

December 21, 2016

*Practice Groups:*

*Telecom, Media and  
Technology*

*Transportation*

*Artificial Intelligence*

*Public Policy and  
Law*

## NHTSA Pushes For Smartphones to Incorporate Automatic Pairing and Driver Mode in New "Guidelines"

*By Scott Aliferis, Darrell L. Conner, Cliff L. Rothenstein, Stephen A. Martinko, Robert A. Lawton, Thomas R. DeCesar, and Peter V. Nelson*

New [guidelines](#) proposed by the National Highway Traffic Safety Administration ("NHTSA") earlier this month would encourage manufacturers of a variety of portable electronic devices to include technologies aimed at combating distracted driving.<sup>1</sup> The guidelines would affect smartphones, tablets, GPS/navigation systems, other mobile communications devices, and wearable technology, as well as aftermarket devices that are designed for use in motor vehicles, such as navigation or display systems. The broad reach of the guidelines would encompass a number of industries that have not, to date, been the subject of significant regulatory efforts by NHTSA, and mark the agency's latest effort to address issues at the intersection point of motor vehicles and technology. Styled as the "Phase 2 Guidelines," the new guidance follows an earlier "Phase 1," which addressed similar driving distraction issues with respect to original vehicle equipment, as described below. While the Phase 2 Guidelines are framed as "voluntary" and "nonbinding," they will likely exert a significant influence on technology development in the affected industries as manufacturers and developers scramble to comply. Stakeholders should consider submitting comments on the guidelines before the deadline of February 3, 2017.

NHTSA developed the Phase 2 Guidelines in response to studies suggesting that the use of mobile devices in vehicles by the driver hinders driver performance and may be contributing to a rising incidence of distraction-related crashes. NHTSA believes the guidelines will complement broader efforts to curb distracted driving, including industry-led activities and changes to state motor vehicle laws. Although the guidelines are primarily aimed at portable device manufacturers, they will also likely affect mobile application developers who may need to adjust their apps to comply.

### The Phase 1 Guidelines

The proposed Phase 2 Guidelines come more than three years after NHTSA issued the final version of its Phase 1 Driver Distraction Guidelines for In-Vehicle Electronic Devices (the "Phase 1 Guidelines") in April 2013.<sup>2</sup> The Phase 1 Guidelines provided direction to original vehicle manufacturers regarding in-vehicle electronic devices that require a driver's visual attention and manual input. As discussed below, because NHTSA's proposed Phase 2 Guidelines essentially apply the Phase 1 Guidelines to aftermarket and portable devices, it is important to understand what these guidelines said. While the Phase 1 Guidelines have

<sup>1</sup> NHTSA, Visual-Manual NHTSA Driver Distraction Guidelines for Portable and Aftermarket Devices, 81 Fed. Reg. 87656 (proposed Dec. 5, 2016), <https://www.gpo.gov/fdsys/pkg/FR-2016-12-05/pdf/2016-29051.pdf>.

<sup>2</sup> NHTSA, Visual-Manual NHTSA Driver Distraction Guidelines For In-Vehicle Electronic Devices, 78 Fed. Reg. 24818 (Apr. 26, 2013), <https://www.gpo.gov/fdsys/pkg/FR-2013-04-26/pdf/2013-09883.pdf>.

## NHTSA Pushes For Smartphones to Incorporate Automatic Pairing and Driver Mode in New “Guidelines”

many nuances and exceptions, they essentially had three main provisions relating to how original motor vehicle equipment should be designed to prevent driver distraction:

1. The “2/12 Rule”: Under the 2/12 Rule, drivers should be able to complete tasks by looking at the device, and away from the road, in 2 second intervals for a maximum of 12 seconds.
2. Per Se Lock Outs: Under Phase 1, some functionalities were automatically locked out even if the original equipment was able to comply with the 2/12 Rule. Examples of per se lock outs include: device functions and tasks not intended to be used by a driver while driving; manual text entry; displaying video and images; automatically scrolling text; and displaying text to be read.
3. Other Device Interface Provisions: Lastly, Phase 1 also recommended a number of additional criteria designed to assist the driver in safely accessing the originally installed electronic equipment. Examples include: no obstruction of view; easy to see and reach; single-handed operation; and ability to easily interrupt the activity. These criteria were explained at length in the Phase 1 Guidelines.

### The Phase 2 Guidelines

For aftermarket devices, NHTSA’s Guidelines are straightforward—its Phase 1 Guidelines would apply equally to aftermarket devices in the same way they apply to originally-installed vehicle equipment. Accordingly, NHTSA recommends that the 2/12 Rule, the per se lock outs, and the other device interface provisions should apply to aftermarket devices as they would to originally installed electronic equipment.

For portable devices, such as smartphones or tablets, NHTSA guidelines go further. The proposed Phase 2 Guidelines specify that the agency’s preferred approach is for all portable devices used, or potentially used, by the driver during operation of the vehicle to automatically “pair”—i.e., wirelessly connect—with the vehicle while it is being driven. When portable devices are paired with the vehicle, NHTSA recommends that the visual interface on the device itself be completely disabled so drivers will only be able to manipulate it directly through the vehicle system, except in the case of an emergency. Further, the functionality of the device would be significantly curtailed to comply with the Phase 1 Guidelines.

As an alternative, in the event the device is not paired with the vehicle, the Phase 2 Guidelines state that devices should have the capacity to be placed in a “Driver Mode” when the vehicle is in use, a setting that would bring the device into compliance with NHTSA’s Phase 1 Guidelines. This includes the 2/12 Rule, the per se lock outs, and the other device interface provisions mentioned above and fully explained in NHTSA’s earlier guidelines. As set forth in the agency’s proposed Phase 2 Guidelines, NHTSA prefers that devices automatically determine whether a driver or a passenger is using the device and only engage Driver Mode when used by the driver. Recognizing that this driver distinction technology may not be widely available at this time, NHTSA suggests as a fallback option that Driver Mode could also be manually engaged by the operator.

While NHTSA claims its Phase 2 Guidelines will be voluntary and nonbinding, the agency also anticipates the guidelines will be incorporated into portable and aftermarket devices within 16 months after they are finalized. NHTSA intends to monitor conformance with its Phase 2 Guidelines and make its findings regarding the implementation of the Phase 2 Guidelines publically available.

## NHTSA Pushes For Smartphones to Incorporate Automatic Pairing and Driver Mode in New “Guidelines”

### Implications

If finalized in their current form, the impact of NHTSA’s Phase 2 Guidelines could be significant. Importantly, while NHTSA repeatedly claims that its guidelines are only voluntary, the reality is that many device manufacturers and app developers may determine they are obligated to comply with NHTSA’s new guidelines in an effort to abide by the agency’s recommendations for motor vehicle safety. And, given the agency’s plan to publish its tests results related to the compliance with the guidelines, some businesses may simply want to avoid the potentially negative press that would come with a bad review by the agency. Compliance or noncompliance with the Phase 2 Guidelines may also present liability considerations or safety defect/recall questions for industry participants. NHTSA could also try to promulgate the Phase 2 Guidelines as mandatory regulations in the future—although the agency states it has no current plans to do so.

NHTSA’s Phase 2 Guidelines also signal the latest attempt from the agency to expand its jurisdiction in the rapidly changing field of transportation technologies. Similarly, in September 2016, the agency released a bulletin interpreting its jurisdiction under the National Traffic and Motor Vehicle Safety Act (“Safety Act”).<sup>3</sup> In that bulletin, despite questions regarding the scope of its jurisdiction and the potential impact on innovation in the area, the agency asserted that its authority extends to automated vehicle technologies and software, such as mobile apps.<sup>4</sup> Even though NHTSA styles its latest publication as guidelines, the same questions apply here regarding the agency’s authority, or lack thereof, to regulate mobile devices and software that do not meet the definition of motor vehicle equipment under the Safety Act. Likewise, the agency’s new claim that it has authority to publish these guidelines based on its research authority appears dubious, especially considering the significant effect these guidelines could have on the mobile device industry and the questions raised in the past regarding the agency’s authority to promulgate nonbinding guidelines.

With a new administration coming in less than two months, it will be interesting to see how the new leadership of the Department of Transportation balances the various stakeholder interests in this area. Interested entities should consider filing comments regarding NHTSA’s proposed Phase 2 Guidelines. The agency will accept comments on the Phase 2 Guidelines until February 3, 2017. Our CarTech team and the authors of this alert are available to answer any specific questions you may have about the guidelines and their impact, and can assist in the preparation and submission of comments.

---

### Authors:

#### Scott Aliferis

scott.aliferis@klgates.com  
+1.202.661.3865

---

<sup>3</sup> NHTSA, Enforcement Guidance Bulletin 2016-02: Safety-Related Defects and Automated Safety Technologies (Sept. 23, 2016), <https://www.federalregister.gov/documents/2016/09/23/2016-23010/nhtsa-enforcement-guidance-bulletin-2016-02-safety-related-defects-and-automated-safety-technologies>.

<sup>4</sup> K&L Gates, NHTSA’s Claimed Jurisdiction Over Software and Applications May Stifle Innovation (Apr. 14, 2016), <http://www.klgates.com/nhtsas-claimed-jurisdiction-over-software-and-applications-may-stifle-innovation-04-14-2016/> (regarding proposed NHTSA Enforcement Guidance Bulletin).

## NHTSA Pushes For Smartphones to Incorporate Automatic Pairing and Driver Mode in New “Guidelines”

**Darrell L. Conner**

darrell.conner@klgates.com  
+1.202.661.6220

**Cliff L. Rothenstein**

cliff.rothenstein@klgates.com  
+1.202.778.9381

**Stephen A. Martinko**

stephen.martinko@klgates.com  
+1.202.778.9320

**Robert A. Lawton**

robert.lawton@klgates.com  
+1.717.231.4549

**Thomas R. DeCesar**

thomas.decesar@klgates.com  
+1.717.231.4563

**Peter V. Nelson**

peter.nelson@klgates.com  
+1.202.778.9358

## K&L GATES

Anchorage Austin Beijing Berlin Boston Brisbane Brussels Charleston Charlotte Chicago Dallas Doha Dubai  
Fort Worth Frankfurt Harrisburg Hong Kong Houston London Los Angeles Melbourne Miami Milan Munich Newark New York  
Orange County Palo Alto Paris Perth Pittsburgh Portland Raleigh Research Triangle Park San Francisco São Paulo Seattle  
Seoul Shanghai Singapore Sydney Taipei Tokyo Warsaw Washington, D.C. Wilmington

K&L Gates comprises approximately 2,000 lawyers globally who practice in fully integrated offices located on five continents. The firm represents leading multinational corporations, growth and middle-market companies, capital markets participants and entrepreneurs in every major industry group as well as public sector entities, educational institutions, philanthropic organizations and individuals. For more information about K&L Gates or its locations, practices and registrations, visit [www.klgates.com](http://www.klgates.com).

This publication is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

© 2016 K&L Gates LLP. All Rights Reserved.