

Charting the Future of Autonomous Vehicle Policy

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Last month, the National Highway and Safety Administration (NHTSA) released its highly anticipated self-driving vehicle [guidelines](#). Much of the momentum behind the release of this policy is related to the ability of autonomous vehicles to drastically [reduce](#) the 35,000 automotive fatalities that occur each year. More critically, 94 percent of accidents are due to [human error](#). This year, the issue gained even more attention given the 10.4 percent uptick in deaths in 2015. Although seemingly a distant reality, industry experts forecast that autonomous vehicles are no more five-years from full scale deployment. Impacted stakeholders should consider participating in the policy conversation, while also strategizing for opportunities and challenges knowing the changing landscape.

NHTSA's policy guidance, while not an enforceable regulatory document, frames the discussion for state and federal policy on self-driving vehicles. In particular, the debate about how to regulate self-driving cars highlights two broader issues – the government's regulatory approach in the age of technological disruption, and product liability in the age of automation.

NHTSA's guidance while generally well received by industry, offers a mixed bag and underscores the need for industry participants to remain vigilant during policy development. Under the current regulatory regime, NHTSA lacks preemption authority over state law. Traditionally, states have regulated vehicle licensure and registration while the federal government regulates motor vehicle safety standards. NHTSA's guidelines suggest states retain the authority over driver's licenses, car registrations, traffic laws, insurance, and legal liabilities. To the benefit of industry and greater regulatory certainty, the regulations do suggest that states avoid issuing possibly conflicting safety standards and leave that authority to the federal government. However, NHTSA's guidance does propose regulatory expansions with unclear means of enforcement. For example, at the heart of the guidance is a 15-point safety assessment that NHTSA requests manufacturers adopt and submit to NHTSA in the development of their self-driving vehicles. Yet questions regarding enforcement and accountability remain largely unclear. This type of voluntary, but suggestive, policy regime is indicative of the regulatory approach that the federal government is likely to adopt more frequently in the age of technological disruption. Because the development of technology will quickly outpace statutory mandates and the federal rulemaking process, NHTSA is taking this more suggestive regulatory approach.

However, certain parts of NHTSA's guidance have raised industry concerns and require more clarity from NHTSA and potentially Congress. In particular, section four of the guidance speaks to NHTSA's view of modern regulatory tools that it may need to regulate automated vehicles.

NHTSA's discussion of pre-market approval authority and potential post-sale authority raises a critical red flag. Today, auto manufacturers self-certify compliance with the federal motor vehicle safety standards before deploying their vehicles. Imagine a scenario where a government entity pre-certifies the sale of every new make and model of vehicle or aftermarket accessory. The implications for stifling innovation and market deployment would be staggering. The same outcome could be true in a post-sale authority environment if NHTSA determines it must preapprove and regulate post sale software updates or aftermarket accessories on automated vehicles. Again, industry participants should consider taking a hard look at these discussions for potential impacts to their business. Despite NHTSA's stance of taking a more hands off approach in this sector, issues such as these require further discussion, clarification, and debate and, ultimately, the only way to do so is to become a part of the federal process by engaging with NHTSA, Congress and other industry stakeholders.

From a legal liability perspective, the transition to autonomous vehicles has the potential to create a sea change in the way liability is assigned in automobile accidents and other tort related circumstances. As acknowledged previously, 94 percent of vehicle crashes are due to user error. In a world of driverless vehicles accidents will still occur but much less frequently. Should the existing liability framework continue to exist or should industry look for a way to treat this type of circumstance differently so that litigation does not impede the deployment and adoption of driverless cars? Adam Thierer from the Mercatus Center at George Mason University takes an interesting [look](#) at the liability question and the implications for the legal industry and insurance stakeholders. Thierer argues that liability will shift to the fleet owner or vehicle manufacturer instead of the driver. This possibility raises questions for auto manufacturers, parts suppliers, and aftermarket parts suppliers about how they will deal with liability issues moving forward. As Thierer suggests, one possible solution is for Congress to exempt manufacturers from state tort claims and create a separate legal process for autonomous vehicle liability suits.

Ultimately, the questions of regulatory authority and approach, compliance and liability will continue to play out over and over again as more and more segments of the economy come under the reach of automation. As much as technology outpaces existing norms and public policy, the federal government will continue to play a role in the regulatory landscape and market development. In the context of autonomous vehicles, the process of forming a new regulatory environment necessitates industry participation and advocacy. Companies looking to plan ahead for this change should consider the implications and whether or not to add their voice to the conversation.

Please contact Kevin Swanson at 202.747.9578 for more information about NHTSA's guidance on self-driving vehicles and how Michael Best Strategies can help stakeholders engage with the federal government on these emerging and challenging issues.