

CLIENT ALERT

Department of Transportation and Congress Take Additional Steps to Advance Development and Deployment of Autonomous Vehicles

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As noted in a [previous alert](#), highly automated vehicles (HAVs) are poised to radically transform the transportation and related industries in the coming years. Federal and State policymakers continue to grapple with how best to advance these technologies, while at the same time promoting safety and other consumer interests. While no Federal HAV regulations yet exist, the Department of Transportation (DOT) and the National Highway Traffic Safety Administration (NHTSA), as well as Congress, have recently taken additional actions related to HAVs.

First, in September, DOT and NHTSA [released](#) their [Automated Driving Systems 2.0: A Vision for Safety](#) (Guidance), replacing their previous HAV policy guidance. DOT/NHTSA have also opened multiple dockets to solicit public comment on aspects of the Guidance. Second, the House of Representatives passed an HAV bill, and the Senate Commerce, Science, and Transportation Committee recently approved one. Whether either of these bills will become law remains to be seen, but both signal likely directions Congress will take when addressing HAVs.

DOT/NHTSA Guidance

The Guidance supplanted DOT/NHTSA's [Federal Automated Vehicles Policy](#), released in the fall of 2016. The stated purpose of the Guidance is to support the automotive industry, the States, and other key stakeholders by facilitating a dialogue between consumers and stakeholders about best practices relative to the testing and deployment of automated vehicle technologies. The Guidance is purely voluntary. It does not include any compliance requirements or enforcement

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mechanisms, and contains only recommendations and suggestions for the industry's consideration and discussion. DOT Secretary Chao has commented that she views this voluntary policy as a living document that provides a flexible framework for the industry to use, and which will be updated in the future as the industry evolves.

The Guidance, much like the policy it replaced, lays out a framework for accelerating the safe development and deployment of self-driving vehicles. It focuses on Society of Automotive Engineers (SAE) International Levels of Automation 3, 4, and 5 (Conditional, High, and Full Automation), and clarifies that entities do not need to wait to test or deploy their Automated Driving Systems (ADSs). It also clarifies Federal and State roles in regulating various aspects of the technology. The Guidance encourages industry best practices and provides technical assistance to States as well as best practices for policymakers.

A large portion of the Guidance is devoted to describing 12 priority safety design elements for consideration, including, but not limited to, vehicle cybersecurity, human machine interface, crashworthiness, consumer education and training, and post-crash ADS behavior. The Guidance also describes approaches that could be used to achieve those design elements. The Guidance recommends that entities engaged in ADS testing and deployment publish Voluntary Safety Self-Assessments demonstrating how they address the safety design elements. One notable difference between the 2016 policy and the 2017 Guidance is that the latter does not address privacy or ethical considerations.

DOT/NHTSA currently have three open dockets related to ADSs. Comments on the [Guidance](#), and on its separate, attendant [Paperwork Reduction Act](#) reporting requirements, are due on November 14. NHTSA will hold a [public meeting](#) to seek input on the Guidance on November 6. DOT/NHTSA also have an open docket related to the [Voluntary Safety Self-Assessments](#). Comments in that docket are due on December 18, following a separate workshop that NHTSA hosted on October 20.

House SELF DRIVE Act and Senate AV START Act

On September 6, the House of Representatives unanimously passed [H.R. 3388, the Safely Ensuring Lives Future Development and Research in Vehicle Evolution \(SELF DRIVE\) Act](#). On October 4, the Senate Committee on Commerce, Science, and Transportation approved [S. 1885, The American Vision for Safer Transportation through Advancement of Revolutionary Technologies \(AV START\) Act](#), paving the way for the bill's consideration by the full Senate.

Both the House and Senate bills provide for Federal preemption of State HAV laws, grant exemptions from Federal Motor Vehicle Safety Standards (FMVSS), create cybersecurity requirements, and exclude commercial vehicles over 10,000 pounds, but there are some notable differences. The chart below compares some of the significant provisions in the two bills.

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Issue	SELF DRIVE Act (H.R. 3388)	AV START Act (S.1885)
Preemption	Federal preemption of any State laws that seek to regulate the design, construction, or performance of HAVs, ADSs, or components of ADSs.	Federal preemption of any State laws that seek to regulate the design, construction, or performance of HAVs, ADSs with respect to any of the manufacturers' safety report subject areas. No licensure discrimination on the basis of disability.
New FMVSS	Within two years, the Secretary of Transportation must issue a final rule requiring submission of safety assessment certifications regarding how each HAV or ADS manufacturer is addressing safety. The rule must be reviewed every five years. A full FMVSS rulemaking must commence within 18 months.	Within six months, the Director of the National Transportation Systems Center must submit to the Secretary of Transportation a report that identifies which of the current safety rules are in conflict with the operation of HAVs (i.e., requiring or referencing a human driver) and propose updates. Within three months of report submission, the Secretary shall commence a rulemaking proceeding to incorporate the report into the relevant safety standards, and must issue a final rule within one year of report submission date. In addition, within six months the Secretary must establish a Highly Automated Vehicles Technical Committee to make technical recommendations for HAV and ADS safety, and commence a future rulemaking on the Committee's recommendations that are approved following the Secretary's review and public comment.
Safety Assessments	Until a final rule takes effect, manufacturers may submit voluntary safety assessment letters as described in NHTSA's updated 2017 Automated Driving Systems Guidance.	Manufacturers must submit to the Secretary a safety report at least three months before selling or otherwise commercializing an HAV or ADS, and then once per year thereafter.

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Cybersecurity	Six months after enactment, HAV manufacturers may not sell, introduce, or import HAVs without a cybersecurity plan that includes a written policy, an officer assigned to cybersecurity matters, a process for limiting access to ADSs, and a process for training employees to implement and maintain the cybersecurity of the HAVs.	Within 18 months, HAV and ADS manufacturers must develop, maintain, and execute a written plan for identifying and reducing cybersecurity risks to the motor vehicle safety of HAVs and ADSs.
Exemptions	Graduated number of exempted vehicles from the FMVSS over the four years following enactment: up to 100,000 vehicles by the third and fourth years.	Graduated number of exempted vehicles from the FMVSS over the three years following enactment: up to 15,000 vehicles in the first year, 40,000 in the second year, and 80,000 in the third year and for every year thereafter. After four years, a manufacturer of HAVs may petition the Secretary to expand the exemption to more than 80,000 vehicles in any 12-month period.
Privacy	Within six months, HAV companies must have privacy plans that detail how they will collect, use, and store data, and how they will keep customers informed about their privacy policies.	Within one year, NHTSA must create an online Motor Vehicle Privacy database describing what personally identifiable information (PII) will be collected about individuals operating motor vehicles; how that information will be used, disclosed, and otherwise handled; what steps will be used to protect against unauthorized disclosure of PII; and the privacy policies of motor vehicle manufacturers.

Likelihood of Future Action

The likelihood of either the House or the Senate bill, or a compromise version merging the two bills, being signed into law this year is relatively slim, given other Congressional priorities. It is likely, however, that the same or similar bills will be re-introduced next year if there is no final action this year. HAV policy discussions have been relatively bipartisan, and the transportation industry and numerous Federal agencies have devoted a significant amount of attention to this emerging industry.

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At the same time, the new DOT/NHTSA Guidance will guide manufacturers as they test and deploy HAVs and ADSs, and the agencies will continue to monitor developments in the industry, review the public comments in the various dockets, and likely respond with updated non-binding guidance in the future, even in the absence of Federal laws or regulations specifically targeted to the new technologies.

If you have any questions regarding this client alert, please contact the following attorneys or the attorney with whom you regularly work.

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