)(2) and with the U.S. Department of Justice's interpretations of the Americans with Disabilities Act and Rehabilitation Act of 1973.

Relevant Sections of NPA, proposed MUTCD and related regulations:
NPA Paragraph 395/Proposed MUTCD Section 4D.02
NPA Paragraph 397/Proposed MUTCD Section 4D.05
NPA Paragraph 419/Proposed MUTCD Sections 4I.01 and 4K.01

Recommended solution: FHWA should reinsert text from the 1971 MUTCD that required installation of pedestrian signals when vehicular signals cannot be seen by pedestrians and should consult with USDOJ on MUTCD provisions addressing accessible pedestrian signals.

Explanation of comment: I have divided this comment into two parts:

A) DOT failures to provide pedestrian signals when the vehicular signals are not positioned so that they can be seen by pedestrians without visual impairments; and

B) DOT failures to provide accessible pedestrian signals for people with visual impairments.

A) <u>The MUTCD should require DOTs to provide pedestrian signals when the vehicular signals are not positioned so that they can be seen by pedestrians without visual impairments.</u>

One of my long-standing concerns is that DOTs will sometimes choose to place vehicular traffic signals where (sighted) pedestrians cannot see them and then not provide pedestrian signals. This problem seems to occur most often on one-way streets or divided roads where the vehicular signals face only drivers traveling in the one-way direction or on one side of the street, even though pedestrians travel both ways on both sides. This is a particular problem along some suburban roads: vehicular signals will be overhead in the middle of the street on each side of the road, but only facing in one direction.

I have encountered this problem several times here in D.C. (*e.g.* 26th and M NW, 16th and New Hampshire NW, Southern Avenue and Valley Terrace SE), numerous times in Maryland (e.g. Goucher Boulevard and Providence Road), and fairly routinely in other states when I have been traveling. From discussions with other advocates, I have learned that this is not an uncommon problem and I know that some members of the National Committee on Uniform Traffic Control Devices (NCUTCD) recognize this problem and have attempted to address it.

I first encountered this problem more than a decade ago in Kensington, Maryland, and I dutifully complained to Maryland's State Highway Administration, innocently thinking it was an oversight, not an intentional practice. I got a letter telling me they planned to correct the issue but that the "Manual of Uniform Traffic Control Devices" permitted this practice so they had done nothing wrong. I have since learned that many transportation professionals do believe this practice is authorized by the current MUTCD, specifically by current Section 4D.03, which reads:

> If engineering judgment indicates the need for provisions for a given pedestrian movement, signal faces conveniently visible to pedestrians shall be provided by pedestrian signal heads (see Chapter 4E) or a vehicular signal face(s) for a concurrent vehicular movement.

Although I do not believe this paragraph was ever intended to allow engineers to leave out pedestrian signals if the vehicular signals are not visible to pedestrians, I am happy to see that FHWA is proposing to delete it. Proposed Section 4D.02 is a significant improvement over current Section 4D.03. That said, new Section 4D.02 does not go far enough because it does not require installation of pedestrian signals if vehicular signals are not visible to pedestrians.

Initially, I want to point out that the 1971 MUTCD explicitly required installation of pedestrian signals if the vehicular signals were not visible to pedestrians. Section 4D-3 of the 1971 Manual said that pedestrian signals had to be provided:

> When vehicular indications are not visible to pedestrians such as on one-way streets, at 'T' intersections; or when the vehicular indications are in a position which would not adequately serve pedestrians.

This provision was progressively altered and ultimately dropped from the MUTCD for reasons that are unclear. It seems like it would be a simple matter to just reinsert it as part of the standard in proposed 4D.02. I urge FHWA to make this simple change, which also would be consistent with guidance provided in Section 4D.05 ("Road users approaching a signalized intersection or other signalized area, such as a midblock crosswalk, should be given a clear and unmistakable indication of whether they are being directed to stop or permitted to proceed.").

The practice of positioning vehicular signals where they cannot be seen by pedestrians and then failing to provide pedestrian signals is obviously unsafe and, more important, violates the due process rights of sighted pedestrians. Failing to provide accessible pedestrian signals for pedestrians with visual impairments also may violate due process. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations*, 132 S.Ct. 2307, 2317 (2012) (citations omitted); *PHH Corporation v. Consumer Financial Protection Bureau*, No. 15-1177 (D.C. Cir. 2018). "Fair notice" means that the law gives "the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972); *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 272 (4th Cir. 2019); *Comcast Cable Communications, LLC v. FCC,* 717 F.3d 982, 1007 (D.C. Cir. 2013); *Galloway v. State*, 781 A.2d 851, 860-61 (Md. 2001).

State and/or local laws typically require travelers to obey traffic signals. Indeed, in Section 4A.02-4A.06, the MUTCD itself purports to prescribe how pedestrians should behave in response to traffic signals. (As discussed in Comment 9, the MUTCD should not include this language, but my point here is that FHWA along with everyone else has an expectation that pedestrians will obey traffic signals.) If DOTs do not put signals where pedestrians can see them, then it is impossible for us -- no matter how alert, attentive, reasonable and/or prudent we might be -- to obey the signals and we do not have the "fair notice" of what conduct is forbidden or required. Moreover, there is no indication in the text or legislative history of 23 U.S.C. 109(d) -- or any other authority cited by FHWA in support of writing the MUTCD -- that Congress intended for FHWA to concur in state DOT intersection designs that create danger and make it impossible for pedestrians to comply with the law.[1] Unlike the warrant provisions of the MUTCD, due

[1] Nor is there any indication that any state legislature intended to permit this practice. The underlying rationale for traffic laws is the state's "police power" -- specifically, the power of the state to regulate "for the protection of public morals, health, safety, or general welfare." E.g. *Pressman v Barnes*, 121 A.2d 816 (Md. 1955). See also *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905). The state police power is an expansive power, but there nevertheless must be "a real and substantial relation to the public health, morals, safety, and welfare" of the public in order for a law to be upheld. E.g. *Tyler v City of College Park*, 3 A.3d 421 (Md. 2010). If any legislature actually did intend the law to both require pedestrians to follow traffic signals as well as to allow traffic engineers to decide not to provide those signals, then it raises the question whether there actually is any "real and substantial relation to the public health, morals, safety, and welfare" of the public -- and the validity of the law itself is questionable. *Maryland Board of Pharmacy v. Sav-A-Lot*, 311 A.2d 242 (Md. 1973), citing *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) ("If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects . . . , it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.")

process does not count the number of people crossing a street. Again, it would be fairly simple to resolve this problem by re-inserting the text quoted above from the 1971 MUTCD into the proposed standard language in new Section 4D.02. This would be well within FHWA's legal authority[2] under 23 U.S.C. 109(d) to address the location of traffic control devices.

B) The MUTCD's provisions on accessible pedestrian signals should be revised to reflect the requirements of 23 U.S.C. 217, the Americans with Disabilities Act, and the Rehabilitation Act of 1973, and due process. At the very least, FHWA should consult with USDOJ about the contents of these provisions.

Proposed sections 4D.02 and 4I.02 state, "Accessible pedestrian signals . . . should be provided based on the results of an engineering study considering the factors listed in Section 4K.01." Section 4K.01 then sets out in a guidance a number of criteria to be considered if an engineering study is performed, but the overarching consideration -- which comes into play before an engineering study is even performed -- appears to be, "[i]f a particular signalized location presents difficulties for pedestrians who have vision disabilities to cross the roadway." Guidance in 4K.01 then goes on to detail the factors to be considered if that threshold is crossed and an engineering study is performed.

Initially, I note that Section 4K.01's threshold inquiry appears to be inconsistent with the guidance in 4D.02 and 4I.02. The latter imply that an engineering study should always be performed to determine whether accessible pedestrian signals are needed, not that a study need only be performed if a particular crossing is difficult. Leaving that point aside, the guidance and other statements in 4K.01 also do not appear to take into account any applicable legal requirements. More specifically, neither "safety" nor any variation of the word appears in 4K.01 even though 23 U.S.C. 217(g)(2) specifically provides:

> Transportation plans and projects shall provide due consideration for safety and contiguous routes for bicyclists and pedestrians. *Safety considerations shall include the installation, where appropriate, and maintenance of audible traffic signals and audible signs at street crossings*.

23 U.S.C. 217(g)(2) (emphasis added). FHWA has been delegated authority under 49 C.F.R. 1.85(a)(2) to administer Section 217 and so could easily incorporate its substance into the guidance in 4K.01.

The guidance in 4K.01 also fails to take into account court decisions under the Americans with Disabilities Act (ADA) or the positions taken by the U.S. Department of Justice (USDOJ) on applicability of the ADA and Rehabilitation Act of 1973 to accessible pedestrian signals. See *American Council of the Blind of New York et al. v. City of New York et al.* , No. 18 Civ. 5792 (PAE) (S.D.N.Y. 2020). USDOJ recently intervened in a Chicago lawsuit, *American Council of the Blind of Metropolitan Chicago*

[2] I discuss FHWA's legal authority for the MUTCD at length in Comment 13.

et al. v. City of Chicago, No. 19 C 6322 (N.D. Illinois). In its pleadings, USDOJ states that Chicago is in violation of the ADA and Rehabilitation Act because its failure to provide accessible pedestrian signals deprives blind people of "benefits and services provided to sighted pedestrians" and imposes "risks and burdens not experienced by sighted pedestrians." The MUTCD does not reflect these considerations anywhere. By omitting any reference to them, FHWA potentially misleads DOTs into thinking they need only consider installing accessible signals if a particular crossing is "difficult" and then only if an engineering study supports installation. FHWA should, at the very least, include a guidance statement advising DOT employees to consult their agencies' attorneys regarding application of the ADa and Rehabilitation Act. FHWA also might bring Section 4K.01 to the attention of USDOJ's Civil Rights Division and request their advice about how best to address this issue.

Finally, I note that, at least in states that require blind pedestrians to follow the same laws as sighted pedestrians, failing to provide accessible pedestrian signals may raise the same due process issues that I discuss in the first part of this comment. Even in jurisdictions that explicitly give blind pedestrians right-of-way at all locations (*e.g.* DC Code 7-1004), FHWA and DOT failures to take those laws into account in engineering and designing streets raise concerns.

Comment 2: MUTCD statements regarding use of the R9-3 sign to close crosswalks are not within FHWA's legal authority and leave the erroneous impression that DOT employees can alter state or local right-of-way law whenever they find it "desirable" to do so.

Relevant Sections of NPA, proposed MUTCD and related regulations:
Proposed MUTCD Section 2B.58
NPA Paragraph 395/Proposed MUTCD Section 4D.02

Recommended Solution: Eliminate all language suggesting that DOT employees can close crosswalks because they think a crossing is undesirable. Revise all statements about use of the R9-3 sign to make clear that DOT employees can only close a crosswalk if they have the legal authority under their jurisdiction's laws to do so and only within the parameters of that authority.

Explanation of Comment: Sections 2B.58 and 4D.02 both include statements that imply that DOTs can eliminate crosswalks whenever they find it "desirable" to do so. Section 2B.58 (lines 23-24) states,

> The No Pedestrian Crossing (R9-3) sign may be used to prohibit pedestrians from crossing a roadway at an undesirable location or in front of a school or other public building where a crossing is not designated.

Section 4D.02 (lines 30-32) similarly says:

> If it is necessary or desirable to prohibit certain pedestrian movements at a traffic control signal location, No Pedestrian Crossing (R9-3) signs (see Section 2B.61[3]) should be used if it is not practical to provide a barrier or other physical feature to physically discourage the pedestrian movements. [footnote added]

This advice is inappropriate because, absent valid legal authority, DOT employees cannot simply close a crosswalk because they think doing so is "desirable". Pedestrian right-of-way at crosswalks is established by state/local statutes and/or regulations. Every time a DOT employee decides to close a crosswalk, that decision has ramifications not just for the safety of pedestrians but also for our legal rights -- closing the crosswalk effectively shifts right-of-way to drivers and leaves the pedestrian who uses that crossing vulnerable to civil or criminal charges depending on state/local law. These are not decisions that should be made lightly, just because a crossing might be "undesirable" from an engineering point of view. It is especially infuriating when this action is taken because a DOT created an unsafe situation by ignoring pedestrians' legal rights in the first place (e.g. by making one crossing especially unsafe in order to keep vehicle traffic moving and then closing that one crosswalk in the unrealistic hope that pedestrians will accept the questionable idea that it is safer for us to cross a wide street three times rather than once).

I recognize that some legislatures have adopted UVC Section 15-108, which purports to give DOT employees the legal authority to "close" unmarked crosswalks:

> After an engineering and traffic investigation, the (State highway commission) and local authorities in their respective jurisdictions may designate unmarked crosswalk locations where pedestrian crossing is prohibited or where pedestrians must yield the right of way to vehicles.

Not all legislatures have adopted this provision, however, and the MUTCD needs to be written in a way that is consistent with varying state laws. In addition, "desirability" of a crosswalk is not a criterion for closing under Section 15-108. Finally, this UVC provision is neither wise from a policy standpoint nor a valid delegation of authority. It is unwise because my own experience, time after time, is that DOT employees exercising this discretion are quite willing to create hazards for pedestrians if drivers will benefit in even a small way, and then will close a crosswalk as the solution to the hazard they created rather than eliminating the hazard.

Section 15-108 is not a valid delegation because, in order for a legislature to delegate authority to an administrative agency like a state or local DOT, the delegation must include an "intelligible principle":

> To articulate an intelligible principle to satisfy the nondelegation doctrine, the legislature must 'clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'"

[3] The reference to Section 2B.61 here also is confusing. Section 2B.61 addresses Right Turn on Red.

Unum Life Insurance Co. v. District of Columbia, 238 A.3d 222, 232 (D.C. 2020) (citing *Mistretta v. United States*, 488 U.S. 361 (1989)). Section 15-108 does identify the public agency that should apply Section 15-108, but the remaining text does not meet the other criteria -- Section 15-108 does not delineate any policy, nor does it set boundaries for the authority. The closest 15-108 comes to articulating an intelligible principle is its introductory language -- "[a]fter an engineering and traffic investigation". This language does tell us that "an engineering and traffic investigation" must be completed before a crosswalk is closed, but it says nothing about how this investigation should be conducted, what criteria should be considered, or the limitations (boundaries) on the authority. There is no intelligible principle in Section 15-108.

FHWA certainly has authority to prescribe what the R9-3 sign should look like, how close to a crosswalk it should be placed, and to set similar criteria. Statements about use of the sign, however, should not imply to DOT employees that they have authority they do not have and should not use words like "desirable" that are completely subjective.

<u>Comment 3</u>: **The MUTCD should include a clear statement advising transportation professionals that the Manual does not preempt state or local laws and that they should consult their agency's lawyers to ensure that they implement the MUTCD consistently with their own state's and/or locality's law.**

Relevant Sections of NPA, proposed MUTCD and related regulations:
NPA Paragraph 21/Proposed MUTCD Section 1D.04

Recommended Solution: Revise Section 1D.03 to use active voice as described below. Repeat the same language at the beginning of each Part of the MUTCD.

Explanation of Comment: Proposed standard section 1D.03 includes the following sentence: "All regulatory traffic control devices shall be supported by laws, ordinances, or regulations." This sentence is vague due to use of passive language. It would be more consistent with the Federal Government's "plain language" guidance (see https://www.plainlanguage.gov/media/FederalPLGuidelines.pdf at page 20 and generally Executive Orders 12866 and 13563) to rephrase this sentence to active voice – e.g. "Install regulatory traffic control devices only where their use is authorized by law."

Rephrasing this sentence would have the added benefit of making it clear to state DOT employees that, as FHWA's Federalism analysis states and the Supreme Court held in *Easterwood*, the MUTCD does not preempt state law. The MUTCD needs to be absolutely clear that DOT employees cannot use traffic control devices that appear in the Manual unless their use of those devices is consistent with their jurisdiction's laws. I believe Section 1D.03 is intended to make this point, but the use of passive voice leaves its meaning unclear. I also strongly recommend that FHWA make this statement

more prominent and, at least to some extent, make it repeatedly (e.g. place it at the beginning of each Part of the Manual) so that the point does not get lost.

Comment 4: **The proposed MUTCD statements about "target road users" are not supported by legal authority or reality. They also are contrary to the Safe Systems approach, which recognizes and reflects the fallibility of human beings.**

Relevant Sections of NPA, proposed MUTCD and related regulations:
December NPA Paragraph 5/Proposed MUTCD sections 1A.03 and 1D.01

Recommended solution: Delete all discussion of "target road users".

Explanation of comment: The NPA says that FHWA is adding statements about target road users "because proper use of traffic control devices can be optimized by stating the expectations for road users responding to the traffic control devices." This idea, along with the MUTCD text discussing target road users, is problematic for several reasons.

First, Section 1A.03 is characterized as a "support" statement which, as defined by Section 1C.01.D. is "an informational statement". Informational statements should be factual. As a description of actual human road users, though, the statements made here are just not true. We see crashes all the time and tens of thousands of fatalities each year in part because humans are not always alert, attentive, reasonable or prudent. The latter is reason enough to delete these statements.

Second, "support" statements are not supposed to "convey any degree of mandate, recommendation, authorization, prohibition, or enforceable condition". Section 1C.01.D. The "information" provided about target road users in Section 1A.03 reads more like a wishlist of human behavioral traits: it seems to state the expectations that FHWA and state DOTs would like to impose upon road users. Consequently, these statements do not really fit as "support" statements.

Possibly the true intent here is to indirectly establish a "standard" or "guidance" for road user behavior. FHWA, however, does not have any legal authority to write standards establishing expectations for the qualities and behavior of road users. As discussed in Comment 13, FHWA's primary statutory authority for the MUTCD is 23 U.S.C. 109(d), which says that state DOTs, with FHWA's concurrence, are responsible for approving "the location, form and character of" traffic control devices. People are not devices. This language does not give state DOTs or FHWA any authority over the qualities and behavior of road users. In addition, the behavior of road users generally is governed by state and/or local statutes and common law; the rules that apply will vary somewhat from state to state. FHWA's Federalism Assessment specifically states that the MUTCD does not preempt state law, so this unwarranted intrusion into state law territory should be deleted. See also *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 669 (1993).

More important, cities, towns, counties and even states across the country have been adopting Vision Zero/Safe Systems and FHWA itself has said that it supports this approach, acknowledging that Safe Systems is "founded on the principles that humans make mistakes and that human bodies have limited ability to tolerate crash impacts." The descriptions of target road users in Sections 1A.01 and 1D.01 denies the human fallibility that is central to Safe Systems and, at best, pays lip service to the varying physical abilities of humans. The statements also fail to recognize the differing cognitive abilities of humans -- are children and teenagers expected to exercise the same levels of alertness and attentiveness as adults? Are people with cognitive impairments now effectively prohibited from crossing the street if DOTs rely upon these statements in making decisions about how to use traffic control devices? Neither of these are questions that should be raised by a Federal agency's statements.

Finally, my own experience as a pedestrian is that I could be 100% alert, attentive, reasonable and prudent and the DOTs applying the MUTCD will repeatedly and regularly fail me and other pedestrians completely. I might, for example, reasonably expect to be able to see the traffic signals at any signalized intersection that I approach but, as I discuss in Comment 1, the MUTCD does not ensure that I can and DOTs across the country have created major dangers for pedestrians by failing to uniformly ensure that I and other pedestrians have the information we need in order to know what to do when we arrive at a signalized intersection. The statements made in 1A.01 and 1D.01 are, simply put, insulting. They serve no legitimate purpose and should be deleted.

Comment 5: **FHWA's statement, in Section 1A.06, that the "The Rules of the Road contained in the UVC are intended to be recommendations for States to adopt in their State statutes and are not independently legally enforceable" is helpful, but later statements in the MUTCD are not consistent with this statement. FHWA should refrain from recommending adoption of the UVC.**

Relevant Sections of NPA, proposed MUTCD and related regulations:
December NPA Paragraph 8/Proposed MUTCD Section 1A.06
December NPA Paragraph 382/Proposed MUTCD Section 4A.02

Recommended Solution: Retain the "Support" statement in Section 1A.06, but delete the second sentence of the "Guidance" statement. Review and revise the remainder of the MUTCD to ensure consistency with Section 1A.06's Support statement. In the alternative, delete all references to the UVC from the MUTCD.

Explanation of Comment: In Section 1A.06, FHWA initially makes clear that DOTs cannot rely upon UVC provisions unless their jurisdiction has adopted the UVC. This is a very helpful statement as some traffic engineers do not seem to understand the distinction between exercising their engineering judgment within the limits of the law and substituting their engineering judgment for the law.

Unfortunately, other sections of the MUTCD incorporate text from the UVC and thereby create confusion about the UVC's role and meaning. For example, in Section 4A.02, FHWA states that the UVC "is the primary source for the standards for the meanings of vehicular signal indications to both vehicle operators and pedestrians as provided in Sections 4A.04 and 4A.05, and the standards for the meanings of separate pedestrian signal head indications as provided in Section 4A.06." Sections 4A.04-4A.06 then incorporate the text of these UVC provisions. As I discuss in Comment 9, this incorporation of the UVC's text exceeds FHWA's legal authority, but it also is problematic because it is inconsistent with Section 1A.06's description of the UVC's role. The Manual needs to be clear throughout that DOTs cannot ignore their state's or locality's laws in favor of unadopted UVC provisions.

In addition, FHWA's should eliminate the "Guidance" in 1A.06 that says that "statutes, ordinances, and resolutions should be consistent with the 'Uniform Vehicle Code'". The UVC has not had significant input from legal scholars in many years. Although some lawyers participate on the NCUTCD, which currently manages the UVC, their emphasis appears (based on my own attendance at some meetings and informal discussions with members) to be on using the UVC (and MUTCD) to limit liability, as well as facilitating movement of motor vehicle traffic, rather than respect for the Rule of Law and fairness to all road users.

For example, as I discuss in Comment 2 above, Section 15-108 of the UVC, which purports to authorize DOT employees to close crosswalks, is unwise from a policy standpoint and a legally-dubious delegation of authority. Section 11-805, for another example, states that minimum speeds can be established if "slow speeds" on a street "impede the normal and reasonable movement of traffic". In this context, it is clear that "traffic" is referring solely to motor vehicle traffic, which then makes this provision of the UVC inconsistent with its own definition of traffic, which includes pedestrians. More important, it elevates the movement of vehicle traffic over safety. Similarly, as I discuss in Comment 9, the UVC's provisions on pedestrian right-of-way at signalized intersections conflict with long-standing court decisions. These are just three examples of serious deficiencies with the UVC.

Finally, while the NCUTCD is a dedicated group of professionals, it is largely composed of people with engineering and planning expertise, not legal expertise. If FHWA wants to resurrect the UVC, the better approach would be to ask an organization like the Uniform Law Commission or American Law Institute to take the task on and/or to ask Congress to authorize a grant which could fund a qualified legal organization to overhaul the UVC. In either event, the UVC has the potential to affect the lives of many people and any work on it should be done openly and transparently.

Comment 6: FHWA's incorporation by reference of definitions from the UVC, AASHTO Transportation Glossary, and "other publications referenced in Section 1A.05" is both inconsistent with the description of these publications in Section 1A.05 and inconsistent with the incorporation process prescribed by 1 C.F.R. Part 51.

Relevant Sections of NPA, proposed MUTCD and related regulations:
December NPA Paragraphs 16-17/Proposed MUTCD Section 1C.02

Recommended Solution: Delete the following language from Section 1C.02: "Unless otherwise defined in this Section, or in other Parts of this Manual, words or phrases shall have the meaning(s) as defined in the most recent editions of the 'Uniform Vehicle Code,' 'AASHTO Transportation Glossary (Highway Definitions),' and other publications referenced in Section 1A.05." The MUTCD should either include all necessary definitions of traffic control devices or incorporate them by specific reference, following the requirements of 1 C.F.R. Part 51.

Explanation of Comment: In the Standard section of 1A.05, the MUTCD incorporates by reference two Federal documents. In the Support section of 1A.05, the MUTCD lists 46 other publications (including the UVC but not the AASHTO Transportation Glossary) and states that the 46 publications "are not regulatory in nature, and are not independently legally enforceable, but might be useful sources of information with respect to the use of this Manual." In Section 1C.02, though, in the first Standard paragraph, the MUTCD effectively incorporates by reference the UVC, the Glossary and every other publication listed in 1A.05 by ambiguously referring the reader to these various documents for additional, unidentified definitions. This does not make sense. FHWA should not tell the public that the publications are just useful, non-regulatory references and then incorporate them by reference into a Standard (regulatory) provision.

In addition, if FHWA is trying to incorporate these documents by reference, it has not complied with the requirements that apply to incorporation by reference. Specifically, 1 C.F.R. 51.5(a) provides that, in order to incorporate other publications by reference, FHWA must

> (1) Discuss, in the preamble of the proposed rule, the ways that the materials it proposes to incorporate by reference are reasonably available to interested parties or how it worked to make those materials reasonably available to interested parties; and
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> (2) Summarize, in the preamble of the proposed rule, the material it proposes to incorporate by reference.

Neither the December nor the February NPAs (the preambles) include this information. The December NPA does use the term "incorporation by reference" in the "List of Subjects" under 23 C.F.R. Part 655, but there is no discussion in the NPAs or Part 655 of the 46 documents. Nowhere is there a summary of the material FHWA is incorporating by reference.

<u>Comment 7</u>: Section 1C.02's complex and ambiguous definition of "intersection" raises due process concerns, as do some of the other definitions in the MUTCD that differ from those used in state or local laws. FHWA should attempt to eliminate these conflicts by confining MUTCD definitions to those needed to describe traffic control devices.

Relevant Sections of NPA, proposed MUTCD and related regulations:
December NPA Paragraphs 16-17/Proposed MUTCD Section 1C.02

Recommended Solution: Eliminate standard definitions that a) do not describe traffic control devices and b) may conflict with state or local laws. In the alternative, move definitions that do not describe traffic control devices to a separate Support section so that it is clear that they are informational rather than mandatory. If this option is chosen, the Support statement should make clear that, if there is a conflict between one of these definitions and state/local law, then DOT employees must act consistently with their state/local law. Alternatively, the MUTCD could use terminology like that used in the definition of "school" ("or as otherwise defined by the State").

Explanation of Comment: In his detailed April 29 comment on Section 1C.02's definition of "intersection", Benjamin Ross (FHWA-2020-0001-2004) provides a clear example of a problem with one of the MUTCD's definitions. As Mr. Ross explains, the MUTCD definition itself is so complex that it may well leave even a reasonable and prudent road user unable to tell whether they are at an intersection. This raises the same due process concerns that are raised by the missing pedestrian signal issue that I discuss in Comment 1: How does a person of ordinary intelligence know what they are supposed to do? This problem will be compounded by variations between the MUTCD definition and a differing definition under state law. If a DOT employee makes decisions about design and engineering based on the MUTCD definition, a reasonable road user trying to comply with the state law may be left clueless about the appropriate action.

The same problem potentially applies to other MUTCD definitions that tread into areas governed by state or local law. For example, definitions of "crosswalk" vary somewhat from jurisdiction to jurisdiction, as does the meaning of "right of way". Section 1C.02 defines "right of way [assignment]" as "the permitting of vehicles and/or pedestrians to proceed in a lawful manner in preference to other vehicles or pedestrians by the display of a sign or signal indications." The District of Columbia Court of Appeals, however, long ago held that pedestrian right-of-way at a green traffic signal means that a pedestrian has "the right of way to enter upon the crossing when the crossing is open and that right of way continues until they have reached the opposite curb," even if the signal changes while the pedestrian is crossing. *Griffith v. Slaybaugh*, 29 F.2d 437, 439 (1928). It is unclear whether the MUTCD definition contemplates this scenario.

Another example of the problems posed by these definitions is the conflict between the definitions of "highway" and "sidewalk". "Highway" is defined as "general term for

denoting a public way for purposes of vehicular travel, including the entire area within the right-of-way." "Sidewalk," on the other hand, is defined as "that portion of a street between the curb line, or the lateral line of a roadway, and the adjacent property line or on easements of private property that is paved or improved and intended for use by pedestrians." There is no definition of street; the entry for that term says, "See Highway," which takes us back to the definition of a highway as being for vehicular travel. Where exactly a sidewalk fits in there is unclear. These definitions, too, differ from some state law definitions which further exacerbates the ambiguity.

<u>Comment 8</u>: MUTCD standards on speed limit signs should be limited to the location, form and character of the signs and should not address their content (*i.e.* the number setting the speed limit). FHWA does not have the legal authority to require that engineering studies be performed before a speed limit is set. FHWA's recommendations regarding speed limits should be consistent with its authority under 23 U.S.C. 315, due process and the principles governing Federal Spending Clause conditions.

Relevant Sections of NPA, proposed MUTCD and related regulations:
NPA Paragraph 67/Proposed MUTCD Section 2B.21
NPA Paragraph 347/Proposed MUTCD Section 3C.01

Section 2B.21 begins with this standard statement: "Speed zones (other than statutory speed limits e.g, established by Federal or state law) shall only be established on the basis of an engineering study that has been performed in accordance with traffic engineering practices." FHWA has no legal authority to mandate how speed limits should be set. Section 109(d) authorizes FHWA to address the "form, location and character" of traffic control devices, not the content of those devices. Consequently, this statement should be deleted. The phrase "based on the engineering study," which appears in the second standard statement (lines 36-38) also should be deleted.

In addition, even if FHWA's legal authority does permit it to mandate how speed limits should be set, that authority is specifically connected to Federal funding and, under the Supreme Court's decision in *South Dakota v. Dole,* 483 U.S. 203 (1987), any condition imposed upon states in connection with Federal funding must meet several criteria. The condition imposed must be:

(1) in pursuit of the general welfare;
(2) unambiguous;
(3) related to a national concern;
(4) constitutional; and
(5) not coercive.

It is at best unclear whether Section 2B.21's standard requiring engineering studies meets these criteria. Most of the guidance on engineering studies appears focused on issues that affect drivers. This may be appropriate for travel on interstates and other pedestrian-free environments, but it is not in pursuit of the welfare of all people traveling

on all streets. It also is unclear exactly what the "national concern" would be that justifies mandating engineering studies. And, as I discuss in detail below, as implemented by some states, reliance on the 85th percentile speed raises due process concerns.

Leaving aside the standard, as I discuss in greater detail in Comment 13, FHWA does have authority, under 23 U.S.C. 315, to make recommendations that address "preserving and protecting the highways and insuring the safety of traffic thereon." It would conceivably be within this authority for FHWA to make recommendations to state DOTs about how speed limits should be set. These recommendations would need to be in guidance statements, however, not standard statements, and the existing guidance statements are problematic because only one of the criteria listed -- reported crash experience -- appears to be clearly focused on safety issues. The criteria listed also ignore a key point: What are the legal rights of road users along the street in question? If state law preserves pedestrian right of way at all crosswalks at all intersections, then the chosen speed limit needs to reflect that legislative choice -- that is, speed limits should never be set at a level that makes it impossible for pedestrians to exercise our rights.

Of particular concern is Section 2B.21's reference to the 85th percentile speed. As FHWA is well aware, NTSB has convincingly pointed out the deficiencies of the 85th percentile speed approach to speed limits in its 2017 study. As America Walks, NACTO and ITE have commented, it is good that FHWA has moved reference to the 85th percentile speed into the guidance in 2B.21 and provided more context and alternatives, but it would be better to adopt a Safe Systems approach, at least for settings in which pedestrians are present. Use of Safe Systems would be far more consistent with Section 315's directive to ensure the safety of traffic on the highways (understanding, of course, that "traffic" is broadly defined in Section 1C.02 to include pedestrians and that "highway" is defined in 23 U.S.C. 101(a)(11)(A) to include all streets). I also agree with David Helms's comments analyzing this issue, especially the deficiencies he points to in the NCUTCD's recommendations.

I now want to turn to the due process issue that I raised above. Although I do not think that the MUTCD guidance violates due process since the 85th percentile speed is named as just one criterion, some state applications of this principle are problematic. Even if FHWA simply encourages consideration of the Safe Systems approach, it would be helpful in persuading the worst states to reconsider their use of the 85th percentile speed.

Relying on driver decisions to set speed limits means that the decisions of private actors (drivers) are dictating the speed limit. California's justification for using the 85th percentile speed, for example, makes this clear:

> Speed limits established on the basis of the 85th percentile conform to *the consensus of motorists* of the reasonable and prudent speed, rather than the judgment of one or a few individuals.

2019 California Manual for Setting Speed Limits, Section 3.4.3 (page 38) (July 2019) (emphasis added).

The government, however, cannot delegate its regulatory authority to private actors. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). In *Carter Coal*, Congress enacted a law delegating power to fix maximum hours of labor to a subset of coal mine owners and laborers. The Supreme Court ruled that the delegation violated due process:

> The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form, for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. . . . Some coal producers favor the Code; others oppose it, and the record clearly indicates that this diversity of view arises from their conflicting and even antagonistic interests. The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. [citations omitted]

Driver-driven speed limits endanger pedestrians and, just as important, lead to a broader cascading effect: traffic engineers may, for example, abrogate pedestrian right-of-way at crosswalks by "closing" crosswalks as I discuss in Comment 2. Rather than implementing the right-of-way law by ensuring that streets are designed and engineered consistently with pedestrian rights, engineers design for the speed that drivers have chosen, which creates hazards for pedestrians. Recognizing those hazards, engineers may then "fix" the problem they created by making it difficult to impossible for pedestrians to actually use crosswalks, expecting us to walk or roll blocks out of our way in order to find a usable crosswalk.

This effect on pedestrians can perhaps be seen most clearly in Virginia, where state law links pedestrian right-of-way to driver speed: pedestrians do not have right-of-way at unmarked crosswalks unless the speed limit on the street is 35 mph or less. See Virginia Code 46.2-924(A)(3). Virginia engineers maintain that speed limits must be set based on the 85th percentile speed. (See, for example, http://www.thedinwiddiemonitor.com/news/vdot-speed-drop-signal-not-warranted-at-intersection-following-crashes/.) This means that if drivers "85th percentile" their speed up to more than 35 mph, pedestrians lose the right-of-way at any unmarked crosswalks. I saw

the consequences of this Virginia law when I attended a speed management summit hosted by GHSA and IIHS in Charlottesville in 2019. There was one marked crosswalk a block from the conference hotel, and only two more marked crosswalks between the hotel and IIHS research center, which was about 17.5 miles away. The posted speed limit on the road -- Route 29 -- was 45 mph, so pedestrians only have right of way at those three marked crosswalks.

Virginia is not the only place this happens, though; it just happens to be unique in having a specific right-of-way law that is driven by driver choices. Even where state right-of-way law doesn't change based on driver choices, however, engineers may decide that, given the high speed limit chosen by drivers, drivers "cannot be expected to see" pedestrians enter a crosswalk. To address this issue, they "close" the crosswalk. (Or possibly they do a study to see if there are enough pedestrians using the crosswalk to warrant installing a traffic signal and, because the speed limit on the street makes the crossing hostile to pedestrians, pedestrians are unwilling to risk their lives to cross the street, the warrant criteria are not met, and the engineers close the crosswalk. See also Comment 15.)

When the decisions of drivers dominate the government's decision about setting speed limits and lead directly or indirectly to consequences for other travelers, then one group (drivers) is being allowed to regulate the conduct of another (pedestrians) and it is just as obnoxious and unconstitutional a delegation as the one in *Carter Coal*.

Comment 9: **FHWA should revise Sections 4A.02-4A.06 to remove all standard statements. FHWA does not have the legal authority to address road user right-of-way in MUTCD standards and these statements have nothing to do with the location, form and character of traffic control devices.**

Relevant Sections of NPA, proposed MUTCD and related regulations:
NPA Paragraph 382/Proposed MUTCD Section 4A.02-4A.06

Recommended solution: FHWA should thoroughly review these provisions and remove all "Standard" statements that address issues of substantive law or, where appropriate and with consideration for variations in state law, convert such statements to "Support" statements.

Explanation of comment: Section 4A.02 states that FHWA is using UVC definitions in standards in Sections 4A.03-4A.06 that state the meanings of vehicular and pedestrian traffic signals. Sections 4A.03-4A.06 then, like the UVC, describe not the meanings of traffic signals but the expected behavior of road users, including who does and does not have right-of-way. As I discuss at greater length in Comment 5, incorporation of UVC language into MUTCD standards is inconsistent with Section 1A.06's caution that the UVC provisions are "recommendations for States to adopt in their State statutes and are not independently legally enforceable." Incorporation of UVC provisions as standards here also is inconsistent with FHWA's legal authority under Section 109(d) to address

"the location, form and character of informational, regulatory and warning signs, curb and pavement or other markings, and traffic signals installed or placed."

To give a more specific example of the problem FHWA is creating I will discuss subsection 4A.03.A.3 in detail. This provision says,

> Pedestrians facing a CIRCULAR GREEN signal indication, unless otherwise directed by a pedestrian signal indication or other traffic control device, are permitted to proceed across the roadway within any marked or unmarked associated crosswalk. The pedestrian shall yield the right-of-way to vehicles lawfully within the intersection or so close as to create an immediate hazard at the time that the green signal indication is first displayed.

Similar provisions, also drawn from the UVC, appear in other parts of Chapter 4A, including 4A.06.B. Nothing in these provisions addresses "the location, form and character" of traffic control devices, as authorized by 23 U.S.C. 109(d). Instead, this language attempts to prescribe what pedestrians should and should not do. As I discuss in Comment 4, FHWA has no authority to address the behavior of road users in the MUTCD.

Leaving aside FHWA's authority under Section 109(d), this provision also creates a potential conflict with state and local laws on pedestrian right-of-way. The second sentence of this provision, particularly the first half -- which appears to endorse the aggressive "beat the pedestrian to the crosswalk" game played by some drivers -- is especially problematic. It ignores long-standing case precedent that places the burden on drivers to anticipate that pedestrians will enter crosswalks. The District of Columbia Court of Appeals, for example, long ago held that pedestrian right-of-way at a green traffic signal means that a pedestrian has "the right of way *to enter* upon the crossing when the crossing is open" (that is, when the signal is green). *Griffith v. Slaybaugh*, 29 F.2d 437, 439 (1928) (emphasis added). The *Griffith* court also stated that the pedestrian's right "to enter" an intersection when the signal is green is "absolute" (*Id.*) and that it is the driver's responsibility to anticipate that pedestrians will be crossing the street and "to look, to see, and to know that pedestrians were not in his road" before entering an intersection, even if the driver has a green light. *Id.*

Moreover, consistent with *Griffith* and like many other states, D.C.'s courts recognize the principle that each law-abiding road user has the right to expect other road users to obey the law. *E.g. Asal v. Mina*, No. 18-CV-534 (D.C. 2021) ("As a general proposition, a plaintiff is not bound to anticipate negligent conduct on the part of others. Rather, he may assume that others will fulfill their duties."). Consistent with the court's decision, D.C.'s traffic regulations require drivers to reduce speed whenever "entering and crossing an intersection" (D.C. Municipal Regulation (DCMR) 18-2200.5) and prohibit drivers from obstructing the intersection (DCMR 18-2405.1(a)). D.C.'s regulations do permit imposition of a penalty on pedestrians entering a crosswalk "suddenly," but only if the pedestrian does not have right of way. DCMR 18-2603.1.

I have focused on D.C. because I live in D.C. and am most familiar with our court's decisions, but they are not that dissimilar from other state court decisions. Although there is variation in how the principle is applied, many state courts recognize the idea that each law-abiding road user has a right to expect other road users to obey the law. In the case of pedestrians at crosswalks this commonly means there is a right to expect drivers to give right of way. We are not required to anticipate that drivers will break the law. See, for example, *Kazan v. Kennedy* (W.D. Wash. 2016) (citing *Jung v. York*, 449 P.2d 409 (Wash. 1969)) ("A pedestrian cannot at one and the same time have a right to assume that the right of way will be yielded and a duty to look to make sure that it is.")

My point here is that this is a complex area of law, with significant variations in how state courts interpret the law, and it is both inappropriate and potentially confusing for the MUTCD to tread into it. Many of the other provisions in Sections 4A.03-4A.06 suffer from the same problem -- they attempt to incorporate substantive law into MUTCD standards. This is inconsistent with the "Support" statement in Section 1A.06 about the UVC, beyond FHWA's legal authority, and harmful in that it creates ambiguity about whether the MUTCD provisions preempt inconsistent state law provisions. Given that FHWA specifically claims, in its Federalism Assessment in the NPA, that the MUTCD does not preempt state law, MUTCD standards should not address substantive law.

The above said, I understand that it may be helpful to describe what the various traffic signals mean. It would be better to do this in "Support" statements, though, rather than turning UVC provisions into MUTCD standards. In addition, the information provided should discuss the meaning of the signals in a general way that is consistent with state and/or local law, not the expected behavior of road users. For example, 4A.03 could just broadly state, "Green signals mean that vehicular and pedestrian traffic may enter an intersection consistent with state or local law addressing right-of-way."

Comment 10: **MUTCD guidance on pedestrian signal timing does not adequately address the needs of people with disabilities. In addition, permitting Right Turn on Red at locations at which the minimum pedestrian "walk" time is provided is unsafe and unwise.**

Relevant Sections of NPA, proposed MUTCD and related regulations:
December NPA Paragraph 100/Proposed MUTCD Section 2B.61
December NPA Paragraph 424/Proposed MUTCD Section 4I.06

Recommended Solution: FHWA should revise the guidance on pedestrian signal timing to put greater emphasis on accessibility and the rights of pedestrians under state law. This should include highlighting use of passive pedestrian detection, use of slower walking speeds at all locations, and strongly discouraging DOTs from changing the countdown while it is happening (e.g. programming the signal to drop from 20 to 10 because vehicle traffic is waiting on another approach).[4] FHWA should consult with

[4] I don't know what the right word is for this. Some advocates call these adaptive signals. *E.g.* https://www.theurbanist.org/2017/06/09/adaptive-signal-system-kicks-pedestrians-curb/ .

USDOJ on the adequacy of this guidance. FHWA also should discourage use of Right Turn on Red at crossings at which the minimum pedestrian "walk" time is provided.

Explanation of Comment: MUTCD Section 4I.06's guidance on pedestrian signal timing is problematic and should be revisited. When FHWA published this guidance in 2009, moving to using 3.5 feet per second was walking speed, it relied on two studies to support that change: 1) Transit Cooperative Research Program (TCRP) Report 112, I*mproving Pedestrian Safety at Unsignalized Crossings* and 2) Institute of Transportation Engineers, *The Continuing Evolution of Pedestrian Walking Speed Assumptions*. Both studies show that although many people do walk or roll at 3.5 feet per second or faster, older and/or disabled people walk significantly more slowly. The TCRP report even includes a table showing mean walking speeds for people with various types of disabilities, most lower than 3.5 feet per second:

Table 4. Mean walking speeds for pedestrians with disabilities and users of various assistive devices. (*8*)

Disability or Assistive Device	Mean Walking Speed, ft/s (m/s)
Cane or Crutch	2.62 (0.80)
Walker	2.07 (0.63)
Wheel Chair	3.55 (1.08)
Immobilized Knee	3.50 (1.07)
Below Knee Amputee	2.46 (0.75)
Above Knee Amputee	1.97 (0.60)
Hip Arthritis	2.24 to 3.66 (0.68 to 1.16)
Rheumatoid Arthritis (Knee)	2.46 (0.75)

TCRP Report at page 8. Consequently, FHWA's basis for recommending use of 3.5 feet per second -- while an improvement upon the previous recommended walking speed of 4 feet per second -- was pretty dubious.

Moreover, while you included a provision recommending use of a lower walking speed where people walk more slowly, the guidance is confined to locations where slower or disabled pedestrians "routinely use a crosswalk." This is absurd. Pedestrians who move more slowly or who are disabled have the right to use any crosswalk, regardless of how many other people "routinely" use it. Many courts recognized this point long ago, ruling that pedestrian right-of-way at crosswalks means that pedestrians have both the right to enter the crosswalk and the right to complete the crossing, regardless of whether the signal has changed while they are still crossing the street. See, for example, *Quaker City Cab Co. v. Fixter,* 4 F.2d 327, 328 (3d Cir. 1925); *Griffith v Slaybaugh*, 29 F.2d 437 (App. D.C. 1928); *Riddel v. Lyon*, 213 P. 487 (Wash. 1923); see also *Peck v. United States*, 195 F.2d 686, 688 (4th Cir. 1952) ("The pedestrian's right of way extends from one side of the street to the other. It does not begin at any particular point in the intersection, nor does it end at any particular point. It begins on one side of the street and extends until the pedestrian has negotiated the crossing.")

FHWA should revise the guidance to ensure that sufficient time is provided at every signalized crosswalk for the slowest pedestrians. FHWA also could move the discussion of passive pedestrian detection from option to guidance and strongly encourage DOTs to use it.

Similar issues exist with respect to the minimum "walk" time of 4-7 seconds recommended by FHWA. Not all pedestrians are capable of leaving the curb during that short a period of time, especially if drivers are allowed to turn right on red at the intersection, since many drivers fail to stop and yield before turning. FHWA also should revisit its guidance on minimum walk times, or at least mandate that, where engineers provide only this minimum walk time, right on red must be prohibited. The option for a minimum 4-second walk time also should be eliminated. This is inadequate for any pedestrian.

Finally, an increasing problem with pedestrian signals is that engineers appear to be programming them in some cases to respond to vehicle traffic by dropping seconds from the pedestrian signal countdown so that drivers waiting on a different approach get a signal faster. This is unconscionable. Many pedestrians rely upon the number of seconds in making decisions about crossing the streets. Making signals unpredictable puts them in direct peril. FHWA needs to prohibit this practice, not encourage it.

I also urge FHWA to discuss this issue with USDOJ. It is at best unclear to me whether, in light of the positions they are taking in litigation against cities, they would consider the guidance provided here acceptable under the ADA and Rehabilitation Act. FHWA may not be in a position to provide definitive guidance but it could caution DOTs to discuss this problem with their own attorneys and USDOJ.

<u>Comment 11</u>: MUTCD restrictions on aesthetic crosswalks are unwarranted and reflect a higher evidentiary burden than FHWA imposes upon other examples of non-uniformity.

Relevant Sections of NPA, proposed MUTCD and related regulations:
December NPA Paragraph 367/Proposed MUTCD Section 3H.03

Recommended Solution: Explicitly permit states and cities to use aesthetic treatments in crosswalks or remain silent on this issue.

Explanation of Comment: FHWA's various rulings about aesthetic crosswalks make blanket assertions without any evidence or logic to support them. It could be argued just as easily that the use of bright colors and bold patterns enhances the visibility of crosswalks – in fact, FHWA's definition of "crosswalk art" as "any freeform design to draw attention to the crosswalk" (emphasis added) implies that this is true. There is no explanation of how artwork in a crosswalk would distract people or how it would contribute to a "false sense of security" (or even what that term is supposed to mean).

In the December NPA, FHWA also states, “FHWA believes that this proposed section is necessary because it is important that these treatments not resemble or interfere with the uniform appearance of traffic control devices, which could confuse and distract road users.” Yet at the same time, as I discuss in Comment 1 above, FHWA permits DOT employees to leave out accessible pedestrian signals entirely. Surely that omission is even more significant than the appearance of crosswalks for purposes of uniformity.

FHWA also demands that commenters supporting aesthetic treatments provide “quantifiable and objective data, such as from human factors evaluations, about the safety and operation of vehicular and street traffic, safety and navigation of pedestrians, any assessments of the effects of nonstandard designs on pedestrians with low visual acuity or other vision impairments, and the ability of machine vision of autonomous vehicles to detect accurately and react appropriately to the markings as a crosswalk or, if not installed with a crosswalk, other type of marking.” This is a heavy burden -- a much heavier burden than FHWA imposes on those supporting continued use of the 85th percentile speed, as discussed in Comment 8, the merits of which are significantly weaker. It also is a much heavier burden than the “desirability” criterion that FHWA imposes on DOT employees who wish to close a crosswalk. See Comment 2.

It also is dubious whether the restrictions FHWA wants to impose would be upheld by a court. As discussed in Comment 8, the Supreme Court’s decision in *South Dakota v. Dole* (which upheld USDOT’s withholding of 5% of funds from states that did not adopt a drinking age of 21 due to concerns about drunk driving) requires that courts consider a variety of factors before upholding spending restrictions, including whether the condition imposed (1) in pursuit of the general welfare; (2) unambiguous; (3) related to a national concern; (4) constitutional; and (5) not coercive. It seems unlikely that a court reviewing these factors and FHWA’s proposed restrictions would see artistic crosswalks as posing the same national threat as drunk drivers.

FHWA’s approach to this issue also is contrary to the requirements outlined in Executive Order 12866[5] (Regulatory Planning and Review). Specifically, Section 1(b)(7) of the Order requires FHWA to “base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation”. FHWA cites no scientific, technical, economic or other information in support of its rulings; instead, FHWA attempts to impose the burden of providing evidence upon the states and localities wishing to use crosswalk art. Absent evidence, FHWA should refrain from prohibiting states and localities from using crosswalk art.

FHWA’s position also implicates Federalism principles. Crosswalks are part of state traffic regulation – under state laws and/or state court decisions, drivers are required to stop (or yield in some states) to pedestrians at crosswalks throughout the country – and

[5] In the December NPA, FHWA claims that this rulemaking is non-significant for purposes of Executive Order 12866 and that there are no Federalism implications. The proposed provisions on crosswalk art are one example of why both statements are questionable.

traffic regulation is traditionally the constitutional province of states and localities under their police power. Under Section 3(a) of Executive Order 13132 (Federalism), FHWA is required to "closely examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and shall carefully assess the necessity for such action." There is no indication that FHWA has examined this issue.

In addition, under Section 3(b) of the Order, "National action limiting the policymaking discretion of the States shall be taken only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance." There is no evidence that the use of crosswalk art by states and localities is "a problem of national significance," nor do the rulings cite any constitutional or statutory authority for limiting the policymaking discretion of the states in this area.

Comment 12: 23 U.S.C. 402(a) does not provide legal authority for the proposed MUTCD or related regulations.

Relevant Sections of NPA, proposed MUTCD and related regulations:
December and February NPAs: Background sections
December NPA: Proposed revision 5 to the authority citation in 23 C.F.R. Part 655
December NPA: Paragraph 9/Proposed MUTCD Section 1B.01
December NPA paragraph 11/Proposed MUTCD section 1B.03
23 C.F.R. 655.603(a)[6]

Recommended solution: Remove all references to 23 U.S.C. 402(a) from the proposed MUTCD and related regulations.

Explanation of comment: These provisions of the December and February NPAs and proposed MUTCD all reference 23 U.S.C. 402(a)[7] as one of the legal authorities for the MUTCD. This citation is incorrect. Section 402(a) does not provide any authority to FHWA to do anything.

The current version of Section 402(a) requires states to have a highway safety program, approved by USDOT, "designed to reduce traffic accidents and the resulting deaths, injuries, and property damage" [subsection (a)(1)]. USDOT is directed to "promulgate uniform guidelines . . . expressed in terms of performance criteria" that reduce deaths and serious injuries from speeding [subsection (2)(A)(i)], alcohol/drug impairment [subsection (2)(A)(iii)], and other unsafe driving behaviors [subsection (2)(A)(vi)]; encourage use of seat belts and other restraint systems [subsection (2)(A)(ii)]; prevent crashes involving motorcycles [subsection (2)(A)(iv)]; reduce deaths and serious injuries

[6] I recognize that 23 C.F.R. 655.603(a) is not amongst the provisions for which the NPA is proposing amendments. Nevertheless, I have included it (and throughout these comments, other provisions not specifically identified in the NPA) because FHWA will need to change it and a technical change like this should be fairly simple.
[7] All citations are to https://uscode.house.gov/ .

from school bus crashes [subsection (2)(A)(v)]; improve law enforcement services [subsection (2)(A)(vii)]; increase driver awareness of commercial motor vehicles [subsection (2)(A)(viii)]; improve driver performance [subsection (2)(B)]; improve pedestrian and bicycle safety [subsection (2)(C)]; and provide for effective crash records, crash investigations, vehicle registration/inspection/operation, and emergency services [subsection (2)(D)].

Section 402(a) obviously covers a fairly wide range of related subjects, but does not speak at all to traffic control devices. It appears that this citation is a mistake carried over from the 2009 MUTCD: Prior to enactment of MAP-21 in 2012, Section 402(a) included language that was read by at least one court to authorize the MUTCD: "[S]uch uniform guidelines shall include, but not be limited to, provisions for . . . highway design and maintenance (including lighting, markings, and surface treatment), traffic control . . .". See *Miller v. United States*, 710 F.2d 656 (10th Cir. 1983). That language, however, is not in the current version of Section 402(a) so does not provide authority for the MUTCD.

In addition, 49 C.F.R. 1.94(a) and 1.95(e) delegate the Secretary's authority to carry out Section 402(a) to the National Highway Traffic Safety Administration (NHTSA), not to FHWA. FHWA's only delegation of authority in 49 C.F.R. 1.85 under Chapter 4 of Title 23 relates to Section 409, which addresses use of reports and surveys in legal proceedings. See 49 C.F.R. 1-85(a)(4). Subsection (c)(14) of Section 1-85 does reference Section "402" of the Federal Highway-Aid Act of 1973, but that Section 402 is a financial provision; it does not appear to have anything to do with 23 U.S.C. 402(a) or traffic control devices.

Finally, NHTSA, not FHWA, receives an appropriation to carry out 23 U.S.C. 402. See Consolidated Appropriations Act, 2021 (House Rules Committee Print 116-68) at pages 1650-1651. In general, under Federal appropriations law principles, if a specific appropriation is made to carry out a purpose (here, implementation of 23 U.S.C. 402), then a general appropriation that otherwise could be construed to apply to that purpose cannot be used:

> It is a well-settled rule that even where an expenditure may be reasonably related to a general appropriation, it may not be paid out of that appropriation where the expenditure falls specifically within the scope of another appropriation . . . In other words, if an agency has a specific appropriation for a particular item, and also has a general appropriation broad enough to cover the same item, it does not have an option as to which to use. It must use the specific appropriation.

Government Accountability Office (GAO), *Principles of Appropriations Law*[8], Volume I, Pages 3-407-408 (4th ed. 2017). In this case, NHTSA receives a specific appropriation to carry out Section 402, so FHWA cannot spend its own funds to implement 402 even if

[8] Also known as the *Red Book*, GAO's treatise is available on its website here: https://www.gao.gov/legal/appropriations-law/red-book .

section 402 can be read broadly enough to authorize the MUTCD and even if FHWA's delegations of authority could be read to include section 402.

<u>Comment 13</u>: FHWA does not have legal authority to require any agency to apply the standards in the proposed MUTCD "regardless of source of funding" or to require application of other non-mandatory provisions.

Relevant Sections of NPA, proposed MUTCD and related regulations:
December NPA Paragraph 3/Proposed MUTCD Section 1A.01

Recommended solution: Revise Section 1A.01 and any other relevant provisions to accurately reflect FHWA's legal authority to apply the MUTCD.

Explanation of comment: In proposed MUTCD Section 1A.01, FHWA states:

> Applicability of the MUTCD to facilities open to public travel is independent of the type of ownership or jurisdiction (public or private) and the source of funding (Federal, State, local, or private).

None of the legal authorities cited by FHWA in the December of February NPAs supports application of MUTCD standards "independent of . . . source of funding." This statement also does not distinguish between MUTCD "standard" and "guidance" statements. As discussed below and in FHWA's webinars on the MUTCD, the primary authority for MUTCD "standard" statements is 23 U.S.C. 109(d). This authority does not apply unless Federal funding is involved. Specifically, Section 109(d) provides:

> On any highway project in which Federal funds hereafter participate, or on any such project constructed since December 20, 1944, the location, form and character of informational, regulatory and warning signs, curb and pavement or other markings, and traffic signals installed or placed by any public authority or other agency, shall be subject to the approval of the State transportation department with the concurrence of the Secretary, who is directed to concur only in such installations as will promote the safe and efficient utilization of the highways.

I agree that Section 109(d) can be read to provide legal authority to FHWA to publish an MUTCD -- in essence, an MUTCD could represent FHWA's statement of how it will exercise its responsibility for concurring in state DOT decisions about the location, form and character of traffic control devices. But there are specific conditions that must be met in order for this authority to apply.

- FHWA only has authority to apply the requirements (standards) it creates to "any highway project in which Federal funds hereafter participate" (i.e. after enactment of Section 109(d)) and to any "*such* project constructed since December 20, 1944" (i.e. any highway project in which Federal funds participated as far back as

December 20, 1944). Section 109(d) does not provide legal authority for FHWA to apply the MUTCD unless Federal funds are involved.

- FHWA can apply MUTCD standards to "the location, form and character of informational, regulatory and warning signs, curb and pavement or other markings, and traffic signals". Section 109(d) does not give FHWA authority to impose behavioral requirements upon road users or to address substantive matters of law. As the Supreme Court noted in holding that the MUTCD does not preempt state law, the Manual is "devoted to describing for the benefit of state employees the proper size, color, and shape of traffic signs and signals." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 669 (1993).

- FHWA can only concur in traffic control devices that "promote the safe *and* efficient utilization of the highways." FHWA cannot elevate efficiency over safety; if anything, safety is identified first and should be given higher priority than efficiency.

The limited legislative history of Section 109(d) also makes clear that public safety was a core principle behind Section 109(d) and that it was never intended to provide authority for FHWA (or its predecessor agencies) to impose requirements regardless of Federal funding involvement. Nor was it intended to provide authority for FHWA, let alone mid-level employees of state government, to make decisions affecting the substantive rights of pedestrians or other road users. Although it has undergone some minor revisions over decades, the text of Section 109(d) originated in the Federal Highway Act of 1944 (Public Law 78-521), where it appeared as Section 12 (see page 843). The Senate discussed the bill and this provision on September 15, 1944. Senator Carl Hayden (D-AZ) explained:

> Then, at the very last of the bill, in section 12, there is a provision which everyone agrees is highly desirable for uniformity in highway-marking signs throughout the United States.
>
> The junior senator from Massachusetts [Mr. Weeks], being a careful legislator, thought that we had gone too far, and so an amendment was inserted to provide that on highways and streets hereafter constructed under the Federal-Aid system the form and character of informational, regulatory, and warning signs, curb and pavement of other markings, and traffic signals, shall be subject to a standard code approved by the State highway department and the Commissioner of Public Roads.

67 *Cong. Rec.* 7790 (1944). This discussion shows that the Senate understood the requirements to apply to uniformity in the appearance of signs and only when Federal funding was involved in a project.

The House considered the bill on November 24, 1944. During that discussion, Representative William Miller (D-CT) opposed this provision because he thought it took authority away from the states:

> The argument has been advanced by members of this committee throughout the debate that we want to leave the direction for the building and maintenance of these highways within the States. Section 12 completely contradicts that in every respect as it relates to informational markings, traffic signs, and similar signs. I hope that although it is late in the day members of the committee will think seriously before they adopt section 12 of this bill.

Representative William Whittington (D-MS), one of the House floor managers, assured Miller and other members of the House that Section 12 would not take authority away from the states:

> The whole purpose of this section 12 is to promote uniformity that would be in the interests of public safety. . . . Is there any objection to undertaking to secure uniformity in the interest of public safety when that uniformity cannot be made effective without the approval of the highway commissioners of all of the states of the Union?

67 *Cong. Rec.* 8584 (1944). The exchange between Miller and Whittington also makes clear that this language was intended only to require uniformity in the appearance of markings, signs and other traffic control devices. It was not intended to lead FHWA or state DOTs to intrude into substantive areas of state law.[9]

The December and February NPAs also cited a number of other legal authorities in support of the MUTCD. Both cite 23 U.S.C. 402(a) which, as I discuss in Comment 1, does not apply to FHWA or the MUTCD. Of the other authorities cited, the most significant and pertinent appears to be 23 U.S.C. 315, which provides:

> . . . [T]he Secretary is authorized to prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this title. The Secretary may make such recommendations to the Congress and State transportation departments as he deems necessary for preserving and protecting the highways and insuring the safety of traffic thereon.

Section 315 has two parts. The first sentence authorizes USDOT to write regulations to carry out its responsibilities under Title 23 and so obviously supports writing the MUTCD to the extent authorized by Section 109(d). It does not, however, expand FHWA's legal authority beyond that provided in Section 109(d). The second sentence in Section 315 authorizes USDOT to make recommendations to Congress and the states to preserve

[9] Whittington's response also, interestingly, suggests that Section 109(d)'s requirements (and, therefore, the MUTCD) cannot be applied unless the states also consent, which suggests that this language perhaps should not be applied as broadly as other Federal spending limitations. I will not pursue that argument at this time.

and protect the highways and ensure traffic safety. This part of Section 315 can be read to authorize to provide MUTCD guidance that addresses preserving and protecting highways and insuring the safety of all travelers, but it does not authorize USDOT to apply MUTCD standards, which are mandatory, everywhere and it does not authorize USDOT to turn its recommendations into MUTCD standards.

The remaining authorities cited in the NPAs may be relevant to some of the content of the MUTCD, but none appear to expand Section 109(d)'s reach to non-Federally-funded locations. At the end of the day, the Applicability language in 1A.01 either overstates FHWA's authority or leaves too much open to interpretation. I realize this language is just a "Support" statement, but informational statements should be factual and clear. This one is neither and should be revised to ensure consistency with the legal authority provided in Section 109(d). I also note here that there are a variety of provisions throughout the MUTCD which say that it applies to "site roadways open to public travel" (*e.g.* Section 2M.03). It would be wise to also clarify these statements to make clear that MUTCD standards only apply to these roadways if Federal funding is involved.

<u>Comment 14</u>: I appreciate and support FHWA's addition of the Rectangular Rapid-Flashing Beacon to the MUTCD. The proposed "Await Gap in Traffic" language on the R10-25 sign, however, is not consistent with state law on right-of-way.

Relevant Sections of NPA, proposed MUTCD and related regulations:
December NPA Paragraph 98/Proposed MUTCD Section 2B.59
December NPA Paragraph 432/Proposed MUTCD Section 4L.01

Recommended Solution: Do not include "Await Gap in Traffic" verbiage on any sign, including the R10-25.

Explanation of Comment: My experience with the RRFB is that it is one of the few pedestrian-friendly innovations out there and I strongly support its use. I agree with Toole Design's comments, however, regarding the merits of the "Await Gap in Traffic" verbiage, which is proposed for the R10-25 sign. On that point, the December NPA states:

> [T]hese signs are used only at uncontrolled crosswalk locations where pedestrian-activated warning beacons only alert approaching traffic to the presence of a pedestrian, but do not assign right-of-way to conflicting traffic streams, such as with a traffic signal or hybrid-beacon. In such cases, pedestrians are required to wait for an acceptable gap in vehicular traffic . . .

This misstates and misunderstands the role of the MUTCD and the role of the law. Right-of-way is assigned by law, not signs. Once again, FHWA is treading into an area of state law and it needs to refrain from doing that. As I discussed previously, at least some jurisdictions, like D.C. and Washington state, require drivers to anticipate that pedestrians will enter crosswalks; we have the right to expect and assume that drivers

will yield to us. We are not required to await a gap in vehicle traffic. Thus, the verbiage proposed is inconsistent with our law. Since FHWA maintains that the MUTCD does not preempt state law, it should not include language on signs that is inconsistent with state law.

<u>Comment 15</u>: I support FHWA's decision to convert warrant criteria from standard to guidance. I agree with Toole Design that the criteria need to be further reevaluated to incorporate a Safe Systems approach. The criteria also need to reflect the legal rights of pedestrians.

Relevant Sections of NPA, proposed MUTCD and related regulations:
NPA Paragraph 347/Proposed MUTCD Section 3C.02
NPA Paragraph 390-393/Proposed MUTCD Sections 4C.02-4C.08

Recommended Solution: Revise the warrants to reflect the Safe Systems approach and pedestrian rights.

Explanation of Comment: FHWA's past practice of establishing warrants as standards was never within its legal authority because it went beyond Section 109(d)'s direction that FHWA address the "form, location and character" of traffic control devices. Thus, downgrading the criteria to guidance is a step in the right direction.

As Toole Design explains in its comments, however, the proposed guidance still emphasizes minimizing motorist delay and puts too much emphasis on pedestrian volumes. This is inconsistent with the Safe Systems approach. It also is inconsistent with FHWA's authority under 23 U.S.C. 315 to make recommendations to preserve and protect the highways and insure the safety of travelers. Criteria that emphasize the needs of drivers to move quickly and efficiently leave out safety.

Finally, pedestrians have the right to use any legal crosswalk. Some state/local laws, including D.C.'s and Washington State's (as discussed more thoroughly in previous comments), go even further, recognizing that pedestrians have the right to enter the crosswalk and the right to expect drivers to yield to us. FHWA's guidance needs to be consistent with these rights. The job of a DOT employee is to implement the law, not to impose additional burdens on exercise of legal rights. If a pedestrian has the legal right to use a crosswalk, then the only question in the DOT's mind should be: How do I treat this crossing to protect that right? FHWA's guidance should incorporate this principle.

In addition, FHWA's statements advising DOT employees not to apply crosswalk markings "indiscriminately" and to perform an engineering study before marking any crosswalk are not helpful or wise from a policy standpoint. The statement in 3C.02 guidance to consider "the possible consolidation of multiple crossing points" also is unhelpful and more likely to create safety hazards than to resolve them.

These provisions also do not promote uniformity. While unmarked crosswalks continue to exist and may be appropriate in some very low traffic places, the reality is that the past century of DOT emphasis on minimizing motorist delay has eliminated unmarked crosswalks as a practical matter in most places. Consequently, the only "crosswalk" that most drivers understand is the one that is marked. FHWA's guidance should advise DOT employees to mark the crosswalk if their state recognizes pedestrian right-of-way at the crosswalk.

Finally, while I oppose inclusion of a special chapter for automated vehicles, Section 5B.02 emphasizes that AVs need markings in order to operate. It is unclear to me why FHWA wants to countenance a situation in which a pedestrian would not be able to exercise their legal right-of-way at an unmarked crosswalk because an AV cannot recognize it. It's also unclear to me why AVs should be entitled to markings but not pedestrians.[10]

<u>Comment 16</u>: Automated Vehicles and their manufacturers are not entitled to special consideration and should not be the subject of a separate chapter.

Relevant Sections of NPA, proposed MUTCD and related regulations:
December NPA Paragraphs 448-460/Proposed MUTCD Chapter 5

Recommended Solution: Delete Chapter 5

Explanation of Comment: I agree with Toole Design's comments regarding the merits of Chapter 5. In addition, as I discuss in the preceding comment FHWA appears to be according AVs more respect than it shows for pedestrians. FHWA should act within its legal authority by incorporating any traffic control device "form, location and character" guidance relevant to AVs into other chapters.

<u>Comment 17</u>: FHWA does not have legal authority to address the appearance and conduct of adult crossing guards.

Relevant Sections of NPA, proposed MUTCD and related regulations:
December NPA Paragraph 527/Proposed MUTCD Section 7D.02

Recommended Solution: Eliminate all text from Section 7D.02 that addresses the appearance and conduct of adult crossing guards.

Explanation of Comment: As I have explained previously, FHWA's authority to publish the MUTCD derives from 23 U.S.C. 109(d), which authorizes FHWA to address the "form, location and character" of traffic control devices. Even under the broad-ranging definition of "traffic control device" in Section 1C.02, an adult human is not a traffic control device. The "Stop" paddle in their hand may be and I have no quarrel with

[10] AVs, of course, should be programmed to comply with the law and should not be permitted on any street until they are capable of complying with the law.

FHWA addressing the appearance of that paddle, but the human is beyond FHWA's purview.

<u>Comment 18</u>: FHWA has not addressed the requirements of Executive Order 12898 and FHWA Order 6640.23A in this rulemaking.

Relevant Sections of NPA, proposed MUTCD and related regulations: All

Recommended Solution: Withdraw and revise the NPA to address EO 12898.

Explanation of Comment: Both EO 12898 and FHWA Order 6640.23A require FHWA rulemakings (and other activities) to address environmental justice considerations. Order 6640.23A specifically provides, "Future rulemaking activities undertaken, and the development of any future guidance or procedures for FHWA programs, policies, or activities that affect human health or the environment, shall explicitly address FHWA compliance with EO 12898, with DOT Order 5610.2(a), and with this directive." Given that we know that our pedestrian safety crisis is disproportionately affecting minority communities and that this effect is related to unsafe infrastructure, FHWA should have conducted an analysis of the under EO 12898 and Order 6642.23A.

Conclusion

I appreciate this opportunity to provide these comments. I also am attaching technical/clerical comments that may be of interest. For these I used FHWA's suggested form. I can be contacted at myrna38717[AT]gmail.com .

Grassroots advocates like myself have valuable local knowledge that is too often brushed aside by traffic engineers based on the rule-bound dictates of the MUTCD. To make matters worse, much of the guidance is outdated, pseudoscientific and based on the premise that speeding cars through intersections is the most important goal. I join America Walks and other groups to ask that U.S. DOT perform a comprehensive overhaul of the MUTCD, as well as Part 655 of Title 23 of the Code of Federal Regulations, centering safety and equity. This rewrite also should focus on ensuring that the MUTCD and regulations are clearly consistent with FHWA's current statutory authority and respect for the rights of all travelers.

Eileen McCarthy's Supplemental Technical/Clerical Comments on Docket No. FHWA-2020-0001 National Standards for Traffic Control Devices; the *Manual on Uniform Traffic Control Devices for Streets and Highways*; Revision

Proposed Section Number(s)	Agree with concept and text as proposed	Agree with concept; suggested rewording of text in Comments	Disagree with concept	Comments *Please include justification for your position based on objective experience and empirical data. If there is a specific statement with which you take exception, please provide the Page and Line numbers from the mark-up version of the proposed MUTCD text.*
1A.04, Lines 24-25	Not applicable	Not applicable	Not applicable	This text is a Support statement that refers the reader to Section 1C.02 for definitions of "engineering study" and "engineering judgment". Nothing in the rest of 1A.04 uses those terms, however, so the presence of this random sentence in 1A.04 is confusing.
1A.02 and 1C.02	N/A	N/A	N/A	You have one section (1A.02) entitled "Traffic Control Devices-Definition" but the actual definition is in 1C.02. This is more confusing than helpful, especially since the language is not completely consistent. The real purpose of 1A.02 seems to be summarizing devices that are not traffic control devices. It would be better to give this section a title that announces that purpose – e.g. "Devices Not Covered by this Manual".
1B.01 and 1C.01	N/A	N/A	N/A	Section 1B.01 states that the MUTCD is "the national standard for all traffic control devices". Section 1C.01.A defines a "standard" as "a statement of required, mandatory, or specifically prohibitive practice regarding a traffic control device." The remainder of Section 1C.01 describes other non-mandatory provisions -- guidance, options, support. The use of the term "standard" in both places creates unnecessary ambiguity. Does 1B.01 mean that the entire MUTCD, including the provisions defined by 1C.01 as non-mandatory, actually is mandatory? I suggest either finding different words or clarifying 1B.01 to make clear that only MUTCD standards comprise the "national standard".
2A.01	N/A	N/A	N/A	This section states, "Signs should not be used on a frequent basis to confirm rules of the road or statute." This sentence is puzzling because many signs are used for the purpose of informing people of the law -- e.g. speed limit signs, stop signs, yield signs. In fact, Section 2B.01 specifically says that the purpose of "regulatory signs" is "to inform road users of selected traffic laws or regulations and indicate the applicability of the legal requirements." Section 2A.01 should be clarified.
2A.04	N/A	N/A	N/A	The third paragraph of the Standard section says, "Also, the third paragraph in the Support section says that 1A.05 has information about how to obtain the 'Standard Highway Signs' publication." 1A.05 does not include that information. It just says that the "Standard Highways Signs" publication is an FHWA publication.
23 CFR 655.603(b)(1) MUTCD 1C.01	N/A	N/A	X	23 CFR 655.603(b)(1) states, "The guidance statements contained in the National MUTCD shall also be in the State Manual or supplement unless the reason for not including it is satisfactorily explained based on engineering judgment, specific conflicting State law, or a documented engineering study." MUTCD Section 1C.01, though, clearly states that guidance is not mandatory. Based on the analysis of FHWA's legal authority (see primary comments above), I

				do not think FHWA can make its guidance mandatory. In any event, these two provisions appear to be in conflict.
4I.06	N/A	N/A	X	This section contains a Support statement saying, “If a leading pedestrian interval is used without accessible features, pedestrians with vision disabilities can be expected to begin crossing at the onset of the vehicular movement when drivers are not expecting them to begin crossing.” I agree that APS signals should be provided, but the statement here about driver expectations should be deleted. This is another inaccurate statement that intrudes into state and local law. Drivers are required to expect pedestrians to enter the crosswalk at any point when the pedestrian has right of way and to stop or yield to us, depending upon what the law requires.