

# What Automakers Should Expect From Biden's DOT

By **Patricia Doersch and Callan Smith** (January 25, 2021)

President Joe Biden has indicated a strong desire to advance a large-scale infrastructure package early in the new year. The automotive industry certainly stands to benefit indirectly from greater federal investment in highways, roads and bridges.

But automakers will also be directly impacted by how Biden and his nominee to head the U.S. Department of Transportation, Pete Buttigieg, exercise their authority as safety regulators.

Before the surprise Democratic victories in Georgia's U.S. Senate runoff elections, Biden was preparing to accomplish much of his ambitious agenda through the somewhat self-defined authority the president holds as head of the executive branch, including via executive orders, regulations and enforcement discretion. Unified Democratic control of the legislative and executive branches provides congressional Democrats and the Biden administration more options to push their priorities through legislation as well as executive action.

Democrats may introduce more aggressive legislative proposals now that they control both chambers of Congress, but their very narrow majorities mean that bipartisan compromise will remain important to enacting those proposals. How will the Biden administration take advantage of these Democratic majorities?

Will Biden's DOT assume a more active role in setting federal vehicle safety standards? How might DOT reinstate Obama-era fuel economy standards in an effort to reduce U.S. carbon emissions and address climate change? Should the automotive industry anticipate more robust safety enforcement? And lastly, how can manufacturers best position themselves to succeed in a regulatory environment that may look quite different from the past four years? These questions are discussed in detail below.

One thing is certain: If Buttigieg ushers in a more active DOT regulatory posture, automakers would be wise to respond by matching the department's level of engagement, by submitting comments on new rulemakings affecting the industry, such as proposals for new federal safety or fuel economy standards; reviewing and updating internal safety compliance programs to ensure they adequately mitigate new and evolving risks; and fostering constructive relationships with safety regulators at DOT now.

Such goodwill can work to an automaker's benefit, should compliance concerns arise in the future.

## How the Trump Administration Approached Safety Regulation

The DOT under former President Donald Trump's secretary of transportation, Elaine Chao, embraced a decidedly hands-off approach to regulatory oversight, determined not to pick winners and losers or impede innovation in rapidly developing fields like autonomous vehicles, or AVs, and hyperloop systems.



Patricia Doersch



Callan Smith

While voicing concern for the patchwork of laws that states and local jurisdictions could promulgate in the absence of a binding federal framework, Chao preferred to offer best practices and encourage consensus — and issue very few new binding regulations on the automotive industry.

Chao also acted promptly upon taking office to reverse Obama-era guidance and regulations the Trump administration viewed as misguided or ineffective, including fuel economy standards. Revising regulations through formal notice-and-comment rulemaking, however, was a multiyear process, requiring sound data to support each substantive change.

The automotive industry also experienced a marked decrease in enforcement actions under Chao. She allowed existing monitorships to continue according to the terms of the consent orders, but she relied much less on consent orders to address major compliance violations, despite a relatively constant number of recalls during her tenure.

### **Possible Changes in Oversight, Enforcement and Rulemaking Under the Biden Administration**

In general, we expect the Biden administration DOT will return to the Obama administration's dual approach to regulatory oversight. This means reliance on nonbinding agreements with manufacturers when possible, to bring about safety improvements on timelines faster than rulemaking — e.g., the DOT's Obama-era agreement with 20 automakers to install automatic emergency braking systems in all new passenger vehicles by 2022 — and robust use of enforcement authority to address significant safety concerns.

We also expect the Biden administration to advance its priorities via rulemaking. Those priorities include support for the U.S. automotive industry — particularly good-paying union jobs in automotive manufacturing — and mitigating the transportation industry's impacts on climate change.

To that end, the automotive industry should anticipate a significant change in regulatory approach from that of the Trump administration, which may require revisiting Trump's DOT regulations on rulemaking, guidance and enforcement procedures. And Biden's DOT may take a more proactive approach in establishing a unified federal framework to guide development of rapidly advancing technologies in such areas as AVs and vehicle-to-vehicle communications.

Additionally, it is hard to see Biden achieving his environmental goals without strong support for electric vehicles, or EVs — including both commercial vehicles and passenger cars — and their charging infrastructure.

### ***Tools Available to Effect Change***

A new president has a number of tools available to effect change necessary to implement his or her priorities. Some of the previous administration's policies, if established by executive orders, internal executive branch policy memoranda and agency guidance documents, can be rescinded quickly — or simply ignored.

Regulations can be rewritten through lengthy, formal notice-and-comment rulemaking processes, which generally require agencies to publish a proposed rule, receive public comments, and review and respond to those comments in the final rule. This process often takes years, and implementation could be further delayed if the rules are then challenged in court.

Regulations may also be abrogated by Congress through legislation. Democrats may attempt to overturn DOT regulations in the major surface transportation reauthorization that must advance in 2021, absent an extension of the current authorization.

This approach could be constrained by the 60-vote majority requirement in the Senate, assuming the legislative filibuster remains in place. But major surface transportation bills in recent years have passed the Senate by wide bipartisan margins.

Democrats in Congress may also attempt to use the Congressional Review Act to block recently finalized Trump administration rules. The CRA is an oversight tool Congress can use to overturn a rule issued by a federal agency by a simple majority vote in the Senate and House.

Because successful CRA joint resolutions of disapproval are subject to a presidential veto, the CRA is primarily effective when Congress desires to overturn rules issued in the final 60 legislative days of an outgoing administration. For example, when the Trump administration took office with Republican control of the U.S. House of Representatives and Senate in 2017, the CRA was used to overturn 17 of the Obama administration's so-called midnight rules.

### ***A More Engaged Federal Safety Regulator***

As discussed above, Chao refrained from establishing certain federal standards for emerging technologies, because she viewed those standards as an impediment to industry innovation. Assuming he is confirmed by the Senate, Buttigieg may be able to change the DOT's approach to regulatory oversight immediately.

One area where Congress has been unable to reach consensus on final legislation — and thus where Biden's DOT may act on its own authority — is AV testing and deployment. In the last year of former President Barack Obama's second term, the National Highway Traffic Safety Administration released a federal automated vehicles policy, in which the agency asserted federal regulatory authority over AVs while also outlining best practices and a model state policy for AV issues — e.g., licensing — under states' purview.

Importantly, Obama's DOT identified potential new regulatory tools, such as NHTSA premarket approval, to aid safe AV deployment. A premarket approval approach would be a significant shift from NHTSA's current self-certification regime, and Biden's DOT could again consider this approach as a way to help boost public confidence in the safety of AVs.

During her tenure, Chao shifted the DOT's regulatory approach for AVs compared to the previous administration. Chao recommended voluntary action by industry in lieu of regulation, suggesting that manufacturers and developers post on their websites their own voluntary safety self-assessments.

Her policy documents also promoted development of voluntary technical standards based on standards development organizations such as the Society of Automotive Engineers. Instead of suggesting a model state regulatory structure, Chao's AV 2.0 guidance suggested best practices for states to consider.

The DOT subsequently issued its AV 3.0 guidance, integrating automation across all transportation modes, and its AV 4.0 guidance, proposing a federal policy framework across 38 federal agencies and commissions.

We anticipate Buttigieg may direct the DOT to revert to a more active role in the regulation and development of AV technology. Broadly accepted Democratic priorities in recent surface transportation authorization legislation that could gain ground in Biden's DOT include federal preemption of states and localities from setting safety standards for AVs, through the promulgation of new AV-specific federal motor vehicle safety standards.

We also expect NHTSA to increase its focus on addressing certain behavioral changes that have proven safety benefits, including greater seat belt usage and reduced distracted and impaired driving.

### **Back to the Future of Stricter CAFE and GHG Emissions Standards**

Within two months of Trump's inauguration, NHTSA and the U.S. Environmental Protection Agency announced their intention to reconsider the Obama administration's Corporate Average Fuel Economy, or CAFE, and greenhouse gas, or GHG, emissions standards.

The agencies made good on their promise by issuing proposed amendments to the CAFE and GHG emission standards in August 2018. They finalized those revisions in the Safer Affordable Fuel-Efficient, or SAFE, Vehicles rule, issued in two parts.

In September 2019, NHTSA clarified its statutory authority to set nationally applicable fuel economy standards, and the EPA withdrew California's ability to set its own GHG emissions standards. Several states and the California Air Resources Board, or CARB, challenged the EPA's action, in litigation that is ongoing.

The challenge initially divided automakers, with Ford Motor Co., BMW of North America LLC, Honda Motor Co. Ltd., Volvo Car Corp. and Volkswagen AG backing CARB's ability to enforce stricter emissions standards. General Motors Co., Fiat Chrysler Automobiles NV, Toyota Motor Corp. and 10 smaller automakers sided with the Trump administration.

GM recently announced it is exiting the lawsuit, and urged other automakers to do the same. Biden's EPA and DOT may similarly reconsider their position, at which point CARB's ability to enforce its own stricter emissions standards could be reinstated.

In March 2020, NHTSA and the EPA finalized scaled-back fuel economy requirements — a 1.5% increase in fuel economy each year from 2021 to 2026, attaining a projected fleet-wide fuel economy target of 40.4 miles per gallon by the end of the period. This is significantly less than the approximate 5% increase each year under the previous standard.

NHTSA and the EPA justified the changes included in the SAFE Vehicles rule in their regulatory impact analysis by comparing the rule to the previous standard. The agencies estimated the rule would reduce total costs by \$200 billion — including \$100 billion in reduced automaker regulatory costs — reduce the average price of a new vehicle by \$1,000, reduce highway fatalities by 3,300 and increase vehicle sales by 2.7 million.

If the Biden administration chooses to revisit and revise the SAFE Vehicles rule, it will need to review these justifications, and address how any proposed revisions might alter these estimated impacts. In any case, this rulemaking example illustrates the considerable time required to reverse significant regulations through formal notice-and-comment rulemaking.

Reducing vehicle emissions is fundamental to realizing Biden's commitment to addressing climate change. Biden is expected to use all approaches at his disposal to accomplish this —

including international agreements, changes in federal discretionary grant and loan criteria, federal procurement actions (e.g., requiring federal government vehicle fleet purchases to be EVs) and agency regulations.

Accordingly, among the wide-ranging actions taken to address climate change, we expect the Biden administration to consider restoring CARB's ability to regulate emissions, and to revisit the Trump administration's revised CAFE standards. In addition, we expect the administration to advocate for new legislative incentives — possibly a new version of the "Cash for Clunkers" program, or tax incentives — to encourage consumers to purchase EVs.

In Biden's view, increased focus on EVs offers an opportunity for the U.S. automotive industry by incentivizing EV production. Biden also believes the U.S. must catch up with international competitors by investing additional resources in EV technologies.

### ***Robust Safety Enforcement***

Buttigieg may be able to change the DOT's enforcement posture immediately, because a change in posture does not generally require new rulemakings or repealing agency guidance. We anticipate the DOT's enforcement posture will be similar to the Obama administration's approach.

Between 2014 and 2016, the DOT issued \$524 million in civil penalties, totaling more than half of all civil penalties imposed over NHTSA's 50-year history. That period represented an unprecedented level of motor vehicle safety enforcement.

While the DOT rarely uses formal mandates anymore for safety recalls, the change in the Trump DOT's safety enforcement posture can be illustrated by examining the share of all recalls that were influenced by NHTSA during his administration, as compared to other administrations.

For example, 138 of the 713 recalls in 2007 were influenced by NHTSA; 180 of the 711 recalls in 2013 were influenced by NHTSA. But only 57 of the 966 recalls in 2019 were influenced by NHTSA. We expect the number of NHTSA investigations and NHTSA-influenced recalls under Buttigieg to return to pre-Trump levels, which will likely result in a higher share of NHTSA-influenced recalls.

The Trump administration made very limited use of consent orders to address and remediate major compliance concerns — despite a growing number of recalls over the last four years — and did not keep pace with the Obama DOT's more extensive use of civil penalties and enforcement actions. Consent orders have proven to be effective tools to remediate major safety compliance concerns and execute major remedies — e.g., recalls of Takata airbags — and we expect the Biden administration to rely on them to improve compliance.

### **Reinterpreting — or Unwinding — the DOT's "Rule on Rules" Governing Regulations and Enforcement Actions**

A potential brake on Biden's DOT quickly adopting a more robust oversight and enforcement posture are the Trump DOT's self-imposed rules governing departmental rulemakings and enforcement protocols.

In an attempt to ensure lasting reforms to DOT's regulatory processes, Chao codified administrative rulemaking, guidance and enforcement procedures in the DOT's January

2020 "rule on rules." The department was guided by directives from the White House Office of Management and Budget, best practices in rulemaking and executive orders issued by Trump.

### ***Limits on Regulations and Their Costs***

One such order, Executive Order No. 13771, titled Reducing Regulation and Controlling Regulatory Costs, instilled a form of regulatory budgeting by requiring that "whenever an executive department or agency ... publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed."

The DOT implemented this edict through DOT Order 2100.6, a January 2018 internal memorandum directing agency employees to abide by specific rulemaking requirements. One of these requirements was that for every significant new rulemaking, the department must "identify at least two existing regulatory burdens to be revoked."

Because the DOT in turn implemented this departmental order by formal rulemaking — codifying these new rulemaking, guidance and enforcement directives as agency regulations — these directives are binding on successor administrations. So instead of simply rescinding the internal memorandum, Buttigieg would be required to navigate the legal requirements of the Administrative Procedure Act to unwind the two-for-one requirement — or any other provisions he seeks to change — via another rulemaking.

This rule on rules could thus continue to serve as a meaningful restraint on the department's rulemaking ability under the Biden administration.

### ***Limits on Enforcement Authority***

The rule on rules also codified new procedural requirements governing enforcement actions initiated by the DOT, designed to ensure that such actions satisfy principles of due process and remain lawful, reasonable and consistent with administration policy.

For example, the requirements state that the DOT "must not use [investigative] authorities as a game of 'gotcha' with regulated entities ... [and] should promptly disclose to the affected parties the reasons for the investigative review and any compliance issues identified or findings made in the course of the review."

These rules guarantee certain basic protections to all entities subject to DOT enforcement actions, regardless of changes in administration. While there is no reason to think that the incoming administration would be any less committed to fair and responsible enforcement procedures than its predecessors, these rules mean that Biden's DOT must operate under Trump's enforcement ideology.

These procedural requirements will not be simple to unwind. To implement some changes in enforcement posture, Biden's DOT must, at least initially, navigate all of the requirements in the rule on rules.

### **How Should the Automotive Industry Prepare for a Biden DOT?**

If past is indeed prologue, the automotive industry should anticipate a return to several elements of Obama-era regulatory enforcement and oversight, which could carry increased regulatory risk for automotive manufacturers.

There is no way to predict precisely how a Biden DOT may exercise its considerable regulatory authority, yet industry stakeholders can prepare for and ameliorate potential safety compliance risks more broadly through investing in and implementing robust compliance programs that mitigate safety compliance risks.

When the department makes assessments on enforcement actions and civil penalties, it views favorably company actions to develop sound compliance programs and a strong corporate safety culture. Mature compliance systems cannot be developed overnight — so the time to take action is now.

---

*Patricia Doersch is a partner and Callan Smith is an associate at Squire Patton Boggs LLP.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*