

## 5 Takeaways From The DOT's New Self-Driving Cars Policy

By **Linda Chiem**

*Law360, New York (September 20, 2016, 9:26 PM EDT)* -- The Obama administration's first-of-its-kind federal policy aiming to accelerate the development of self-driving cars establishes a rigorous safety protocol for carmakers and technology companies to meet, while also seeking to expand the U.S. Department of Transportation's regulatory reach into car design and performance standards.

The 116-page road map issued by the DOT's National Highway Traffic Safety Administration on Tuesday offers broad federal guidance on how auto manufacturers, technology giants, artificial intelligence developers and other companies should go about testing and deploying their automated car technologies for mainstream America.

The highly anticipated federal policy takes a flexible approach to regulating self-driving or driverless cars than the far more conservative preliminary policy that NHTSA released in 2013, experts say, notably carving out a 15-point safety and performance assessment checklist for developing so-called highly automated vehicles that provides some wiggle room for regulations to keep pace with the fast-developing technology.

"The 2013 [policy] was the recognition and excitement of innovation and more and more autonomy in vehicles but it urged people to move with caution," said Katie Thomson, chairwoman of Morrison & Foerster LLP's transportation industry group and the former senior counsel at both the U.S. DOT and the Federal Aviation Administration. "That was dipping the toe in the water. Pivot forward to today and you see real strides on behalf of DOT to be more flexible and nimble and support the development and deployment of these technologies."

Here are five takeaways from NHTSA's new Federal Automated Vehicles Policy.

### **Prioritizing Safety**

The new federal policy, which experts say is surprisingly substantive and far-reaching, heavily prioritizes safety by putting the onus on car manufacturers to voluntarily share information with NHTSA on how their self-driving cars are designed and validated, how their technology functions and whether the interface can properly alert a human driver to take over the wheel if needed.

NHTSA says it will look at 15 criteria when considering whether a self-driving car is safe, including data recording and sharing; privacy; system safety; compliance with federal, state and local laws; crashworthiness; registration and certification; ethical considerations; and others.

"NHTSA has the right idea here in that they want to involve themselves on the ground floor, in the process, rather than coming in at the end to say you three car developers are on the correct side of the line or you five developers are on the wrong side of the line that we have now arbitrarily drawn long after your technology is completed," said Thomas C. Regan, LeClairRyan's automotive industry team leader.

Right now, the 15-point safety assessment letter that companies are being asked to submit is voluntary but U.S. Transportation Secretary Anthony Foxx said Tuesday that they intend to institute a rulemaking process to give the safety assessment criteria the binding force of law.

"It's a guidance document and no one else has to take this guidance seriously, but it seems they've gotten a lot of buy-in from experts and industry players," O'Melveny & Myers LLP attorney Jason Orr told Law360. "It's not that they're leaving it up in the air so much as the DOT is applauding efforts to self-regulate and indicate that they want to encourage this and they want to be kept in the loop."

### **Feds v. States Taking the Wheel on Policy**

The federal government made clear Tuesday that its regulatory authority kicks in — meaning its rules apply — when a car is fully automated and takes full control of the driving in some or most of the circumstances.

It's an effort to smooth out or eliminate any inconsistencies in state-level regulation that have been blamed by some stakeholders for stymieing advancements of the technology, experts say.

"That's a helpful statement that clarifies the department's position on this issue of its legal authority," Thomson said. "The federal government has exclusive authority of the safety of vehicles and that includes software to operate the vehicles to varying degrees. And DOT is saying, 'We intend to fully occupy this space, but we will work with you to regulate in the other areas you normally regulate.' It's just making clear where the line is."

There's currently a patchwork of regulation in just a handful of states, including California, Nevada, Florida and Michigan, legalizing the testing of self-driving cars, although some of those regulations require that the operators of the automated vehicles stay in the driver's seat and have the ability take over control of the car if the technology falters or an emergency pops up.

"They have legitimized their own authority to act in a more ad hoc manner, more situationally and more case by case, as opposed to before," said Mike Nelson, a partner at Sutherland Asbill & Brennan LLP. "The emphasis on safety and the appreciation that, while this technology has potential for unknown and individual accidents and risks, a greater good is going to be achieved with automation."

So while NHTSA has now stepped up to say it's at the head of the table when it comes to regulating the testing and deployment of highly automated vehicles, it's encouraging states to work together to establish cohesive laws for operating such cars in their jurisdictions. For example, states will retain their traditional regulatory oversight over areas such as licensing human drivers and registering motor vehicles in their jurisdictions, enacting and enforcing traffic laws and regulations, conducting safety inspections, and regulating motor vehicle insurance and liability requirements.

"One thing this made very clear is that NHTSA and the DOT are emphasizing the preemptive force of any regulations that evolve from this guidance and they're saying to the public and to state regulators that

vehicle performance standards — which in their mind includes the software, the artificial intelligence program — are federal territory and states would do well to cede their authority [in that space]," Orr said.

He added that it's an open invitation for states to adopt NHTSA guidance on a broader scale than has been done in the past. So while only a few states have enacted laws to test automated cars on roads, the expectation here is that more states are going to pass laws to address this, he said.

### **Expanding Feds' Regulatory Reach**

Under current law, carmakers are responsible for self-certifying that all of the vehicles they manufacture for use on public roadways comply with all applicable federal motor vehicle safety standards, or FMVSS. So, if a car is compliant within the existing FMVSS regulatory framework and maintains a conventional vehicle design, there is currently no specific federal legal barrier to a highly automated vehicle being sold to consumers, NHTSA said.

But going forward, NHTSA says it may look to Congress to expand its regulatory reach, notably the authority to approve automated or self-driving car features before they can go to market.

NHTSA doesn't have this power currently. But other agencies, like the Federal Aviation Administration, do have the power of premarket approval to regulate the introduction of new products and technologies. For example, the FAA uses premarket approval processes to regulate the safety of complex, software-driven products like autopilot systems on commercial aircraft, and unmanned aircraft systems, or drones.

Thomson explained that it's an unusual ask that's likely to trigger additional discussion from stakeholders during the 60-day comment period that's now open on the new policy.

"In this case, NHTSA is looking to get involved in improving these technologies on the front end rather than setting prescriptive standards," Thomson said. "[It] would give NHTSA much more of a window into the design, the deployment of how it operates and it could intervene at any time to say, 'This isn't appropriate for certification,' or that it's sufficiently safe. That's a very big paradigm shift."

Another route would be to have Congress expand NHTSA's existing exemption authority, which only allows it to grant exemptions from auto safety standards to 2,500 vehicles per year for a two-year period.

For now, manufacturers and other entities designing new automated vehicle systems are subject to NHTSA's defects, recall and enforcement authority. And NHTSA made clear that it will continue to exercise its available regulatory authority over highly automated vehicles by using what's already within its power — interpretations, exemptions, notice-and-comment rulemaking, and defects and enforcement authority.

"It's almost like a student driver scenario where the companies making the cars are in the driver's seat but the federal government is going to be in the right passenger seat watching what's going on," Nelson said.

NHTSA simultaneously issued what it called a final enforcement guidance bulletin on Tuesday, clarifying how its recall authority will apply to automated vehicle technologies. It emphasized that semiautonomous driving systems that fail to adequately account for the possibility that a distracted or inattentive driver-occupant might fail to retake control of the vehicle in a safety-critical situation may be defined as an unreasonable risk to safety and subject to recall.

### **Cybersecurity, Data-Sharing Concerns**

The new policy doesn't establish a uniform regulatory standard to address vehicle cybersecurity. NHTSA says it's an evolving area and more research is needed before proposing a national standard.

Instead, it's encouraging companies to design their self-driving car systems following established industry best practices and principles published by National Institute for Standards and Technology, SAE International, the Alliance of Automobile Manufacturers, the Association of Global Automakers, the Automotive Information Sharing and Analysis Center and other relevant organizations.

Manufacturers and other entities are also being asked to document their testing and validation methods and collect incident and crash data "for the purposes of recording the occurrence of malfunctions, degradations, or failures in a way that can be used to establish the cause of any such issues," according to NHTSA.

But it remains to be seen how willing companies will be to share information they perceive as potentially hindering their competitive edge in the race to get self-driving cars onto U.S. roads.

"I'm not sure whether entities who are working in this innovative space are going to feel comfortable sharing that information both from a proprietary perspective and liability perspective," Thomson said.

### **Liability Concerns**

States will be responsible for determining liability rules for self-driving cars and NHTSA advised that they consider how to allocate liability among self-driving car owners, operators, passengers, manufacturers and others when a crash occurs.

For example, if a highly automated vehicle is determined to be at fault in a crash, who should be held liable? For insurance, states need to determine who — the owner, operator, passenger, manufacturer or another party — must carry motor vehicle insurance.

Insurers have been waiting for concrete information on the potential risk exposures faced by the first wave of autonomous vehicles to roll in before they start underwriting policies for self-driving cars en masse, experts tell Law360. Unlike other emerging technologies such as drones, which are comparable to existing aircraft from a risk management standpoint, autonomous cars represent a whole new frontier for the insurance industry, according to attorneys.

"I think we will start to see an increase in product liability cases against manufacturers and developers of these technologies should these new technologies fail in any way, especially in personal injury lawsuits," said Darren C. Audino, a partner at Weber Gallagher Simpson Stapleton Fires & Newby LLP. "Lawsuits could and should bring caution to manufacturers and developers of these new technologies and to companies who will ultimately be placing HAVs into the marketplace. Lawsuits are inevitable, as no technology is flawless."

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