

3 Takeaways From DOT's New Automated Vehicles Policy

By **Linda Chiem**

Law360 (October 10, 2018, 8:45 PM EDT) -- The U.S. Department of Transportation's newly updated policy on self-driving or autonomous cars eases the rules for development while also paving the way for upgrading infrastructure and integrating the new technology with other modes of transportation, experts say.

The 80-page road map issued Oct. 4 by the U.S. Department of Transportation's National Highway Traffic Safety Administration expands on the broad federal guidance released last year on how auto manufacturers, technology giants, artificial intelligence developers and other companies should go about testing their automated car technologies before their debut on the highway.

The guidance signals that federal officials are eager to offer additional regulatory clarity to companies while also steering clear of hard-line rules that might hinder the fast-evolving automated car technology, experts say.

"It expressly acknowledges the practical need for automated and traditional vehicles to share the road, and for the first time declares that Americans' freedom to drive will not be impaired, at least by governmental action," Dykema Gossett PLLC senior counsel Bill Kohler said.

Here, Law360 examines a few takeaways from the NHTSA's Automated Vehicles 3.0 guidance.

Standards Remain Voluntary

The DOT and NHTSA made clear that they're embracing voluntary, consensus-based technical standards for developing self-driving or autonomous vehicles.

And just like with last year's guidance, the updated version doesn't carve out any compliance requirement or enforcement mechanism, and it's purposely crafted that way so the federal government can adjust its guidance and eventually start drafting rules to account for safety and the evolving technology.

"NHTSA is kind of signaling an end to 'analysis paralysis,' this notion that you need to wait for technology to be perfect before it can go on the roads," said Todd Benoff, co-leader of Alston & Bird LLP's connected and autonomous vehicle team and partner in its products liability practice group. "NHTSA pretty openly acknowledges that waiting for perfect is going to cost lives. Their point about

delaying or unduly hampering this technology until all the specific risks have been identified and eliminated means delaying safety benefits.”

But the DOT won't be dragging its feet when it comes to making decisions, Benoff explained, as indicated by its plan to have various other DOT agencies begin rulemaking to help integrate automated vehicle technology.

The NHTSA published an advanced notice of proposed rulemaking on designing a national pilot program to test and deploy autonomous vehicles; most autonomous vehicle testing is currently done at the state and local levels. The agency also said it will request public comment on a proposal to streamline the processing of petitions for exemptions from federal safety standards.

Additionally, the Federal Motor Carrier Safety Administration, the safety regulator for the commercial trucking sector, will initiate an advance notice of proposed rulemaking to identify regulatory gaps in the inspection, repair and maintenance for automated driving systems, or ADS.

Notably, AV 3.0 says the Federal Motor Vehicle Safety Standards — the federal regulations laying out safety specifications for cars — will be tweaked “to be more flexible and responsive, technology-neutral, and performance-oriented to accommodate rapid technological innovation.” This means the industry might be allowed to build autonomous vehicles without standard vehicle features like steering wheels and brake pedals.

And the DOT says it will interpret and adapt the definitions of “driver” or “operator” as appropriate to recognize that such terms do not refer exclusively to a human, but may include an automated driving system.

“To me, that's almost a bold move,” Benoff said.

Experts described it as a sensible and reassuring approach that advances the integration of automated technologies into the transportation system.

“As a lawyer advising companies in the gray area when it comes to these new technologies, the DOT's approach allows for the greatest flexibility to innovate,” said Cheryl A. Falvey, a partner and co-chair of Crowell & Moring LLP's advertising and product risk management group. “It looks like NHTSA is willing to take a hard look at existing vehicle standards to modify them to allow for technology-driven change.”

The updated policy will still ask automakers and technology companies to publicly disclose a “voluntary safety self-assessment” detailing what they're doing to safely test and deploy automated driving systems. But the companies won't be required to file a safety assessment with the DOT, nor will they need the agency to sign off on any such assessment before they start testing their automated cars.

Critics of the policy say AV 3.0 peddles weak, nonbinding guidelines that allow manufacturers of autonomous vehicles to use the nation's roads and highways as testing grounds for unproven technology.

“AV manufacturers will continue to introduce extremely complex, supercomputers-on-wheels into the driving environment with meager government oversight and accountability,” Cathy Chase, president of Advocates for Highway and Auto Safety, said in a statement.

“Under the 3.0 guidance, instead of publishing information that would allow the public to accurately gauge the safety performance of an AV system, companies making driverless cars are instead allowed to release glossy marketing brochures like the ones previously submitted by a few manufacturers,” Chase added.

Integration in the Crosshairs

The new guidance goes beyond just passenger vehicles and covers automated buses, transit and commercial trucks. As such, various other DOT agencies are gathering input from industry stakeholders on what sort of infrastructure improvements will be needed to accommodate autonomous vehicles operating in various modes of transportation.

“The most important thing about 3.0 is we’re starting to see intermodal coordination,” Neal Walters, practice leader of Ballard Spahr LLP’s product liability and mass tort group, told Law360. “We’d like to think that autonomous vehicles are just going to operate in a vacuum through these advanced components, [but] we recognize that they’re not just autonomous and they’re not just electric — they’re going to be connected not just from vehicle to vehicle, but from vehicle to infrastructure.”

The Federal Highway Administration will also update its 2009 Manual on Uniform Traffic Control Devices, or MUTCD — the set of federal standards used by road managers nationwide to install and maintain signs, signals, markings and other devices used to regulate or guide traffic.

Additionally, the Federal Railroad Administration will research how to develop and demonstrate a concept of operations, including system requirements, for the use of automated and connected vehicles to improve safety of highway-rail crossings.

And the Maritime Administration and the FMCSA are evaluating the regulatory and economic feasibility of using automated truck queueing as a technology solution to truck staging, access and parking issues at U.S. ports, according to the new policy. The Federal Transit Administration, meanwhile, has published a five-year research plan on automating bus transit.

Crowell & Moring’s Falvey said it’s exciting to see a strategy for coordination among all the agencies under DOT’s purview and industry partnerships.

“One example from the 3.0 policy is the attention to technology and sensors and automated vehicles at rail crossings. Not only will they pull expertise together from NHTSA and the Federal Railroad Administration, but they are expanding their research with U.S. DOT partners and the Association of American Railroads to develop a closed loop system,” she explained. “That kind of cooperative engagement on automated technology helps drive safety into the future.”

The DOT also said it is continuing its work to preserve the ability for transportation safety applications to function in the 5.9 GHz spectrum, the dedicated short-range communications band that the Federal Communications Commission set aside in 1999 to help fulfill highway safety initiatives. But it said it’s open to exploring ways to share that spectrum with other users — such as WiFi and other commercial services — in a manner that maintains priority use for vehicle safety communications.

However, like its predecessor, AV 3.0 punts on offering any firm guidelines on data-sharing and privacy, saying only that the “DOT takes consumer privacy seriously, diligently considers the privacy implications of our safety regulations and voluntary guidance, and works closely with the Federal Trade Commission

— the primary federal agency charged with protecting consumers’ privacy and personal information — to support the protection of consumer information and provide resources relating to consumer privacy.”

Meanwhile, it’s leaving it up to the states and local governments to identify, prioritize and allocate resources to counteract cybersecurity threats, especially if such a threat affects critical transportation infrastructure.

The Center for Auto Safety has taken issue with that approach, citing a growing number of “deaths, injuries and crashes involving a variety of semi-autonomous vehicles.”

“DOT continues to insist that eliminating regulation is the way to achieve safety,” the group said in a statement. “Despite cybersecurity vulnerabilities continuing to dominate headlines and rising public concern surrounding driverless cars, NHTSA is still failing to require the submission of any information about the most basic level of safety prior to this technology being deployed on our streets and in our neighborhoods.”

Feds Stay in Driver's Seat on Safety Standards

When the Obama administration rolled out the first-ever federal automated vehicles policy in September 2016, it said the federal government has the authority to regulate the testing and deployment of highly automated vehicles, while encouraging states to work together to establish cohesive laws for operating such cars in their jurisdictions.

When the Trump administration released its 2.0 policy in September 2017 to replace the Obama-era policy, it reinforced that federal authority by stating the NHTSA will be responsible for regulating the safety design and performance aspects of motor vehicles, including automated driving systems, while states will continue to be responsible for regulating the human driver and vehicle operations.

The 3.0 policy goes even further, clearly stating the federal government will take the wheel on safety standards and that any state laws on automated vehicle design and performance will be preempted. State, local and tribal governments will be responsible for licensing human drivers, registering motor vehicles, enacting and enforcing traffic laws, conducting safety inspections, and regulating motor vehicle insurance and liability.

It's an effort to eliminate any inconsistencies in state-level regulation that have been blamed by some industry stakeholders for stymieing advancements of the technology, especially as federal legislation explicitly carving out the federal government’s regulatory authority in this space has languished, experts say.

“U.S. DOT has sent a strong message that they intend to occupy the field here when it comes to advanced vehicle safety technologies, warning states that unnecessarily or overly prescriptive state requirements could stifle innovation,” Falvey said. “That’s critically important if we want to avoid a patchwork of state laws with different uses of terminology on these automated technologies.”

But it still stirs up legal questions.

“To me, it’s that last point, the liability, that creates a messy possibility because tort liability is going to be different in every state that these automated driving systems go into,” Benoff said. “And you could eventually get to the point where you have jury verdicts saying, hey, this technology is defectively

designed even though it passes everything that the feds say, [yet] the jury sees a problem. The FMVSS is not a magic shield to tort liability. ”

The new policy lays out several best practices for states on adapting their policies and procedures for licensing and registering automated vehicles, assessing the readiness of their roads, and training their transportation workforces for the arrival of automated vehicles.

"DOT has acknowledged that states have authority over ADS testing, but the lack of agreed standards over testing methods have left the industry guessing what is the appropriate level of safety with respect to areas such as test drivers," said Steve Wernikoff, co-leader of Honigman Miller Schwartz and Cohn LLP's autonomous vehicle industry group.

"The 3.0 document recommends that states consider minimum requirements for test drivers who operate test vehicles at different automation levels, but ultimately, manufacturers and equipment manufacturers likely could use more clarity concerning best practices for this issue," he added.

--Editing by Philip Shea and Alanna Weissman.