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Automated Vehicles: Do New Act and Policy Clarify the Regulatory Future?

The Trump administration took its first major step to facilitate the deployment of automated vehicles with the Department of Transportation's release of "[Automated Driving Systems 2.0: A Vision for Safety](#)," an update to the 2016 Federal Automated Vehicle Policy. The updated policy comes on the heels of the U.S. House of Representatives' vote approving the [SELF DRIVE Act](#) ([which we previously discussed](#)). The Senate also is beginning to develop legislation.

Despite this activity, the future regulatory landscape for automated vehicles remains uncertain. There's a broadly accepted belief that automated vehicles will be beneficial, particularly in light of data showing that human error and distraction are significant causes of vehicular injuries and deaths. By removing humans, the argument goes, transportation will become safer. The goal of the recent Congressional and administration actions has been to facilitate the roll-out of automated vehicles to achieve the economic and safety benefits that the technology promises.

The debate now taking place is less about whether the technology should be deployed and more about how best to implement the technology and maintain U.S. leadership. The major issues include:

- defining the role federal and state governments should have in regulating automated vehicles safety and their use;
- addressing whether there should be mandatory or voluntary safety standards for such vehicles; and
- determining whether the existing regulatory system should be retained or replaced by a new one.

Congress and the administration have presented different answers to these questions. The legislation would construct a new mandatory regulatory approach built on the existing system and division of responsibilities between the federal and state governments. The administration's updated policy document reflects a very hands-off approach with an emphasis on voluntary measures, which leaves some room for Congress to act before the DOT does.

An analysis of some of the key issues raised by these two recent actions follows below:

SELF DRIVE Act

On September 6, 2017, the House of Representatives passed by voice vote the "SELF DRIVE Act" (H.R. 3388). Among other things, the bill would:

- define the respective roles of the federal and state governments,
- direct the National Highway Traffic Safety Administration to initiate a rulemaking process to update the existing federal motor vehicle safety standards to address automated vehicles,
- make the "voluntary" safety assessment certifications mandatory, and
- increase the number of exemptions from the NHTSA safety standards to allow increased testing and deployment of automated vehicles.

The bill raises a number of questions even as it tries to provide clarity for industry and regulators.

Federal-State Roles

The bill would divide responsibility for automated vehicles between the federal and state governments in a manner consistent with the approach under current law. The federal government would have authority for establishing safety standards for "highly automated" vehicles (*i.e.*, SAE Levels 4 and 5). States would be preempted from establishing different or more stringent safety standards (except for vehicles they obtain for their own use), and would retain responsibility for registration, licensing, driver education and training, insurance, law enforcement, crash investigations, safety and emissions inspections, and congestion management of vehicles on streets, unless the state requirements would unreasonably restrict "the design, construction, or performance" of highly automated vehicles, automated driving systems, or components of automated driving systems.

While this may seem straightforward, it is likely to spawn disputes about the scope of federal preemption. For example, state or local licensing or registration requirements or restrictions on the use of local roadways could touch aspects of vehicle safety and overlap or conflict with future federal safety standards, as many recently issued state and local requirements already appear to do. And if NHTSA does not establish safety standards for automated vehicles, states would seem to be free to act on their own, leading to the problem that the legislation seeks to avoid.

New Safety Standards for Automated Vehicles

The bill directs NHTSA to promulgate new safety standard for highly automated vehicles. NHTSA's existing vehicle safety standards address vehicle crash avoidance, crashworthiness and post-crash survivability for vehicles. The designs for many automated vehicles, however, would not satisfy many of these standards, which were written with human drivers in mind. Without a clear picture of what an automated vehicle might look like in the future, it is unclear how NHTSA will decide what aspects of the existing vehicle safety standards should remain or will need to be modified. Moreover, NHTSA will need to evaluate whether it should establish operational standards for software and other automated components or whether such requirements unnecessarily restrict innovation.

NHTSA will have to address these issues as it attempts to develop safety standards for automated vehicles. One possible solution would be to establish performance standards that automated vehicles need to achieve. Determining what those performance standards might be, however, could be challenging. Some commenters have suggested a graduated approach, refining the standards as additional information is gathered.

Exemptions

One of the bill's key provisions is to significantly increase the number of exemptions from the vehicle safety standards that NHTSA may issue for automated vehicles to up to 100,000 vehicles per manufacturer each year.

The bill would permit NHTSA to issue an exemption if that would make it easier to develop or evaluate in the field either (1) "a feature of a highly automated vehicle providing a safety level at least equal to the safety level of the standard for which the exemption is sought," or (2) "a highly automated vehicle providing an overall safety level at least equal to the overall safety level of nonexempt vehicles." Manufacturers have sought increased exemptions to make it easier to test and deploy automated vehicles.

But once again, the devil is in the details of how NHTSA will actually exercise this exemption authority. How will NHTSA decide whether an exempted feature or vehicle provides a level of safety that is equal to that provided by the vehicle safety standards? This issue is uncertain even under NHTSA's *existing* vehicle safety standards, as the agency has granted only eight exemption requests since 1994, which were based on showing the achievement of an equal "overall safety level." With limited test data or other information for automated vehicles, it may be even more difficult for manufacturers to make a showing of "overall safety level" equivalence.

DOT's Updated Automated Vehicle Policy

Shortly after the House approved the new bill, the Secretary of Transportation released a new Automated Vehicles Policy, intended to update the policy issued in September 2016. The updated Automated Vehicles Policy, in large part, repackages many of the ideas and policies presented in the 2016 policy, although it emphasizes that it is "entirely voluntary" and contains "no compliance requirement or enforcement mechanism." This "nonregulatory approach," without mandatory rules or standards, is designed to make the "regulatory process more nimble," to encourage "new entrants and ideas," and to "remove barriers to innovation."

Voluntary Self-assessment Guidance. Like the 2016 policy, the new policy contains guidance for testing and deployment of automated vehicles to evaluate the safety systems of automated vehicles. The policy encourages entities engaged in the testing and deployment of automated vehicles to submit a "Voluntary Safety Self-Assessment" to NHTSA, but is emphatic that self-assessment is not required for testing or deployment. This contrasts with the House bill's mandatory safety assessment certifications.

The policy outlines twelve categories of safety considerations. Each of these categories were included in the 2016 policy, which discussed them in greater detail. Several areas included in the 2016 policy, including privacy and ethical considerations, are not discussed.

The 2016 policy recommended that manufacturers protect consumer privacy and included considerations for privacy policies. The new policy does not include similar recommendations but instead refers to a [website](#) for NHTSA's approach to privacy. NHTSA maintains that it is the responsibility of the Federal Trade Commission to protect consumer privacy. The omission of privacy from the new policy also contrasts with the House bill's specific requirement that manufacturer's develop privacy plans. Similarly, the new policy does not include any discussion or recommendations regarding ethical considerations, as NHTSA maintains that there is no consensus around acceptable ethical decision-making.

Federal and State Roles. The new policy reiterates the intended role that the federal and state governments. It "strongly encourages" states to take on a role consistent with the House bill's preemption provision and with the 2016 policy. However, the new policy has conspicuously removed "issuing guidance for vehicle and equipment manufacturers to follow" from the list of federal responsibilities. And, as discussed above, there remains significant potential for overlap between federal and state roles, resulting in a lack of clarity on this issue.

Next Steps in AV regulation? Perhaps the starkest contrast between the 2016 policy and the new policy is the lack of clarity about the next steps in the regulation of AVs. The 2016 policy outlined many measures NHTSA intended to take, including mandating safety assessments, gathering data, developing modern regulatory tools, requiring registration, and updating the existing vehicle standards. The new policy provides little insight into these issues, perhaps reflecting a desire to let Congress act before NHTSA gets too far ahead and the Trump administration's general antipathy to federal regulatory action.

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