

3 Takeaways From The Self-Driving Car Bill

By Linda Chiem

Law360, New York (September 8, 2017, 9:38 PM EDT) -- The House of Representatives' swift passage of first-of-its-kind legislation governing how autonomous or self-driving cars are manufactured, tested and deployed in the U.S. assures carmakers and technology companies that the federal government will take the wheel on safety standards, experts say, offering long-sought regulatory clarity to advance the new frontier for automobiles.

In a voice vote on Sept. 6, the House passed HR 3388, the Safely Ensuring Lives Future Deployment and Research in Vehicle Evolution, or SELF DRIVE, Act under what's known as suspension of the rules without amendments, quickly advancing legislation that's intended to ease the process for deploying self-driving cars on U.S. roads by updating federal rules for safety, vehicle testing and other measures while also more clearly defining the roles that federal and state governments will have in regulating highly automated vehicles and those who operate them.

The bill heads over to the Senate, which has not yet taken up similar self-driving car legislation in this Congress. But if the measure continues to advance and ultimately becomes law, it will ensure that the federal government maintains its tight rein on establishing national safety standards for cars, including highly automated vehicles, while leaving room for states and automakers to come up with their own potential rules for other consumer-facing issues, experts told Law360.

Here, Law360 examines some of the highlights of the bill.

Asserting the Feds' Authority on Safety

Under the SELF DRIVE Act, no state would be allowed to regulate the design or construction of self-driving or automated vehicles unless its laws are identical to federal law. Nothing in the bill, however, should be seen as preventing a state from regulating driver-related issues, such as licensing and training, or from regulating dealerships selling autonomous vehicles.



The Waymo driverless car is displayed during a Google event last year in San Francisco. (AP)

“Most importantly, it places responsibility for regulating the design and performance of these vehicles squarely on the federal government, thereby eliminating the costs and legal risks associated with the patchwork of state regulations that have been developing nationally,” said Christopher Grigorian, a partner in Foley & Lardner LLP’s automotive practice. “And, by expanding NHTSA’s exemption authority, the bill would accelerate the real-world use of driverless vehicles, which is crucial to improving these systems and increasing consumer acceptance.”

Experts say that by drawing that clear line in the sand on federal preemption for self-driving or highly automated vehicles, the bill provides the industry with comfort and clarity.

“The preemption language provides significant clarity to assure self-driving vehicle manufacturers that the National Highway Traffic Safety Administration is responsible for national consistency through modernizing the Federal Motor Vehicle Safety Standards to take into account self-driving vehicles,” said Chan Lieu, senior policy adviser in Venable LLP’s legislative and government affairs group.

The bill moves the needle toward realizing a more large-scale deployment of automated vehicles by allowing automakers to each test up to 100,000 self-driving vehicles without meeting existing auto safety standards. But the U.S. Department of Transportation would have to develop a new set of safety rules over the next year for those new self-driving cars.

Specifically, the bill allows automakers to obtain exemptions to deploy up to 25,000 vehicles each without meeting existing auto safety standards in the first year so that they can test the cars in the field and collect data that would better inform future research and development. The cap on the exemptions would then climb to 100,000 vehicles for each automaker every year over a three-year period.

Meanwhile, some attorneys said concern about an unworkable patchwork of state regulations surrounding highly automated vehicles has been overblown.

“All serious players knew that the federal government would retain the exclusive authority to establish safety standards for HAVs,” said Richard Walawender, co-leader of Miller Canfield Paddock and Stone PLC’s automated and connected vehicles practice. “But even still, you’re going to have a patchwork of state liability for HAVs, like you do for regular motor vehicles.”

For example, certain states, including Florida, have legislation in place for HAVs that assesses liability for accident damages on the individual who turned on the HAV system in the car, Walawender said, while other states, such as Michigan, “more sensibly” attribute such liability to the manufacturer of the HAV system.

Carmakers Will Still Self-Certify

The federal regulatory scheme will remain the same under the bill, so automakers won’t have to ready themselves for any significant disruptions to how they’ve traditionally gone about testing and deploying their cars, experts say.

Notably, the bill does not adopt a recommendation laid out in the Obama administration’s September 2016 federal policy on self-driving cars that would have allowed NHTSA to ask Congress for the authority to test and certify all automated or self-driving car features before they can even go to market or hit the road, which is known as pre-market type approval. That would have been a new power granted to NHTSA that experts say would have delayed even further the rollout of automated cars.

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. 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.

“It’s the same basic approach that we have toward regulating [traditional] automobile development. That remains in place,” Steptoe & Johnson LLP partner Tony LaRocca told Law360. “You don’t have to get pre-approval, and there’s no effort to disrupt the basic regulatory regime to cover this new technology. That’s a good thing. There’s a lot to be said for the current way the regulation is imposed on [the automotive industry].”

There’s a fairly good understanding that the federal government will be responsible for vehicle safety and design standards, and states will be responsible for operation and licensing, David Whitestone, partner and chair of Holland & Knight LLP’s government section, told Law360.

“Though it’s not quite that simple when the rubber actually hits the road,” Whitestone said. “You may have a vehicle that does not have a steering wheel or pedals and thus the operation of that, which has historically been a state issue, will be impacted by the physical structure of the vehicle. Some of these areas, because they’re continuing to be innovated, are going to bump up against one another naturally.”

Carmakers to Shape Cybersecurity and Privacy

Experts say a major sticking point in the bill is how it addresses the issue of cybersecurity and privacy. It largely leaves it up to automakers to come up with higher cybersecurity standards, including developing a plan to deal with “reasonably foreseeable vulnerabilities” in their systems and ways to keep malicious commands from remotely taking over vehicles.

“The bill completely punts on the issue of cybersecurity. It merely requires manufacturers to develop their own policies for addressing it, but doesn’t provide any guidelines of compliance,” Walawender said.

The developers of autonomous cars would also have to develop privacy policies that would govern what the company does with a user’s data prior to a purchase. So while the federal government and lawmakers remain vague on formalizing what those standards will be, the manufacturers of connected and highly automated vehicles are taking cues from how other government agencies traditionally have regulated similar technologies as the companies step up their self-policing efforts to guard consumer data, experts have told Law360.

“Until regulators promulgate guidance or commence enforcement actions, it’s not clear how proactive manufacturers are expected to be in discovering new vulnerabilities or as yet unknown vulnerabilities in component parts,” said Jennifer Martin, of counsel in Covington & Burling LLP’s data privacy and cybersecurity practice. “We can expect to see debate about what is expected of manufacturers under this ‘reasonable foreseeable’ standard of care, particularly given how quickly the technology and cybersecurity vulnerabilities and attack vectors are evolving.”

However, some attorneys say the bill thoughtfully incorporates cybersecurity concerns by allowing automakers to more nimbly address such threats.

“I like the way it’s written because it allows the manufacturer to develop a plan. That’s important because it

gets at how antiquated the old law is when you try to import software cyber issues onto a statutory scheme that doesn't deal with software products that are iterative and the threat is changing over time," said Cheryl Falvey, co-chair of Crowell & Moring LLP's advertising and product risk management group and a former general counsel of the Consumer Product Safety Commission.

"I actually think it is addressing cybersecurity in a really novel and important way," Falvey said. "It's extending NHTSA's authority and the manufacturers' to act quickly, which frankly they don't have right now."

--Additional reporting by Michael Macagnone and Allison Grande. Editing by Pamela Wilkinson and Jill Coffey.

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