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DOT Accelerates Toward Autonomous Driving, While Congress May Be Stopped in Traffic

Advisory

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Development of autonomous driving system (ADS) technology has captured the imagination of the policymaking, technology, and urban planning communities in Washington, DC and across the country—and for good reason. According to economic analysis commissioned by Intel, ADS technology could be responsible for stimulating a "new passenger economy" worth up to \$7 trillion by 2050 that could result in entirely new services, applications and efficiencies "associated with vehicle use and from the resulting freedom of movement."¹ However, manufacturers and software developers attempting to bring new autonomous technology to market must navigate a complex web of state and local safety rules, and they must do so today without the benefit of comprehensive federal autonomous vehicle (AV) safety regulations to streamline the development process.

Addressing this problem is a priority for a number of lawmakers in Congress. In 2017, the House unanimously passed legislation which would authorize the Department of Transportation (DOT) to develop a uniform regulatory framework to certify AVs and ADS technology. Similar legislation made progress in the Senate, but ultimately, the 115th Congress adjourned without AV safety legislation reaching the President's desk.

Congress's failure to pass AV legislation does not, however, leave regulators without authority to certify AV technology. To the contrary, stakeholders may rely on DOT's existing regulatory structure—which largely concerns exemptions from existing mandatory standards for AVs where appropriate. And while the exemption process is cumbersome, the White House Office of Management and Budget (OMB) recently cleared the way for the National Highway Traffic Safety Administration (NHTSA) and the Federal Motor Carrier and Safety Administration (FMCSA) to move forward with early stage rules designed to reduce regulatory barriers for the development of AVs and ADS technology.

Both agencies are still in the early stages of the rulemaking process. But OMB's actions signal that DOT is methodically implementing the agency's organizational plan for AV integration which first began under the Obama Administration in a policy document in 2016,² and gained steam under President Trump beginning in 2017. Perhaps more importantly, DOT is not waiting for Congress to pass comprehensive AV legislation before it embarks on a path to establish a regulatory framework for introducing AVs on American roads. Instead, DOT is utilizing the agency's existing regulatory authority, and in accord with the department's public plans. DOT's progress could prove critical for stakeholders seeking to bring new, innovative AVs and ADS technology to the marketplace.

We analyze these important developments in three parts. First, we provide a big-picture look at the Trump Administration's AV policy agenda. Next, we evaluate the major issues stakeholders have raised in pre-proposal comments submitted to NHTSA and FMCSA. Finally, we examine how Congress might (or might not) address certain issues through legislation, and address how stakeholders can work with Congress and the Administration to advocate for solutions that may advance their AV and ADS technology policy challenges.

DOT's Roadmap for AV Regulatory Action

NHTSA and FMCSA's forthcoming rules are linked to implementation of the agency's AV regulatory strategy described in "Automated Vehicles 3.0: Preparing for the Future of Transportation" (AV 3.0)—which outlines DOT's strategy for AV and

ADS regulatory activities.³ In that document, DOT comprehensively reviewed US transportation regulations and described the department's vision for partnering with the regulated community to modernize regulations and remove regulatory barriers for the development of vehicles with ADS.

In AV 3.0, DOT identified one of the primary obstacles delaying the federal government's approval of ADS technology: a legacy regulatory program that is based on mandatory standards developed with a human driver in mind. In general, manufacturers may only introduce ADS technology into commerce if the technology complies with current Federal Motor Vehicle Safety Standards (FMVSS).⁴ However, current FMVSS were developed with the assumption that a vehicle requires a human driver. Many FMVSS therefore depend on a driver and manual driver controls (like a steering wheel, gas or brake pedals), and many FMVSS compliance test procedures depend on a human test driver's interaction with those controls. This structure complicates manufacturers' ability to bring an AV or ADS technology to market.⁵

DOT then provided a series of regulatory activities the department envisioned to address these barriers. NHTSA, for example, planned to streamline the agency's procedures governing the decision-making process for exemptions to existing mandatory standards,⁶ and propose regulatory changes to establish exceptions to certain FMVSS for vehicles equipped with ADS. In parallel, DOT explained that FMCSA will propose changes to its "motor carrier safety regulations to accommodate the integration of ADS-equipped commercial motor vehicles."

Progress Towards Implementing the Plan: NHTSA and FMCSA Activity

NHTSA and FMCSA may soon provide greater clarity and detail regarding the scope of their planned revisions. In the meantime, the agencies have sought public comment on certain issues in advance of issuing proposed regulatory changes, and the comment record from these pre-proposal processes provides insight into the issues that the agencies are grappling with and stakeholders' perspectives on those issues.

First, NHTSA issued a request for comment in January 2018 to develop plans and proposals to remove or modify regulatory barriers in the FMVSS to accommodate AVs with interiors that do not incorporate design features normally included in conventional cars.⁷ Consistent with AV 3.0, NHTSA sought comments to identify barriers within the current FMVSS to ADS vehicle testing and compliance verification—with focus on ADS vehicles without manual driver controls. NHTSA also asked for input on the research needed to address those barriers and what NHTSA's role should be in conducting that research. Ultimately, NHTSA explained that it would like to remove or modify existing regulatory barriers where there is enough data and knowledge to support changes, while ensuring that current FMVSS safety performance requirements are as effective and needed for AVs as conventional vehicles.⁸ While the initial focus is on compliance test procedures, NHTSA also plans to explore "options for telltales, visual and auditory displays and controls and other innovative new vehicle design challenges."⁹

NHTSA received comments from a diverse range of stakeholders in the AV ecosystem, including traditional auto manufacturers, hardware and software component developers, and consumer safety groups and local governments. Auto manufacturers recommended that NHTSA: update the FMVSS to clearly define the terms "driver" and "operator" and add references to "the driver" where applicable; allow dual-mode vehicles to be FMVSS certified through the use of modeling and simulation; and develop new performance criteria specifically tailored to ADS-operated vehicles. Component manufacturers cautioned NHTSA against adopting a one-size-fits-all rule for ADS vehicles and components and urged NHTSA to minimize the burden on third party app developers to getting agency approval for ADS software updates that do not impact safety—such as aesthetics of the interior cabin, interior lighting and audio controls. Several commentators also recommended that NHTSA create procedural safeguards while developing substantive updates to ensure that the agency's engagement is timely and predictable. Consumer safety groups and local stakeholders urged NHTSA to: develop a protocol to capture and share safety data; focus on minimum safety standards to address the shift between a driver and a vehicle's ADS; and ensure that new safety technology is incorporated into autonomous vehicles. Overall, comments encouraged NHTSA to be proactive by updating, streamlining and modernizing regulations where possible to create a flexible regulatory environment, while prioritizing safety and remaining technology neutral.

A parallel proceeding at FMCSA largely tracked NHTSA's approach. The agency requested comment in March, 2018 regarding its plans and proposals to remove or modify regulatory barriers in the Federal Motor Carrier Safety Regulations (FMCSRs) to accommodate ADS-equipped commercial motor vehicles (CMVs).¹⁰ To inform its proposals, FMCSA asked for comments on a preliminary review completed by DOT's John A. Volpe National Transportation Systems (Volpe) Center to identify relevant FMCSRs. FMCSA also requested comments on regulatory requirements that are likely to be affected by integration of ADS-equipped CMVs; information about scenarios and environments where ADS may soon be tested and integrated into CMVs operating on public roads; and comments on measures needed to ensure proprietary or confidential

business information that is shared with the agency is protected.

As in the NHTSA proceeding, FMCSA received comments ranging from private stakeholders to public safety groups and transportation unions. Manufacturers encouraged FMCSA to: clarify how existing regulations apply when an ADS performs the driving function; coordinate with NHTSA to ensure their respective regulatory requirements align; provide regulatory flexibility to states that serve as testing grounds for ADS-equipped CMVs; and expedite implementation of its "Beyond Compliance" program and to include ADSs as part of that program.¹¹ Public safety groups cautioned FMCSA against relaxing safety regulations to test "unproven" ADSs on public roads and raised data security concerns. Unions urged FMCSA to consider the workforce implications of automation and encouraged FMCSA to require a trained commercial driver on all trucks that incorporate ADSs. In general, the comments encouraged FMCSA to work closely with NHTSA to create a flexible regulatory process to safely integrate ADS-equipped CMVs into the U.S transportation system.

AV 3.0 appears to reflect the commentary from both proceedings urging NHTSA and FMCSA to use existing regulatory authority to advance ADS-equipped vehicles. It should therefore come as no surprise that both agencies appear to be doing just that as they prepare to publish advanced notices of proposed rulemaking.

The text of both notices will reveal just how far the agencies are willing to go to remove regulatory barriers that are within the agencies' power. After all, as several commenters acknowledged in the NHTSA pre-rule proceeding last year, the agencies' have limited authority to act through the existing exemption process. DOT does not, for example, have specific authority to issue exemptions from FMVSSs to facilitate development or field evaluation of AV features or vehicles. Additionally, NHTSA may only grant waivers for a period of three years or less (subject to potential renewal upon request), and for a limited sales volume during that time of 2,500 or less vehicles or fewer.¹² These are issues that Congress may address through legislation, however, as discussed below.

The Congressional Role: Legislators May Act, But DOT Need Not Wait

Fortunately there is strong interest in Congress for legislation designed to facilitate deployment of AVs and ADS technology by delegating DOT specific regulatory authority it does not have today. Accomplishing that objective will not be easy in a divided Congress and will require resolution of complex and politically sensitive issues that include, but are not limited to the appropriate roles of federal, state and local governments. However, lawmakers entered 2019 with momentum from the previous term after the House unanimously passed the SELF DRIVE Act (H.R. 3388) and the Senate came very close—but ultimately not close enough—towards passing similar legislation near the end of 2018. The same bipartisan desire to pass legislation appears to motivate leaders of the new Congress as well.

On the other hand, there are structural factors that did not exist between 2017 and 2018 that may complicate that effort. First and foremost, Congress is no longer under one-party rule, the Democratic majority in the House will likely put its imprimatur on new comprehensive AV safety legislation. Democratic leaders of the Energy and Commerce Committee have not released their priorities for a new AV bill in 2019. However, on December 5, 2018, Rep. Jan Schakowsky (D-IL), who now chairs a key subcommittee with jurisdiction over AV policy, suggested that changes to H.R. 3388 will be forthcoming by describing the legislation as a "starting point for transparent improvements in consultation with the Senate."¹³

An increasingly acrimonious relationship between House Democratic committee leaders and the Trump Administration could also create obstacles to progress. For instance, coming away from a routine oversight hearing on NHTSA activities, Democratic Energy and Commerce Committee leaders criticized the agency's commitment to AV safety by "failing to set [safety] standards for autonomous vehicle technology and other advanced vehicle technologies."¹⁴ The leaders followed up by requesting information from NHTSA Deputy Administrator Heidi King regarding the agency's implementation of AV 3.0, with a focus on plans "to allow the AV industry to rapidly expand without Federal safety regulations."¹⁵ These inquiries are relatively straightforward oversight requests on the surface. However the tone and tenor could suggest an underlying discomfort with the Administration's AV policies that could increase as the regulatory process continues and, potentially, spill-over into the legislative process.

Finally, as spring gives way to the summer, the 2020 presidential election will gradually reduce the time lawmakers have to strike a bipartisan deal and increase the potential for presidential politics to reduce the likelihood of Senate success. Congress has plenty of time to resolve the issues that prevented both chambers from enacting legislation in 2018. However, with at least four senators currently running for the Democratic presidential nomination and critical time running off the legislative calendar with each passing day, the obstacles for forging legislation that can pass both chambers are certainly growing. These election-year externalities could present yet another structural impediment to progress.

Conclusion

Congress is certainly capable of overcoming these obstacles while bridging the gap on major policy divisions that prevented lawmakers from sending comprehensive AV safety legislation to the President's desk in 2018. However, stakeholders should be aware that comprehensive AV legislation may not be a viable option between now and December 2020 if the two parties cannot negotiate a solution to the issues that derailed Senate progress in 2018. What then? The answer, at least in the short-term, could be that working within DOT's existing regulatory process as established under AV 3.0 may present the most effective means for manufacturers, software developers and others to achieve their goals.

Forthcoming ANPRM notices from NHTSA and FMCSA—for instance—will offer insight into the specific obstacles to AV and ADS regulatory approval that the agencies are concerned about. They may also identify and seek comment on potential solutions to these challenges, while inviting the public to provide guidance on additional issues that require regulatory attention. Consequently, the notice-and-comment process could present stakeholders with an early opportunity to advocate for solutions to specific obstacles preventing the development of AV or ADS technology.

Stakeholders may also consider working with Congress to address specific regulatory or business challenges through narrow legislation—particularly if DOT may require additional statutory authority to solve a particular problem. While it can be challenging to secure passage of narrow legislation that does not address multiple stakeholder interests, a laser-focused bill that avoids broader, politically charged issues (including but not limited to preemption of state and local laws) can often prove politically tenable in a divided Congress. Additionally, introduction of narrow legislation can offer flexibility to generate support for a concept that can pass on its own merits while retaining the ability to ride along with comprehensive AV legislation if an opportunity for a bipartisan breakthrough emerges in Congress.

No matter what, a comprehensive advocacy plan that is narrowly tailored towards specific regulatory challenges, and which aligns with DOT's AV 3.0 regulatory program will likely put stakeholders in a better position to achieve their goals.

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¹ See Strategy Analytics, *Accelerating the Future: The Economic Impact of the Emerging Passenger Economy*, at 5 (June 2017), available [here](#).

² See *Federal Automated Vehicles Policy* (September 2016), available [here](#).

³ See *Automated Vehicles 3.0: Preparing for the Future of Transportation*, DOT (October 2018), available [here](#).

⁴ DOT regulations under 49 CFR Part 555 permit manufacturers to apply for a temporary exemption from the FMVSS. However, the exemption is limited to no more than 2,500 vehicles per year, for up to two years (three years if the exemption was granted on the basis of substantial economic hardship). Manufacturers may also apply for renewal for two more years (or three more years for hardship exemptions).

⁵ See AV 3.0 at 7.

⁶ The agency issued the final rule on December 26, 2018. See 83 Fed. Reg. 66158 (Dec. 26, 2018), available [here](#). Previously, exemption applications would be published for public comment only after NHTSA determined that the application was complete. The amended rule eliminates the evaluation for completeness, acknowledging that it can be difficult for NHTSA to determine whether complex applications are complete or lack adequate justification, which leads to processing delays. NHTSA must still determine whether there is adequate justification for the petition, but the amended rule streamlines the evaluation process.

⁷ *Removing Regulatory Barriers for Vehicles with Automated Driving Systems*, 83 Fed. Reg. 8,647 (January 18, 2018), available [here](#).

⁸ The RFC noted that while NHTSA began evaluating existing FMVSS for potential barriers in 2015, that review found few FMVSS barriers for vehicles with ADS and with conventional designs. Finding that most testing, compliance verification and self-certification issues for vehicles with ADS are precipitated by alternative vehicle designs, NHTSA initiated new research on the assessment and evaluation of, and solutions to these issues. See *Id.* at 2610.

⁹ *Id.* at 2610.

¹⁰ Federal Motor Carrier Safety Regulations which may be Barrier to Safe Testing and Deployment of Automated Driving Systems-Equipped Commercial Motor Vehicles on Public Roads, 83 Fed. Reg. 12,933 (March 26, 2018), available [here](#).

¹¹ The "Beyond Compliance" program was mandated by the Fixing America's Surface Transportation (FAST) Act to encourage fleets to voluntarily deploy advanced safety technologies and fleet management systems.

¹² *See infra* at n. 4.

¹³ *See* Statement of Rep. Jan Schakowsky (D-IL), December 5, 2018, available [here](#).

¹⁴ *See* Energy and Commerce Committee Press Release, Committee Leaders Voice Concerns Over Agency's Commitment to Consumer Safety, April 17, 2019, available [here](#).

¹⁵ *See* Letter to the Honorable Heidi King, Deputy Administrator of NHTSA, April 17, 2019, available [here](#).