

Comments of the Transportation Departments of  
Idaho, Montana, North Dakota, South Dakota, and Wyoming  
to the  
National Highway Traffic Safety Administration  
in  
Docket No. NHTSA-2023-0061  
Request for Comment:  
NHTSA's Nondiscrimination Compliance Program  
January 31, 2024

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The transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming (“we” or “our”) respectfully submit these comments in response to the request for comment (RFC) published by the National Highway Traffic Safety Administration (NHTSA) at 88 Federal Register 78811 (November 16, 2023).<sup>1</sup> By subsequent notice, 88 Federal Register 86727 (December 14, 2023), NHTSA extended the deadline for comments to February 15, 2024.

In this RFC, NHTSA announces its intention to develop nondiscrimination guidelines and invites comment to inform the development of those guidelines. NHTSA also announces that there will be a further opportunity to comment:

NHTSA is publishing this RFC to engage a broad cross-section of stakeholders and the public. After considering and incorporating comments and information received from this solicitation, NHTSA intends to publish draft Nondiscrimination Guidelines for comment before publishing final guidance.

88 Federal Register 78811 at 78812.

Of note, the first sentence of the RFC specifies that NHTSA is issuing Nondiscrimination Compliance Guidelines for NHTSA Financial Assistance Recipients. 88 Federal Register 78811 (emphasis supplied).

At the outset, the transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming emphasize their commitment to nondiscrimination and to compliance with nondiscrimination laws. This particularly includes the commitment to nondiscrimination by their departmental units that receive financial assistance from NHTSA for NHTSA-administered programs, the subject of this RFC.

In this docket NHTSA has not set forth specific proposed guidelines but requested input on topics that may be addressed in guidelines that NHTSA says it will develop and publish for comment. Accordingly, in this filing we briefly set forth recommendations that we believe will serve NHTSA well in developing any such proposed guidelines.

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<sup>1</sup> These comments are also supported by the South Dakota Department of Public Safety.

## Recommendations

### NHTSA should not proceed directly to final guidelines or guidance

NHTSA should not proceed directly to final guidelines or guidance. To the extent it does more than consider the comments filed in response to this RFC, it should, as described in the RFC, then develop proposed guidelines or guidance and publish them for public comment.

### A more specific proposal should be in the form of guidance or guidelines, not rules

If, as indicated in this RFC, NHTSA proceeds to a next step of drafting a more specific proposal, that more specific proposal should be in the nature of guidance or guidelines, not a proposed rule. Rules in conformance with statute are usually binding, they usually establish requirements. Guidelines, however, would indicate, to a NHTSA financial assistance recipient, ways that can achieve or help achieve compliance with a statute. They are not binding.

### Limiting administrative burdens would enhance highway safety

A successful State program implementing the NHTSA State safety grant programs will have senior State management focused on identifying the most important opportunities to improve highway safety in the State and determining how to maximize those opportunities through project or program investments or other action.

Dollars, including personnel time and costs, dedicated to administration or data collection, are dollars not available for investment in actual projects and programs that provide safety benefits. So, we see the addition of administrative guidance not clearly called for by statute as not just adding to a State agency's direct costs, but as also imposing opportunity costs, steering the time and effort of State staff from efforts to improve safety.

Further, to the extent the implementation costs are more than minimal, States may well want to pay for those costs out of their NHTSA safety grant funds, making even clearer that unnecessary directives can have an adverse impact on the principal mission – improving safety through effective use of NHTSA safety grant funds.

Moreover, while we agree that nondiscrimination is an important governmental objective, statutes are already in place and we are not aware that the potential for new guidelines outlined in this RFC are being driven by an increase in reported or observed discriminatory actions.

Accordingly, we think NHTSA should undertake a mighty effort to craft the contemplated guidance or guidelines so that they do not ask of States more than is clearly contemplated by relevant statutes. That will help States achieve increased focus and success in delivering a highway safety program that reduces fatal and other crashes.

Avert duplicative regulation or reporting requirements; NHTSA should limit applicability of any new guidelines to the entity that is the recipient of (applicant for) financial assistance from NHTSA, even if that entity is only a unit within a larger government organization

Most State entities responsible for administering NHTSA safety grant programs are units within a transportation department or public safety department, multi-faceted and much larger entities. To the extent that NHTSA is considering that the issues raised in this RFC should govern those larger agencies and non-NHTSA functions, we disagree -- and we are hopeful that is not NHTSA's intent. For example, FHWA and FAA also distribute funds to State DOTs and administer civil rights programs. It is simply not for NHTSA to administer civil rights data collections with respect to, for example, highway program activities. Thus, we are concerned that the data collections identified as items 1, 2 and 3 in the RFC are all overbroad to the extent they concern activity other than NHTSA safety programs and the small units in State government that administer and implement them.

Similarly, but in a different context, data collection item 4 could be overbroad. This item asks for a description of applications by an "applicant" for funding from other Federal agencies. We ask that NHTSA be more precise, so that there can be no doubt that NHTSA is not asking for information from a State DOT about applications for highway or airport construction funds, but only for data on any applications for funds from another Federal agency by the unit that administers the NHTSA highway safety grant programs.

Further, to the extent any data sought in any planned new collection would overlap with an existing NHTSA or USDOT data collection it would be duplicative – an outcome that should be avoided.

So, if NHTSA proceeds to the next step of drafting proposed guidance or guidelines regarding those data collections (items 1-4), the drafting must be precise to avoid overreach to data regarding other than NHTSA programs and to avert imposing duplicative requirements.

Demographic information request is unnecessary

State administration of NHTSA's safety grant programs serves the entire State. The planning required for the safety programs is statewide. NHTSA has access to State demographic data from the Census Bureau. Requiring a safety agency to divert time from its mission to provide State demographic data (see item 5 in the RFC) is not cost-free and it is something NHTSA can do, if it so chooses, without burdening the State.

Further, to the extent any current NHTSA or USDOT required reports or submissions already require presentation of demographic information, a new request for demographic information would be duplicative – again, an outcome that should be avoided.

Issues regarding subrecipients

Item 11 asks whether the "applicant" has a plan to ensure civil rights compliance in subrecipient programs, if any, including subrecipient compliance reviews. The extension of any new data

collection guidelines to subrecipients likely has implications of burdens for both the subrecipients and the recipient (applicant), which apparently would administer the reviews. To the extent NHTSA does extend the reach of any new guidelines to subrecipients, the information required of subrecipients should be minimal and recipients should be asked merely to advise subrecipients to report their civil rights data directly to a clearinghouse, just as they report financial information to SAM.gov.

Utilize existing reporting channels and concepts

To the extent NHTSA seeks data from “applicants” (recipients of NHTSA safety grant program funds), NHTSA should consider calling for it to be filed as part of the State’s triennial review, or its highway safety plan, rather than create a new or more frequent reporting channel.

In addition, any new NHTSA guidelines and data collections should be consistent with those of other USDOT agencies (though less burdensome where possible). That would facilitate administration and avoid confusion as to the meaning of terminology or concepts.

Conclusion

In closing, we emphasize again our strong commitments to nondiscrimination and to highway safety. NHTSA should strive to limit administrative and paperwork guidance to States as to nondiscrimination (and other issues not presented in this docket) to those clearly called for by statute. This approach would help maximize the availability of resources for investment in safety projects and programs, thereby further enhancing safety.

The transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming thank NHTSA for its consideration and urge that further actions regarding the subject matter of this docket be in accord with our recommendations.

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