

May 14, 2021

Honorable Nicole Nason Administrator
Federal Highway Administration
U.S. Department of Transportation
1200 New Jersey Avenue S.E.
Washington, D.C. 20590

Re: Comments for Docket No. FHWA-2020-0001
Notice of Proposed Amendment (NPA) on the Manual on Uniform Traffic Control
Devices (MUTCD)

The Intelligent Transportation Society of America (ITSA) is hereby forwarding comments submitted to us by our members concerning the U.S. Department of Transportation's Notice of Proposed Amendment on the Manual on Uniform Traffic Control Devices (MUTCD). As the trade association representing stakeholders across the transportation sector, including state, city, and county departments of transportation, metropolitan planning organizations, automotive manufacturers and suppliers, technology companies, engineering firms, and research universities, ITSA advocates for transportation technology solutions that make mobility options safer, greener, and smarter. Much of that effort is impacted by the guidance and standards established in the MUTCD, particularly as it pertains to novel traffic control devices and applications and automated driving systems. Given the importance of these standards on transportation innovation, ITSA follows this proceeding with great interest. We appreciate the opportunity to provide feedback from our members on the proposed amendment. The following should not be considered official ITSA policy, rather as our effort to forward to you some brief thoughts that we received from our members throughout this update. We look forward to continuing to engage with this update through our membership on the National Committee on Uniform Traffic Control Devices.

One state department of transportation member of ITSA commented that the current standard should be amended to reflect electric charging as well as petroleum in a "fuel" category. They also expressed their interest in additional designations for accessibility – for example, signage indicating whether an upcoming charging station is accessible to a person with disabilities.

An additional state department of transportation member of ITSA expressed concerns that FHWA did not seem to them to be giving much credence to the many studies that show the use of graphics with text has more impact on the driver. This concerned the commenter, as they felt that the MUTCD should be considering using more graphics to make messages more effective rather than discouraging it. They additionally raised concerns about statements prohibiting the use of fatality numbers on dynamic message signs, which they argue many states are doing already.

Finally, an ITSA member asked the organization to forward language from the Idaho Transportation Department regarding proprietary patents. I am including the language below:

Safety should be the first priority under the MUTCD.

- While the policy of promoting “uniformity” under the MUTCD is important, so is promoting “safety”. Safety is the highest priority according to USDOT.
- Restrictions on proprietary products have the effect of discouraging efforts to improve safety. Innovative patented and proprietary products that advance transportation technology and public safety should be encouraged, rather than discouraged.
- Private enterprise and American small business should be incentivized to innovate safety solutions, rather than deterred.
- Allowing Patented and proprietary products would encourage innovation that would improve safety.
- How many lives are being lost every year by prohibiting patented products that advance safety?
- The prohibition on the use of patented materials included in the MUTCD is a significant barrier to the development and deployment of emerging technologies that can improve highway safety.

The MUTCD should eliminate restrictions on patented products.

- The restrictions in the current MUTCD on the use of products protected by patent should be eliminated.
- Provisions in the proposed revised MUTCD that restrict the use of patented products should be deleted from the revisions to the MUTCD proposed by FHWA. Any needed conforming changes should also be made to MUTCD provisions regarding experimentation or any other provisions so that the testing and use of patented products is allowed.
- Patent protections are authorized by the U.S. Constitution and federal law. The FHWA may be the only government agency prohibiting the use of patented products.
- Traffic control devices contained in this Manual should be allowed to be protected by a patent.
- MUTCD revisions allowing the testing and use of patented products would not excuse a patented product from other requirements in the MUTCD, including uniformity.
- How do we know what is possible until we try?
- Proposed MUTCD Section 1D.08, contains a blanket prohibition against patented traffic control devices and states that they will not be eligible for experimental testing or interim approval, unless patent rights are expressly abandoned. This restriction should be removed and replaced with a provision allowing the testing and use of patented products.
- Change is overdue and now is the time to implement a more inclusive MUTCD policy for patented and proprietary products. Adopting a MUTCD policy that permits a DOT/transportation agency and patent holder to be eligible to participate in the experimentation process, while working in concert with the FHWA, to assure uniformity compliance would be the better approach.
- Products protected by a patent should be given a chance to comply and be used rather than be precluded at the outset from attempting to comply. FHWA should not assume that this change would be problematic.

- A patented device that meets applicable MUTCD requirements should be able to be deployed (as are other devices).
- Unless the MUTCD is revised to allow patents, promising opportunities to improve safety and transform transportation technology by innovative products that are patented or proprietary will never be considered by FHWA.
- MUTCD revisions being proposed by FHWA severely limit or exclude the private sector from future development of transportation technologies and public safety solutions.
- The applicable MUTCD revisions proposed by FHWA (including sections 1B.06 and 1D.08) should be replaced or revised to incorporate a more inclusive policy that considers the merits of all devices, including innovative patented and proprietary products that advance transportation technology and public safety.
- FHWA should weigh and balance all the benefits, costs and MUTCD compliance issues based upon facts and information obtained from experimentation and testing, rather than imposing an inflexible barrier to innovative safety products that are patented or proprietary.
- The MUTCD mandated abandonment and forfeiture of patent rights being proposed by FHWA is not a viable solution, because it bans most patented and proprietary products, while ignoring safety advancements, technological innovations and other considerations that are also important.

The MUTCD should promote innovation, rather than deter it.

- FHWA proposed revisions to MUTCD discourage innovation, rather than promoting it.
- Private sector development will not be undertaken if they are required to abandon their patents, because there is no financial incentive for innovation if private enterprise cannot recover the significant outlays of time and money required to research and develop new transportation technologies.
- Companies and individuals who would develop new highway safety technologies must benefit from the intellectual property they create (*i.e.*, patent the product) to stay in business.
- The FHWA's proposed revisions to the MUTCD essentially excludes the private sector from future development and implementation of transformative transportation technologies and public safety solutions by removing any financial benefit to innovate.
- FHWA's proposed changes to the MUTCD pertaining to patented and proprietary products create regulatory roadblocks to safety advances in America's roadways, by mandating that patent holders abandon their patent protections and allow anyone to use their intellectual property for free. Private sector development will not be undertaken if not allowed to protect their ideas from copy-cats.
- MUTCD revisions proposed by FHWA essentially severely limit or exclude the private sector from future development and implementation of transformative transportation technologies and public safety solutions.
- Private sector development will not be undertaken if companies are required to abandon their patents.

The MUTCD should follow the policy adopted by FHWA when it recently repealed its rule banning states from using patented products in federally funded highway projects.

- “Eliminating regulatory barriers fosters and accelerates innovation in the future” according to FHWA’s own findings when it rescinded and repealed its procurement rule ban on the use of patented products effective October 28, 2019.
- FHWA recently decided to end its regulatory ban on the use of patented and proprietary products when it repealed its rule banning the use of patented products by states in federally funded highway projects. Ending the ban of patented within the MUTCD should also be enacted.
- As stated by the FHWA, the ban on the use of patented products was “outdated” and that the change was made “to encourage innovation in the development of highway transportation technology and methods.” The MUTCD should adopt a similar position. How can states ever use patented products if they are precluded from testing and use under the MUTCD in the first place?
- Change is overdue and now is the time to implement a more inclusive MUTCD policy for patented and proprietary products.

Patented products will not be utilized unless they are cost effective solutions.

- State DOTs and other transportation authorities are very capable and experienced at making prudent decisions concerning cost effectiveness.
- If a given technology or innovation does not provide a legitimate, cost effective solution, state DOTs and transportation agencies will not implement them.

Again, ITSA appreciates the opportunity to forward these brief comments to FHWA and continues to look forward to working with our fellow transportation stakeholders on this important update through the ongoing efforts underway at the National Committee on Uniform Traffic Control Devices. If you have any questions about these forwarded comments, please contact me at bmccurdy@itsa.org.

Sincerely,

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ITS America