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Client Alert Commentary

Latham & Watkins Environment, Land & Resources Practice August 2, 2017 | Number 2193

Self-Driving Car Legislation: Congress Turns the Ignition

A bill that could facilitate more highly automated vehicles on US roads — with important economic and social implications — gains traction.

Overview: Gearing Up for Legal and Regulatory Change

Society is on the verge of a "self-driving" revolution. Given recent technological advancements, which have been perhaps more rapid than widely anticipated, new vehicle technologies will soon fundamentally alter the transportation system. This new technology will bring dramatic economic and social consequences, with implications not only for insurance markets and products liability law, but also for patterns of behavior and, indeed, for how people think about automobile transportation going forward.

America's legal and regulatory system is not yet ready for this change. Certainly, several states have adopted legislation addressing testing of these vehicles, and on-road testing is underway in places such as Ann Arbor, Pittsburgh, Phoenix, and San Francisco. During the Obama administration, the US Department of Transportation actively worked to develop policies and plans to address safety issues related to emergent vehicle technologies, while organizations such as the Uniform Law Commission highlighted changes to existing law that would be necessary to accommodate self-driving cars. But particularly at the federal level, limited concrete regulatory or legislative activity has occurred thus far to address these new technologies and to facilitate the emergence of self-driving vehicles.

That may soon change. On July 27, 2017, the House Energy and Commerce Committee unanimously voted out of Committee the Safely Ensuring Lives Future Deployment and Research in Vehicle Evolution Act, or the SELF DRIVE Act. The bill addresses highly automated vehicles (HAVs), which it defines as vehicles that are "capable of performing the entire dynamic driving task on a sustained basis." The bill includes provisions addressing the preemption of state laws regulating the safety of HAVs, and directing the National Highway Traffic Safety Administration (NHTSA) to use its existing authority to prioritize and promulgate updated and new safety regulations. Timing for the full House's consideration of the bill is uncertain; in the meantime, however, Senators John Thune, Bill Nelson, and Gary Peters are expected to introduce a companion Senate bill in the very near future. This legislation, if enacted, could have major consequences for the regulation of HAVs — helping to prompt action at NHTSA and to encourage further testing and the commercial introduction of new vehicles.

This *Client Alert* reviews the existing legal and regulatory framework for vehicle safety and how the current framework implicates HAVs. This *Client Alert* also identifies current and pending state regulatory

activities, and then focuses on key provisions and consequences of the federal legislation now under consideration.

The Coming HAV Revolution

An understanding of what technologies constitute HAVs may be useful to set the stage. In 2014, the Society for Automotive Engineers International (SAE International) designed a classification system for driving automation, SAE J3016, which is now used worldwide. SAE J3016 identifies five descriptive and technical levels of driving automation (above a "Level 0," which represents no automation at all). An important distinction lies between "Level 2" — where the human driver performs a large part of the dynamic driving task, but a vehicle can take certain actions itself — and "Level 3" (Conditional Automation), where an automated driving system performs many safety-critical functions. HAVs are generally defined as Level 3 and higher, namely "Level 4" (High Automation), where vehicles can drive themselves almost all of the time without driver intervention except in unmapped areas or during severe weather, and "Level 5" (Full Automation), where automated vehicles can drive in any conditions.

The recent pace of HAV technology development and market change has been swift, and further developments seem likely to come even faster. The number of precursor "advanced" driver-assisted systems — including automated breaking systems, driver alerts, adaptive cruise control, and other advanced automobile features associated with lower levels of automation — rose from 90 million in 2014 to 140 million in 2016, creating a market worth roughly US$15 billion. The market for partially and fully automated vehicles is expected to rise to US$42 billion by 2025 and to US$77 billion by 2035, when some estimate that 12 million *fully* automated vehicles may be sold per year worldwide.[1] Traditional automobile manufacturers and start-ups alike have announced major HAV initiatives and partnerships, both reflecting and underscoring the potential for further growth. The regulatory system must evolve to adapt to this accelerating change.

A Roadmap to the Federal Vehicle Safety Regime

The National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act) directs NHTSA to prescribe "motor vehicle safety standards," which must be "practicable, meet the need for motor vehicle safety, and be stated in objective terms."[2] Federal motor vehicle safety standards (FMVSS) are minimum standards for motor vehicle or motor vehicle equipment performance that "[protect] the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident ..."[3] Importantly for HAVs, "motor vehicle equipment" is defined broadly to include virtually any part, component, or system included in a motor vehicle — and NHTSA has interpreted the term to include, for example, onboard communications technologies.[4]

NHTSA has promulgated more than 70 FMVSS addressing a broad range of safety issues, from seat belts to air bags to electronic stability control systems. The first FMVSS were developed in 1967 and mostly related to the physical design of vehicles. New FMVSS are adopted roughly every two to five years, and sometimes more often than that, through agency rulemaking. The FMVSS are found at 49 C.F.R. Part 571.

With certain exceptions, the Safety Act generally prohibits manufacturing to sell, selling, introducing or delivering into interstate commerce, or importing any motor vehicle or motor vehicle equipment manufactured on or after the effective date of an applicable FMVSS, unless certain conditions apply. Specifically, the exceptions include if the activity complies with the standard and, importantly, is covered by a manufacturer certification of such compliance.[5] The Safety Act grants NHTSA the authority to enforce the FMVSS, but not the ability to require pre-market approval of vehicles. NHTSA exercises this

authority by issuing recalls or other remedy orders after the fact for failure to comply with a standard or to respond to a new a safety defect.

NHTSA thus has authority to conduct inspections or investigations of automobiles for the purpose of enforcing the Safety Act and its implementing regulations, and likewise can investigate motor vehicle accidents. Following such an investigation, the agency may determine, after notice and an opportunity for the manufacturer to present information, that a motor vehicle or motor vehicle equipment contains a *defect related to motor vehicle safety* or *does not comply with an applicable FMVSS*. In such cases, NHTSA may notify owners, purchasers, and dealers, and may take action to remedy defects or noncompliance. Manufacturers have affirmative duties to notify NHTSA and consumers if they learn of a defect relating to motor vehicle safety or noncompliance with FMVSS.[6] Additionally, NHTSA can require the manufacturer to remedy defect or noncompliance by repairing the vehicle in question, replacing the vehicle, or refunding purchase prices, less reasonable depreciation.[7]

NHTSA can exempt up to 2,500 vehicles sold in any 12-month period from applicable FMVSS for up to two years if, among other requirements, an exemption would allow for the development or field evaluation of a new safety feature that allows vehicles to meet or exceed the safety level of the standard.[8] In addition, NHTSA may exempt a motor vehicle or item of motor vehicle equipment from the general prohibition on sale or import without a certification if the agency concludes an exemption is "necessary for research, investigations, demonstrations, training, competitive racing events, show, or display."[9]

NHTSA may also preempt state regulation of the safety of motor vehicles and motor vehicle equipment; however, the agency must affirmatively regulate for preemption to apply. That is, the Safety Act provides that "[w]hen a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same performance aspect of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter."[10] NHTSA's preemption of state motor vehicles safety standards does not extend, however, to motor vehicle operation and maintenance, licensing and permits, driver training, liability, and insurance, which remain matters of state law.

Further, the Safety Act includes a savings clause relating to common law liability claims, stating that "[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law."[11] This language has twice led the Supreme Court to consider the relationship between the Safety Act and state tort law. In *Geier v. American Honda*, 529 U.S. 861 (2000), the Court in a 5-4 decision held that while a tort claim was not expressly preempted by the Safety Act, an FMVSS addressing passive restraints nevertheless preempted a state tort action seeking to hold the manufacturer liable for failure to install airbags. The Court held that, in the particular instance, the tort action was preempted under conflict preemption principles because it would have "frustrated the purpose" of the standard, a "significant objective" of which was to give manufacturers a choice about passive restraint technology. A decade later, however, the Court in *Williamson v. Mazda Motor Co.*, 562 U.S. 323 (2011), held unanimously that a federal standard relating to seatbelts did not preempt state tort suits claiming that the manufacturer should have installed a particular type of seat belt where state tort liability would not thwart the purposes and objectives of the federal safety standard in question. *Williamson* thus clarified new limits on the circumstances in which FMVSS preempt state tort claims, and thereby announced that lower courts had over-read the Supreme Court's prior decision in *Geier.*

The Intersection of HAVs and the Safety Act

Out of the more than 70 FMVSS currently in effect (the most recent of which was promulgated just last year), none directly address HAV technologies. Some recently proposed rules begin to consider aspects

of HAV design, such as proposed FMVSS No. 150 that, when finalized, will regulate vehicle-to-vehicle (V2V) communications.[12] Although FMVSS were not designed for HAVs, some of the standards could be read to apply to the emergent vehicle technology. Whether or not current federal standards would still preempt state vehicle safety regulation addressing HAVs — as well as whether or not such state regulation might be subject to conflict preemption — remains unclear.

NHTSA has acknowledged that, precisely because the current FMVSS do not expressly contemplate HAV technologies, a number of them may present challenges with regard to how they should apply to HAVs and how manufacturers could certify compliance. In 2016, the Volpe Center, which serves as the US Department of Transportation (DOT)'s research body, produced a report that identified a long list of FMVSS that could prove problematic for future AV concepts and designs — including issues related to theft protection, rollaway prevention, and brake systems, as well as the more general issue of many FMVSS explicitly or implicitly referencing a human driver.[13]

Furthermore, in 2015 and 2016, Google asked NHTSA to interpret how certain FMVSS would apply to Google's planned "self-driving system" (SDS) technology. NHTSA responded in February 2016, acknowledging that the FMVSS "were drafted at a time when it was reasonable to assume that all motor vehicles would have a steering wheel, accelerator pedal, and brake pedal, almost always located at the front left seating position, and that all vehicles would be operated by a human driver." NHTSA nevertheless agreed with Google that the term "driver" as used in FMVSS could refer to an artificial intelligence system, including Google's SDS. However, NHTSA outlined possible certification problems under the FMVSS, stating the agency either did not know how Google could comply with certain FMVSS or whether the company would need to provide more information before NHTSA could assess compliance (*e.g.,* requirements that address hand or foot operation of certain controls, location of certain controls relative to the driver).[14]

During the Obama administration, NHTSA actively focused on HAV-related issues. In 2013, the agency issued its Preliminary Statement of Policy Concerning Automated Vehicles. In early 2016, DOT and NHTSA issued a joint statement, the "DOT/NHTSA Policy Statement Concerning Automated Vehicles," intended as an update to the 2013 statement. Then, in September 2016, DOT and NHTSA issued the Federal Automated Vehicles Policy, which included safety guidance for the design, development, testing, and deployment of HAVs. As part of the same policy, DOT and NHTSA issued a Model State Policy in September 2016 that clearly distinguished the federal and state governments' responsibilities in regulating HAVs. The Model State Policy also clarified the policy areas that states may consider and analyzed the current and potential regulatory tools that NHTSA can use to help develop and deploy HAV technology. The agency requested comment on the policy and identified a roadmap for future regulatory and other action, including possible rulemakings, public workshops, expert review, work plans for implementation, and education efforts.

Earlier this year, the Trump administration announced its intention to revise the policy, saying that it would release an update in mid to late 2017 that focused on encouraging industry innovation, new market entrants, and ideas that produce safe vehicles. However, as of the publication of this *Client Alert*, the administration has not indicated its intention to take further steps to address HAVs under the Safety Act, and neither DOT nor NHTSA have publicly signaled any move to initiate regulatory action.

State Regulation of HAVs

Meanwhile, many states are moving forward. California, Florida, Georgia, Michigan, Nevada, North Dakota, Tennessee, Utah, and Washington, D.C. have passed major HAV legislation, and Arizona has issued an executive order related to HAVs. Most state laws concerning AVs implement rules for safe HAV

testing procedures, including elements such as prohibiting the operation of HAVs except for testing, mandating the presence of a licensed driver able to take control of an HAV, and requiring special insurance, plating, and data recording rules. Two states — Florida and Georgia — allow operating a fully automated vehicle beyond testing purposes without a human driver. In addition, the Uniform Law Commission has published recommendations for a uniform law on state regulation of HAVs.

Perhaps the most extensive state effort to regulate HAVs is in California, where regulations governing testing of autonomous vehicles were adopted in 2014 and where more than 20 companies are currently testing HAVs (with test drivers behind the wheel) on public roads. In addition, in March 2017, California released proposed rules that would both update provisions to address manufacturer testing of autonomous vehicles that do not require a driver, and govern "deployment" (*i.e.*, operation of autonomous vehicles by the public on public roads).

Additionally, California, Michigan, and Tennessee considered further HAV legislation in 2016, 13 states without HAV legislation considered such legislation in the same year, and 11 states considered HAV legislation in 2015. Furthermore, scores of other bills relating to HAVs have been proposed in states across the country. Concern exists in the auto and technology industries that — absent preemptive federal action to provide a uniform auto-safety framework — a patchwork of state requirements will develop instead, placing potential burdens on deploying new technologies.

Proposed Federal Legislation

While NHTSA has not yet signaled further regulatory action, Congress is now moving to prompt such action. The SELF DRIVE Act includes provisions that further preempt state regulation while also directing NHTSA to take regulatory actions to address HAV safety.[15]

In particular, the bill's preemption provision would amend the Safety Act to prohibit state and local governments from maintaining, enforcing, prescribing, or in effect continuing any law or regulation "regarding the design, construction, or performance of highly automated vehicles, automated driving systems, or components of automated driving systems unless such law or regulation is identical to a standard prescribed under this chapter."[16] In other words, preemption under this provision is considerably broader than the Safety Act's existing general preemption provision, which only preempts state safety regulation when an applicable FMVSS is in effect. The bill includes a new savings clause, clarifying that the Safety Act does not prohibit state or law laws or regulations "regarding registration, licensing, driving education and training, insurance, law enforcement, crash investigations, safety and emissions inspections, congestion management ... or traffic unless the law or regulation is an unreasonable restriction on the design, construction or performance of" HAVs, automated driving systems, or components of automated driving systems.[17] Finally, the bill would rewrite the Safety Act's existing savings clause relating to common law actions. The bill retains language that "[c]ompliance with a motor vehicle safety standard does not exempt a person from liability at common law," but adds a "rule of construction" providing that "[n]othing in this section shall be construed to preempt common law claims."[18]

In addition, the bill requires DOT and NHTSA to take a number of actions to update the FMVSS. First, within 24 months of enactment, DOT must rule to require manufacturers to submit "safety assessment certifications regarding how safety is being addressed by each entity developing a highly automated vehicle or an automated driving system."[19] In the interim, entities must submit safety assessment letters to NHTSA as designated by the September 2016 Federal Automated Vehicles Policy. But the bill clarifies DOT or NHTSA cannot condition deployment or testing of HAVs on review of safety assessment certifications. Second, within one year of enactment, DOT must review FMVSS, as well as publish a plan for updating existing standards and issuing new ones to accommodate developing and deploying HAVs.

This includes NHTSA establishing "both priorities with respect to highly automated vehicles and priorities with respect to other safety initiatives of the Administration, in order to meet the Nation's motor vehicle safety challenges."[20] Third, within 18 months of enactment, NHTSA must "initiate" the first rulemaking in accordance with the plans and then continue future rulemakings in accordance with the plan.[21] The legislation does not state when this regulation must be completed, nor does it specify the scope of issues that must be regulated or the pace at which NHTSA must address these issues.

The bill also amends the Safety Act to require that, in order to manufacture for sale, offer for sale, sell, introduce or deliver for introduction in interstate commerce, or in order to import any HAV or vehicle that performs partial driving automation, a manufacturer must first develop a "cybersecurity plan" meeting certain requirements.[22]

The bill also adds provisions to expand the Safety Act's exemption authority. For instance, the bill adds a new exemption for "field evaluation" of HAVs, capped at 100,000 vehicles per manufacturer in any 12-month period (as opposed to the current applicable limit of 2,500 vehicles per year), subject to a four-year limit.[23] The bill also amends the Safety Act's exemption provision to place an overall limit on all types of exemptions (not just for HAVs) of 25,000 vehicles in the first year; 50,000 vehicles in the second year; and 100,000 vehicles in the third and fourth years, while expanding the periods of certain types of exemptions.[24] Finally, the bill establishes certain labeling and consumer information requirements for HAVs and would create a federal HAV Advisory Council housed within NHTSA.[25]

Conclusion: A New Reality Ahead

Highly autonomous vehicles are clearly on the horizon. America's legal and regulatory system must take steps now to pave the way for this new reality. States have already actively promoted autonomous vehicle testing, and they will need to continue addressing the impact of HAVs on vehicle licensing and operation. But many industry players are concerned that federal action is urgently needed to reduce uncertainty, promote consistency, and not least of all, encourage further innovation. Congress may now be poised to respond, with significant implications for the future of these emerging technologies and the economic and social changes they will bring.

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Endnotes

[1] *See* KERSTEN HEINEKE ET AL., SELF-DRIVING CAR TECHNOLOGY: WHEN WILL THE ROBOTS HIT THE ROAD?, MCKINSEY & COMPANY (May 2017); *see generally* HUBERTUS MEINECKE, AUTOMOTIVE: SEIZING MARKET OPPORTUNITIES AMID INDUSTRY DISRUPTION, THE BOSTON CONSULTING GROUP (July 2017); *see also* NIKOLAUS LANG ET AL., REVOLUTION VERSUS REGULATION: THE MAKE-OR-BREAK QUESTIONS ABOUT AUTONOMOUS VEHICLES, THE BOSTON CONSULTING GROUP (Sept. 2015).

[2] 49 U.S.C. § 30111(a).

[3] *Id.* at § 30102(8), (9).

[4] *Id.* at § 30102(7).

[5] *Id.* at § 30112(a)(1), 30115(a).

[6] *Id.* at § 30118, 30119.

[7] *Id.* at § 30120.

[8] *Id.* at § 30113(b)(3), (d), (e).

[9] *Id.* at § 30114.

[10] 49 U.S.C. § 30103(b)(1).

[11] *Id.* at § 30103(e).

[12] 82 Fed. Reg. 3854 (Jan. 12, 2017).

[13] ANITA KIM ET AL., REVIEW OF FEDERAL MOTOR VEHICLE SAFETY STANDARDS (FMVSS) FOR AUTOMATED VEHICLES: IDENTIFYING POTENTIAL BARRIERS AND CHALLENGES FOR THE CERTIFICATION OF AUTOMATED VEHICLES USING EXISTING FMVSS, JOHN. A. VOLPE NATIONAL TRANSPORTATION SYSTEMS CENTER, US DEP'T OF TRANSP. (March 2016).

[14] Letter from Paul A. Hemmersbaugh, Chief Counsel, NHTSA, to Chris Urmson, Director, Self-Driving Car Project, Google, Inc. (Feb. 4, 2016) (on file with NHTSA) (referencing Letters from Urmson to Hemmersbaugh (Nov. 12, 2015 and (Jan. 11, 2016)).

[15] H.R. 3388, 115th Cong. (2017).

[16] *Id.* at § 3.

[17] *Id.*

[18] *Id.*

[19] *Id.* at § 4.

[20] *Id.*

[21] *Id.*

[22] *Id.* at § 5.

[23] *Id.* at § 6.

[24] *Id.*

[25] *Id.* at §§ 8, 9.