

In the past week, the US House, Senate and Department of Transportation (DOT), in conjunction with the National Highway Traffic Safety Administration (NHTSA), took steps to demonstrate the federal government's interest in providing initial guidance on autonomous driving (AD) technology. This comes in advance of any formal federal regulation of AD technology that will occur once new legislation is enacted for a world in which vehicles might have neither steering wheels nor brake pedals.

Specifically:

- On September 6, 2017, the US House of Representatives approved by voice vote H.R. 3388, the Safely Ensuring Lives Future Deployment and Research in Vehicle Evolution Act (SELF DRIVE Act).
- On September 8, 2017, the Senate Commerce Committee released a staff discussion draft of its proposed AD bill, titled the Advancement of Revolutionary Technologies Act ("Senate Proposal").
- On September 12, 2017, the DOT and NHTSA released "A Vision for Safety 2.0," as new federal guidance for automated driving systems (ADS) ("NHTSA Guidelines"), which replace those issued in September 2016.

The SELF DRIVE Act and Senate Proposal are the first time US federal legislative bodies are weighing in on this important topic. Additionally, the SELF DRIVE Act and Senate Proposals, together with the NHTSA Guidelines, demonstrate that the federal role will serve two purposes for AD:

- Ensure unimpeded development of AD technology by removing barriers to innovation
- Ensure public safety rules in connection with AD technology are guided by consistent standards

Potential for a Consistent Framework

The lack of any meaningful federal regulation of AD technology to date has placed the burden on states and local governments to create their own regulations to deal with the demand to develop, test and deploy AD. Approximately 19 states have enacted specific AD-related legislation, which are generally supportive of AD development and innovation, but regulate AD testing and deployment to varying degrees and by different regulatory standards. This disconnect has created concerns about the viability of deployment of autonomous vehicles on US roadways, particularly if they need to cross state lines. The initial NHTSA Guidelines (Version 1.0) were criticized by AD manufacturers as creating an opportunity for inconsistent state regulation that would result in a "patchwork" of regulation. These federal developments are a signal that a centralized and consistent regulatory approach is near.

Safety "First" for Congress?

The SELF DRIVE Act and the Senate Proposal solidify the role of the federal government as AD regulator. While states would be permitted to regulate AD or motor vehicle safety standards, they may do so only if consistent with the federal regulations and any unreasonable state restrictions on design, construction or performance of highly automated vehicles is prohibited. That is to say, the states would be preempted from regulating these issues in a manner not consistent with the federal regulations established by NHTSA. Registration, licensing, driver training, insurance, safety and emission inspections, and other matters traditionally regulated by the states would continue to be under state authority.

The SELF DRIVE Act and Senate Proposal task the DOT with developing and issuing safety certification rules, and developing a safety priority plan that accommodates the development and deployment of autonomous vehicles and ensures the safety and security of such vehicles and other vehicles on the road. The proposals also require manufacturers to have a written plan regarding data privacy and cybersecurity and to appoint a cybersecurity officer/point of contact to address cybersecurity issues.

While the SELF DRIVE Act and Senate Proposal focus on the safety and performance of these innovative vehicles, they are careful to balance the concern that overregulation can stifle innovation and delay AD technology coming to market, thereby further delaying the lifesaving benefits that this technology can offer. The proposals try to balance these interests in several ways, including:

- DOT is responsible for developing safety certification rules, but the Act specifically prevents the DOT from conditioning deployment or testing of highly automated vehicles on review of safety assessment certifications.
- Exemptions from federal safety standards and allowing up to 100,000 testing vehicles on US roadways within three years of the taking effect (this is an increase from the 2,500 yearly testing permits issued by NHTSA currently). Under the SELF DRIVE Act, however, the exemptions would be capped at 25,000 in year one, while the Senate's bill doubles this number with up to 50,000 exemptions available in the first year.

Undoubtedly, the SELF DRIVE Act and Senate Proposal are motivated by a desire to ultimately bring safety to our roads. However, in balancing the need to bring unfettered ability to innovate to AD manufacturers to achieve safety goals, the bills significantly relax vehicle safety standards with minimal oversight. This prioritization of innovation over safety of ADs may be a point of contention for consumer safety groups.

DOT Encouragement

In her speech releasing the NHTSA Guidelines, Secretary of Transportation Elaine Chao pointed to “encouraging innovation and preserving creativity” as the balance the Department of Transportation seeks to strike. The NHTSA Guidelines complement the SELF DRIVE Act and Senate Proposal, and are a voluntary guide for manufacturers on safety, security and privacy concerns of ADs.

The guidance was split into two main sections – voluntary guidance and technical assistance to states. The focus of the voluntary guidance includes: (1) system safety, (2) operational design domain, (3) object and event detection and response, (4) fallback (minimal risk condition), (5) validation methods, (6) human machine interface, (7) vehicle cybersecurity, (8) crashworthiness, (9) post-crash ADS behavior, (10) data recording, (11) consumer education and training, and (12) federal, state and local laws coordination. Interestingly, the guidance indicates that states should not codify this voluntary guidance and encourages states to leave the regulation of safety design and performance of AD technology to NHTSA in order to avoid any potential conflicts at the state level. The technical assistance to states section provides guidance on best practices for legislatures and best practices for state highway safety officials. This section attempts to define what NHTSA believes is in their purview versus what the states should try to address directly.

The NHTSA Guidelines address the concerns expressed by automakers on its Version 1.0 by recommending against state regulations that place unnecessary burdens on innovation and competition (for example, by limiting testing and deployment of AD technology to manufacturers), and specifically providing guidance on matters that should fall within the federal or state purview. It should be noted that the NHTSA Guidelines are just that – guidelines that provide parameters and suggestions without offering much in terms of concrete rules by which the rollout of AD technology can be guided.

Next Steps

While the recent federal activity is a positive step towards the continued development of AD technology, there are possible implications to this revised framework that will need to be addressed in the future, including:

- **Lax Safety Protections:** As noted above, consumer groups will argue that the federal regulatory scheme is overly permissive and deferential to car manufactures and lacks stringent safety standards to protect consumers.
- **Antitrust Issues:** The NHTSA Guidelines could implicate antitrust issues if companies, who are being encouraged by the guidelines to be collaborative in setting standards and sharing information, take additional steps that could be seen as anticompetition.

- **Impact on Transportation Industry:** While AD will bring immeasurable benefits to the safety of our public roads, as the technology develops it will displace jobs in various sectors of the traditional transportation industry. For example, many of the nation’s approximately 3.5 million commercial truckers fear that their jobs will be among the first to go. To address those concerns, the SELF DRIVE Act applies only to vehicles of less than 10,000 tons. The leadership of the Senate Commerce Committee is currently considering whether to include commercial vehicles in the legislation they ultimately advance. As was evident at the hearing held by the Committee on September 13, legislation is unlikely to move in the Senate until this issue is resolved.
- **Privacy and Security:** With the advancement of AD technology comes the risk that personal privacy and the security of the vehicles from computer hackers may be compromised. While the SELF DRIVE Act and Senate Proposal contain provisions to mitigate this risk, the possibilities and potential concerns that may be implicated remain largely unknown at this point.
- **Insurance.** The impact of AD technology on the insurance industry and coverage is also an unknown. The standards for liability for negligence of ADs will need to be considered further and will depend upon capabilities and developments of the technology.

The current fate of the proposed federal legislation is now in the hands of the Senate and we will continue to closely monitor these developments. While there are still issues to be resolved, quickly finalizing definitive federal guidance will be critical to ensuring a consistent and safe framework for the deployment of AD technology.

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