



National Committee on Uniform Traffic Control Devices

12615 West Keystone Drive * Sun City West, AZ, 85375
Telephone (623)680-9592 * e-mail: ncutcd@aol.com

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Attachment No. 6

Docket Management Facility
U.S. Department of Transportation
1200 New Jersey Avenue SE
West Building Ground Floor Room W12-140
Washington, DC 20590

Re: FHWA Docket No. FHWA-2018-0036, RIN 2125-AF84: Construction and Maintenance – Promoting Innovation in Use of Patented and Proprietary Products

The National Committee on Uniform Traffic Control Devices (NCUTCD) is an organization that exists solely to contribute to the improvement of the *Manual on Uniform Traffic Control Devices* (MUTCD). The NCUTCD meets twice a year. At each meeting, over 300 professionals representing a wide cross-section of MUTCD users develop recommended MUTCD language, review proposed MUTCD language published by the FHWA, and/or offer recommendations to FHWA staff related to important MUTCD issues. There are 19 individual organizations that sponsor the NCUTCD and the total annual contribution of NCUTCD participants exceeds 10,000 person-hours, all of it devoted to improving the MUTCD. Many of the sponsoring NCUTCD organizations represent public agencies that are subject to MUTCD provisions and whose staff use the MUTCD on a daily basis. The NCUTCD believes that the MUTCD is dramatically improved due to the input and thousands of person-hours of volunteer labor that the NCUTCD provides to FHWA. The NCUTCD is particularly significant as it is the only group external to FHWA that provides a means of building consensus opinions of city/county/state government jurisdictions (public sector engineering), private sector engineering, manufacturers and suppliers, professional organizations, law enforcement, road user groups, safety advocates, construction and utility industries, and research groups regarding MUTCD issues.

The NCUTCD hereby submits its response to the docket item referenced above. First, where the *Federal Register* notes specifically that neither proposal “would alter any requirements in the MUTCD found in 23 CFR Part 655, Subpart F”, the NCUTCD is confident that the docket item would not adversely affect those items within our purview. With regard to traffic control devices, significant positive consequences may be gained simply by providing clarity to the difference between patented traffic control devices and proprietary products, and the different procedures regarding exceptions.

That being said, patented and proprietary products are used extensively as components in traffic control devices, so that the NCUTCD does have standing regarding this item. Examples of patented or proprietary products within the category of traffic control devices include sign sheeting and pavement marking materials, traffic signal controllers and detection devices, and structural support elements. As a traffic control device, it is important that motorists are provided “uniform” appearance, but there are many proprietary means to provide a uniform appearance.

The NCUTCD submits the following comments in response to the questions posed in the *Federal Register* notice:

1. What are the challenges in incorporating patented and proprietary products into projects under the current regulatory process?
 - a. *We believe that the exceptions provided in the current regulation (23 CFR 655 Subpart F) allow States to specify patented and proprietary products where appropriate for traffic control devices.*
 - b. *With regard to traffic control devices, it is important to note that by regulation, patented devices cannot be included in the MUTCD, though elements of the product representing the traffic control device can be. This can be and often is confused. We recommend that FHWA post a “fact sheet” on the MUTCD web site to provide more information (i.e. clarity) regarding the difference between a patented traffic control device (not allowed) and proprietary traffic control device products, and the different procedures governing exceptions.*
2. How does the current regulation hinder the incorporation of innovative or cost-effective safety and other products into projects?
 - a. *The NCUTCD does not submit a comment in response to this question.*
3. How does the current regulation hinder the incorporation of proprietary products into projects?
 - a. *The NCUTCD does not submit a comment in response to this question.*
4. How would the proposals support or deter deployment of innovative or cost-effective products on projects? Could the proposals result in any unintended consequences that might deter such deployment?
 - a. *Neither proposal would directly support or deter deployment of innovative or cost-effective products on projects.*
 - b. *With regard to unintended consequences, a lot would depend on messaging to users if either proposal is adopted. Traffic control devices are installed and maintained by thousands of independent, mostly public, agencies throughout the country, many of whom are responsible for many other unrelated functions. If the messaging of any final rule for the proposed regulation changes is not carefully crafted and broadly distributed, it may be misrepresented and/or misunderstood by those that are responsible for purchasing decisions.*
5. How could the proposals to allow specification of patented and proprietary products be implemented consistent with existing competition and low bid requirements?
 - a. *The NCUTCD does not submit a comment in response to this question.*
6. If FHWA rescinds the rule, what standards should FHWA rely on to determine if a State’s specification of a patented or proprietary product violates the competition mandate in 23 U.S.C 112? For example, should FHWA rely on the standard found in the Office of Management and Budget’s (OMB) Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards a 2 CFR 200.319(a)(6)? OMB’s regulations at Part 200 provide a government wide framework for grants management, and 2 CFR 200.319(a)(6) describes seven situations considered to be restrictive of competition.

- a. *Rescinding current regulation specifically does not alter any requirements in the MUTCD, therefore the NCUTCD does not submit a comment in response to this question.*
7. What positive or negative consequences might result from implementation of the proposals? Could the proposals result in potential costs or cost savings? If so, please describe the costs or cost savings and provide data to support these estimates. What might be the effects of the proposals on transparency in the materials selection process?
- a. *With regard to traffic control devices, as noted above, significant positive consequences may be gained simply by providing clarity to the difference between patented traffic control devices and traffic control device proprietary products, and the different procedures regarding exceptions. Examples of proprietary products incorporated into traffic control devices include retroreflective sign sheeting, digital printing processes and materials, durable pavement marking products, traffic signal controllers, traffic detection elements, and many others.*
- b. *Costs are measured in many different ways. Initial cost savings may be offset by increased life cycle costs, and vice versa. Ideally, encouraging innovation would result in a net cost saving.*
8. What positive or negative consequences might affect small businesses that do not have the same marketing resources as larger firms?
- a. *With regard to traffic control devices, marketing resources is but one of many factors affecting small businesses. Most new patented products used in traffic control devices are already required to undergo rigorous product testing, including crash testing, which can be cost prohibitive for smaller companies. That being said, small companies are often the last mile manufacturer, installer, and/or maintainer of traffic control devices so that they would still be able to compete at the local level.*
9. What differences in effects and compliance, if any, could result from the two alternative proposals?
- a. *The NCUTCD does not submit a comment in response to this question.*
10. What is the difference between the number of proprietary products used on State and Federal-funded projects?
- a. *The NCUTCD is a private, non-profit organization whose purpose is to develop suggested changes to the MUTCD; we would not have data to respond to this question.*
11. Do the States follow rules or processes on State-funded projects similar to the Federal process embodied in Section 635.411?
- a. *The NCUTCD is a private, non-profit organization whose purpose is to develop suggested changes to the MUTCD; we would not have data to respond to this question.*

Thank you for the opportunity to comment to the docket on this important item.

Sincerely,



Gene Hawkins
Chair, NCUTCD