

AUTOMOTIVE

UNANTICIPATED CONSEQUENCES FOR NONCOMPLIANCE WITH NHTSA'S VOLUNTARY IN-VEHICLE ELECTRONICS DISTRACTION GUIDELINES

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NHTSA is in the process of adopting Visual-Manual Driver Distraction Guidelines for In-Vehicle Electronic Devices.¹ The guidelines purport to recommend a limit on the amount of time a driver has to divert his eyes to perform tasks on in-vehicle electronic devices while driving and to disable those applications that fail to comply with the limit and certain other specified *per se* distracting applications during vehicle operation. NHTSA calls the guidelines voluntary but notes that it will closely monitor compliance and that it intends to make public the results of that monitoring. By doing so, NHTSA seeks to "promote safety" by "discourag[ing] device interfaces that lack evidence of sound human factors principles in their design" and "discourag[ing] the introduction of egregiously distracting devices and non-driving tasks."²

The effect that noncompliance with these guidelines will have on manufacturer's recall obligations has caused some uncertainty in the industry. At the March 16, 2012 hearing in Los Angeles on NHTSA's proposed guidelines, a commentator observed that "the guidelines land in a gray zone between recommendation and regulation" and asked whether a manufacturer's failure to meet the guidelines would require the automaker to conduct a safety recall.³ Seeking to clarify the record, Administrator Strickland responded that the guidelines were "truly voluntary," "manufacturers may choose not to comply" and that "[t]here is no legal consequence from a federal perspective on noncompliance."⁴ On its face, this response should be reassuring to the industry. It does close the door on possible recalls for vehicles or equipment that do not comply with a safety standard, or in this case a guideline. But, does it close that door all the way? Possibly not. Could manufacturers still be required to conduct distraction-related recalls because a distracting device amounts to a defect related to motor vehicle safety? Possibly. Unless addressed further in the final rulemaking, manufacturers may be heading into uncharted waters when it comes to the true consequences of noncompliance.

The manner in which NHTSA is promulgating its guidelines contributes to the confusion that surrounds the issue of the effect of noncompliance and the need to recall. First, the agency is using the same notice and comment procedures of the Administrative Procedures Act in issuing the guidelines as it uses when issuing Federal Motor Vehicle Safety Standards. The only apparent difference is that instead of issuing a Notice of Proposed Rulemaking, it called it a Notice of Proposed Federal Guidelines. Whether use of these procedures was intended to add significance to the guidelines is unknown. But, why use the procedures of the Administrative Procedures Act for promulgation of guidelines that are supposedly not intended to have the force and effect of law?

Second, the agency justifies the safety need for the guidelines in the same manner it justifies a safety standard, noncompliance with which would require a recall.

An estimated 899,000 of all police-reported crashes involved a report of a distracted driver in 2010. Of those 899,000 crashes, 26,000 (3%) specifically stated that the driver was distracted when he was adjusting or using an integrated device/control. From a different viewpoint, of those 899,000 crashes, 47,000 (5%) specifically stated that the driver was distracted by a cell phone (no differentiation between portable and integrated). It should be noted that these two classifications are not mutually exclusive, as a driver who was distracted by the radio control may have also been on the phone at the time of the crash and thus the crash may appear in both categories.⁵

Further muddling the significance of the guidelines, NHTSA states in its Notice:

..... A manufacturer that produces a vehicle or item of motor vehicle equipment that either does not comply with the FMVSSs or contains a defect creating an unreasonable risk to safety must recall the vehicle or equipment and provide the owner a remedy. 49 U.S.C. 30118-30120.

*Accordingly, a section has been included in the NHTSA Guidelines emphasizing that, to protect the general welfare of the people of the United States; manufacturers are responsible for refraining from introducing new in-vehicle devices that create unreasonable risks to the safety of the driving public.*⁶

These actions and statements suggest that NHTSA may intend the guidelines to have greater significance than mere voluntary recommendations, noncompliance with which would have no consequences. What might that greater significance be?

One possibility is that while NHTSA agrees that the fact of noncompliance with the guidelines, in and of itself, will not result in enforcement action or the need to recall a vehicle or equipment⁷ it may be keeping the door open for compelling a recall if it believes that noncompliance constitutes a defect relating to motor vehicle safety. Consider this scenario. A manufacturer installs an in-vehicle electronic device on which a driver can perform several tasks (driving related or secondary). Through its monitoring, NHTSA determines that one or more of the tasks require the driver to take his eyes off the road for too long as determined under the guidelines. Further, because NHTSA is publishing the results of its monitoring, vehicle owners learn of the noncompliance and begin submitting complaints to the agency in which they attribute accidents and/or injuries to use of that electronic device. Will NHTSA seek to compel a recall under this scenario arguing that noncompliance is nonetheless evidence of a defect? The definition of "defect" under the Act is circular and very broad⁸ so it provides little comfort. As to whether the defect relates to motor vehicle safety, in submissions to the agency the industry has largely agreed with the safety need for the guidelines. Under this scenario, how does a manufacturer evaluate its obligations to conduct a recall? A particular manufacturer may be hard pressed not to agree to conduct a recall.

NHTSA does state in the notice that “[s]ince our voluntary NHTSA Guidelines are not a Federal Motor Vehicle Safety Standard, the degree to which in-vehicle devices meet the specified criteria would not be assessed in the context of a formal compliance program.”⁹ However, if the noncompliance is coupled with reports of accidents and injuries, will NHTSA be able to distinguish this statement, based on its own actions and comments and, using the statutory definition of “defect”, nonetheless pressure the manufacturer to conduct a recall or take enforcement action?

Whether NHTSA ever takes such a position down the road is beside the point. The fact is that the industry needs further clarification of the agency’s intentions. It should insist on language specifying that noncompliance with a guideline does not have the same legal effect as noncompliance with a safety standard, that noncompliance with a guideline does not constitute a “defect” under 49 CFR 30102 (a)(2), and that manufacturers will not be subject to civil or criminal penalties for failing to recall a vehicle or equipment that does not comply with a guideline.

¹ 77 FR 11200.

² 77 FR @ 11232.

³ Question from Jay Joseph, Senior manager of Product Safety, American Honda Motor Company. Tr. p. 39.

⁴ Tr. pp 49-51.

⁵ 77 FR @11203.

⁶ Id. @ 11217-8.

⁷ “Since these voluntary NHTSA Guidelines are not a FMVSS, NHTSA’s normal enforcement procedures are not applicable.” 77 FR @11202.

⁸ 49 USC 30102(a)(2) “defect” includes any defect in performance, construction, a component, or material of a motor vehicle or motor vehicle equipment.

⁹ 77 FR @ 11233.

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