



DOT Aims to Create Flexible Regulatory Framework for Automated Vehicle Technology

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INTRODUCTION

Autonomous vehicles (AVs) and autonomous driving systems (ADS) stand to revolutionize human mobility, urban planning, and energy policy. Recognizing the inherent promise of this exciting emerging technology, many companies and countries are presently vying to be the leader in AV development and to reap the associated economic benefits. Eager to foster AV innovation in the United States, the U.S. Department of Transportation (DOT) unveiled an initiative entitled "[Preparing for the Future of Transportation: Automated Vehicles 3.0](#)" (AV 3.0) on October 4, 2018.

Through AV 3.0, DOT aims to provide conditions that allow and promote growth in the U.S. AV sector by clarifying the regulatory structure for the research, development and deployment of AVs. The initiative is aimed at prioritizing safety, reducing regulatory hurdles, outlining how to work with the federal government, eliminating unnecessary barriers to entry, and remaining technology neutral. Significantly, AV 3.0 includes interpretive changes to existing DOT policy and specific instructions to DOT agencies to amend existing regulations. Both of these actions are intended to reduce existing regulatory burdens on AV developers and will yield opportunities to shape existing DOT policy and regulation in the near future.

This alert provides an overview of AV 3.0, summarizes recent Congressional activity related to AVs, and highlights several upcoming opportunities for stakeholders to help shape federal AV policy.

What does AV 3.0 do?

Building on prior efforts to craft a coherent federal policy for the development and deployment of AVs, DOT's AV 3.0 represents the most comprehensive articulation to date of the Trump Administration's approach to regulating AVs. AV 3.0 is the DOT's effort to eliminate potential regulatory hurdles that might impede innovation by clearly identifying the roles and responsibilities of relevant federal regulators.

AV 3.0 is organized in two parts. Part I, entitled "Roles in Automation", identifies the relevant agencies within the federal, state, local and tribal governments, and among private sector AV developers. Part I is focused on facilitating the near-term development of AVs by identifying and eliminating policy, regulatory, and legal uncertainty and by more clearly identifying discrete roles and responsibilities for the various interested parties. Part II, entitled "The Road Ahead," focuses on the mid- to long-term deployment of AVs, though it does not set a definitive timeline for deployment. Accordingly, Part II is focused on implementation strategies, safety risk management, and next steps to address regulatory gaps.

Part I: ROLES IN AUTOMATION

Is A Driver Necessary?

DOT clarifies the roles and authorities of those federal agencies exercising jurisdiction over transportation areas affected by automation, including the areas of design, construction and performance of both light- and heavy-duty motor vehicles. Accordingly, AV 3.0 sets forth the roles and authorities for agencies within DOT, including the National Highway Transportation Safety Administration (NHTSA), the Federal Motor Carrier Safety Administration (FMCSA), the Federal Highway Administration (FHWA), and the Federal Transit Administration (FTA).

In articulating the various agency roles and authorities, DOT also makes interpretive policy pronouncements aimed at facilitating AV development and identifies potential regulatory hurdles that

may impede innovation in the AV space. First, DOT clarifies that the agency will interpret the definitions of “driver” and “operator” to recognize that such terms do not refer exclusively to a human being, but may in fact include automated systems. This policy interpretation eliminates potential regulatory uncertainty surrounding whether a human driver must be present and operating a vehicle while it is being driven autonomously and arguably preempts conflicting state law.

Second, recognizing that certain motor vehicle safety standards could unintentionally impede development of highly autonomous and fully autonomous AVs, DOT directs NHTSA to propose a regulation that would amend existing vehicle safety standards to accommodate AV technologies and configurations. If promulgated, this rule would clear many hurdles to the research, development and deployment of AVs that will be designed without certain mandatory features such as steering wheels, mirrors, and accelerator and brake pedals.

AV Deployment in 50 States

In addition to articulating federal roles and authorities and identifying federal impediments, Part I also addresses potential conflicts arising from the patchwork of state, local, and tribal laws aimed at regulating AVs. To date, 30 states have enacted legislation related to AVs, and governors in six additional states have issued executive orders on the issue. While this patchwork of state regulations has, in some cases, allowed states to better incentivize AV technological developments within their respective jurisdictions, the absence of a unifying federal framework has created a risky, unpredictable and overly complicated environment that ultimately makes it more difficult for AV technology developers and manufacturers to innovate, test, and deploy their technologies across state lines. With AV 3.0, DOT urges that states and local governments eliminate such barriers, and offers best practices aimed at minimizing conflicts of law and reducing other burdens to entry. These best practices include adopting terminology defined through voluntary technical standards and ensuring compatibility between intrastate and interstate commercial vehicle standards.

Although AV 3.0 aims to resolve jurisdictional disputes cooperatively, the guidance also acknowledges that circumstances may arise where federal law preempts conflicting state law, such as the Federal Motor Carrier Safety Regulations (FMCSRs). It remains unclear how this declaration of federal intent to eliminate potentially conflicting state and local laws will be interpreted in Congress or by the states interested in promoting or slowing deployment of AVs.

Part II: THE ROAD AHEAD

Promoting Deployment

Part II of AV 3.0 outlines DOT’s approach to promote continued AV technology development with the goal of widespread AV deployment in the next decade and beyond. AV 3.0 identifies five strategies aimed at accelerating the integration of AVs:

1. Stakeholder and public engagement;
2. Development of best practices and policy considerations to support stakeholders;
3. Support in the development of voluntary technical standards;
4. Targeted technical research; and,
5. Modernize regulations.

Recognizing that full commercial integration is contingent on public trust in AV safety and reliability, Part II emphasizes the importance of controlled environment and public road testing as a means to validate and verify the safety of a technology. DOT outlines a conceptual framework that is divided into three stages—development and early-stage road testing, expanded ADS road testing, and limited to full ADS deployment.

Federal Safety Standards

AV 3.0 identifies safety as the DOT's number one automation principle, and states that the department "will lead efforts to address potential safety risk and advance the life-saving potential of automation, which will strengthen public confidence in these emerging technologies." Part II builds on this principle and reaffirms DOT's commitment to AV developer self-reporting through the Voluntary Safety Self-Assessment (VSSA) tool introduced in "A Vision for Safety 2.0."¹ DOT continues to encourage companies to make their VSSAs publicly available in order to promote transparency and strengthen public confidence in the technology.

Cybersecurity and Privacy

AV 3.0 includes a more robust discussion on cybersecurity and privacy issues than prior iterations. While the guidance does not mandate any specific actions, DOT encourages AV developers to share information on cyber vulnerabilities through the appropriate Information Sharing and Analysis Centers (ISACs) and through the Department of Homeland Security's National Cybersecurity and Community Integration Center (DHS NCCIC).

CONGRESSIONAL ACTION CONTINUES

DOT's issuance of AV 3.0 sparked renewed interest on Capitol Hill to act on pending legislation that would create a more stable legal and regulatory environment for the development of AVs before the end of 2018. Both the House and Senate advanced legislation last year requiring all AV manufacturers to submit annual safety assessments and have continued to hold hearings on the development of ADS technologies.

- The House of Representatives passed H.R. 3388, the "Safely Ensuring Lives Future Deployment and Research In Vehicle Evolution Act" ([SELF DRIVE Act](#)), by voice vote after it passed out of the House Energy and Commerce Committee by a unanimous 54-0 vote. In addition to requiring NHTSA to regulate AV safety assessment processes, the bill also preempts state regulation of AV technologies and grants DOT the authority to grant exceptions to FMVSS for testing.
- In October 2017, the Senate Commerce, Science and Transportation Committee passed S. 1885, the "American Vision for Safer Transportation through Advancement of Revolutionary Technologies" ([AV START Act](#)), by a voice vote. More information on this legislation is available [here](#)

Senators Dianne Feinstein (D-CA), Ed Markey (D-MA) and Richard Blumenthal (D-CT) have placed procedural holds on the AV START Act due to concerns about the liability provisions, safety standards and preemption authorities included in the legislation. The bill will not reach a vote on the Senate floor as long as these holds are in place, but negotiations to lift these holds are ongoing and, since the release of AV 3.0, the relevant Committee leaders have reiterated their intent to reach an agreement on this legislation in 2018.

Congress has been more reluctant than DOT to clarify the regulatory environment for heavy-duty trucks and transit vehicles. Neither the House nor Senate legislation applies to vehicles weighing over 10,000 pounds. If the House and Senate versions of the legislation are ultimately negotiated through a conference process and enacted into law as currently written, heavy-duty vehicles would still be subject to individual state requirements on safety certifications and exemptions for testing purposes.

In the House of Representatives, it is worth noting that any subsequent legislative effort to regulate ADS technologies for commercial and transit vehicles would need to originate in the Highways and Transit Subcommittee of the House Transportation and Infrastructure Committee. This Subcommittee may see new leadership regardless of the outcome of the election as the current Chairman of the Subcommittee is running to be Chair of the full Committee

¹ AV 3.0 supplements, but does not replace, the "Automated Driving Systems 2.0: A Vision for Safety," the second version of guidance published by DOT last year. Information on last year's guidance is available in this [issue alert](#).

OUTLOOK

AV 3.0 invites interested stakeholders to help define how federal AV policy and regulations will be crafted and implemented. By proposing to streamline regulatory processes and eliminate potentially burdensome regulations, DOT is attempting to create a more flexible environment in which AV developers can operate. However, significant complexities and regulatory hurdles remain in place. AV 3.0 does not establish timelines for regulatory or deregulatory action, nor does it have the endorsement of parties not involved in the development of the guidance, particularly state and local governments. Interested stakeholders will need to engage carefully with the federal government to avoid legal and regulatory complications going forward.

AV 3.0 does outline several upcoming regulatory initiatives that will offer an opportunity to further shape federal AV policy. First, DOT invites [comment](#) on the guidance itself by December 8, 2018. Second, AV 3.0 directs NHTSA to explore the need for future rulemakings through requests for comment on proposed amendments to federal safety standards, with the aim of accommodating ADS configurations and modernizing procedures to process FMVSS exemption petitions.

Consistent with this mandate, NHTSA published an [Advance Notice of Public Rulemaking \(ANPRM\)](#) in the *Federal Register* on October 10. NHTSA's ANPRM seeks public comment on:

1. Potential factors that should be considered in designing a pilot program for the safe on-road testing and deployment of vehicles with high and full driving automation and associated equipment;
2. The use of existing statutory provisions and regulations to allow for the implementation of such a pilot program;
3. Any additional elements of regulatory relief that might be needed to facilitate the efforts to participate in the pilot program and conduct on-road research and testing involving these vehicles, especially those that lack controls for human drivers and thus may not comply with all existing safety standards; and,
4. The nature of the safety and any other analyses that it should perform in assessing the merits of individual exemption petitions and on the types of terms and conditions it should consider attaching to exemptions to protect public safety.

The agency will also request comments on the scope of the study it will conduct on workforce impacts.

Congress will likely engage with a heavy hand as the federal agencies move to regulate AVs specifically on matters related to the changing workforce, state preemption issues, disability access and cyber security. Available tools for Members of Congress to weigh-in include the submission of comments to DOT's guidance, taking further action on legislation to require regulatory actions or changing statutory requirements, and exercising its oversight authority by convening additional hearings in the House and Senate Committees of jurisdiction. Parties seeking to operate in the flexible, deregulated environment proposed by DOT in AV 3.0 should anticipate how Congressional action (or future Administrations) may require the agency to impose additional regulatory requirements on AV developers in the future.

For more information

Van Ness Feldman LLP—with its integrated legal, regulatory, and policy practice groups—is available to assist clients in understanding the implications of executive and legislative branch actions related to automated vehicles. For more information on AV 3.0, or any other federal regulatory action in the automated vehicle space, please contact [R. Scott Nuzum](#), [Tracy Nagelbush Tolk](#), [Mike Weiner](#), or [Gwen Fleming](#).

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