

Feds' Self-Driving Car Policy Rife With Regulatory Blind Spots

By **Linda Chiem**

Law360 (January 10, 2020, 8:43 PM EST) -- A lack of hard-line federal rules governing self-driving cars has left the private sector navigating blind spots in researching, developing and integrating automated vehicle technologies, which may hamper U.S. innovation and competitiveness and prompt Congress to fill the regulatory void, experts say.

The White House and the U.S. Department of Transportation's National Highway Traffic Safety Administration unveiled their fourth autonomous vehicles policy on Wednesday, offering little regulatory clarity, while enumerating the federal government's wish list for tackling safety, security, privacy, mobility and other concerns related to automated vehicle technologies.

"AV 4.0 reveals that the U.S. government is overseeing a ton of work around AV technology, but there are not a lot of conclusions drawn in this document," said Steve Wernikoff, co-leader of Honigman LLP's autonomous vehicles practice group. "While the continued hands-off approach by the administration gives industry a lot of leeway, the consensus is that regulation will be coming at some point."

'Voluntary' Standards

Automakers, AV technology developers and other stakeholders who have been waiting years for more concrete federal rules will have to keep waiting, as the AV 4.0 policy does little to move the needle on establishing actual standards, experts say.

The policy continues to tout "voluntary consensus-based technical standards" for developing autonomous vehicles, leaving it to the private sector to come up with industry guidelines for building and testing their AVs amid various state and local regulations. And just like with the Trump administration's previous iterations of the policy in 2017 and 2018, AV 4.0 doesn't carve out any compliance requirement or enforcement mechanism, and largely lays out aspirational targets for what to include in the eventual regulatory framework.

This time, though, it's not just the DOT playing in the sandbox. The White House National Science and Technology Council and 38 federal departments, independent agencies, commissions and executive offices of the president are collaborating on the rollout of automated vehicle technologies, according to AV 4.0.

"The most significant aspect is that AV 4.0 explicitly goes beyond DOT to identify numerous other

executive branch agencies that will have a role in building the infrastructure and regulatory environment necessary for AVs to operate successfully in the U.S.," said Erika Jones, co-leader of Mayer Brown LLP's connected and autonomous vehicles group.

For example, NHTSA's and the National Transportation Safety Board's safety-focused roles are made clear, and the Federal Trade Commission will focus on privacy and truth in advertising. The Federal Communications Commission is handling spectrum and connectivity, while NASA, the Department of Defense, the Department of Energy and others are also investing in artificial intelligence, quantum computing, encryption and related technologies, Jones said.

In Wernikoff's view, AV 4.0 is "impressive in its efforts to highlight and connect the work of dozens of government agencies in the AV area" because it is not often that the government releases a report weaving together the work from diverse government agencies such as agriculture, the military, the U.S. Postal Service and NASA.

While AV 4.0 mostly just lists aspirational targets for the various federal agencies, it at least reinforces the federal government's intent to take the wheel on an overarching AV policy, according to Eversheds Sutherland LLP's partner Mike Nelson.

"It's significant because the federal government is continuing to take the position that it's going to help establish policy around these things and it's consistent with what it has said in the past — that it's not going to pick winners and losers from a technological standpoint," he said.

A Missed Opportunity

Highway safety advocates have been particularly critical of the feds' refusal to move beyond years of "rehashed, regurgitated and poorly reconstituted version[s] of voluntary guidelines," according to Cathy Chase, president of Advocates for Highway and Auto Safety.

"Without strong leadership and regulations from the NHTSA, AV manufacturers can and will continue to introduce extremely complex, supercomputers-on-wheels onto public roads, in direct contact with vehicles, bicyclists, pedestrians and other road users, with meager government oversight," Chase said in a statement. "Voluntary guidelines are completely unenforceable, will not result in adequate performance standards and fall well short of the safeguards that are necessary to protect the public."

The feds have said they're steering clear of heavy-handed regulation to avoid hampering innovation or setting the U.S. behind other countries in advancing AVs. But some experts say they're worried that approach might end up backfiring.

Hogan Lovells partner Latane Montague, who specializes in transportation regulation, told Law360 that AV 4.0 represents a missed opportunity for the DOT to be at the forefront of AVs and live up to the name of the policy itself, "Ensuring American Leadership in Automated Vehicle Technologies."

"The reason why America has been a leader in the world in automotive industry safety is because NHTSA has actually developed flexible technology-neutral performance-based safety standards," he said. "That's our secret sauce in the global auto industry, and we're not doing it here. We keep publishing 50- to 60-page documents that don't even get close to that. Car companies actually want to engineer to performance targets, that's what they're really good at. But there's no target to shoot at [here]."

Honigman's Wernikoff also said industry stakeholders are expecting to see regulation.

"So manufacturers and technology companies are having to perform their best guesswork on likely requirements, or are trying to cram futuristic vehicles into 20th century regulations," he said. "Although a light regulatory touch promotes innovation, outdated regulations and scant guidance on where the future regulatory 'floor' likely will land could stall innovation."

The feds will eventually have to stop hedging, experts say, and move the ball at least on existing vehicle safety standards. The DOT and NHTSA regulate the safety design and performance standards for all motor vehicles, including AVs, through the Federal Motor Vehicle Safety Standards. The FMVSS mandates things like steering wheels, brake pedals and seat belts, but AV developers have had to apply for exemptions to FMVSS to get out of having to include features typically required in traditional cars but that might not be practical or necessary for autonomous cars. The NHTSA is still reviewing several exemption requests from companies and is in the early stages of drafting new rules aimed at "eliminating barriers" posed by FMVSS.

"Having done a great job in setting the table with AV 2.0, 3.0 and 4.0, DOT must now understand it's time to serve the meal," said Tim Lynch, senior director of Morgan Lewis & Bockius LLP's strategic government relations and counseling practice in Washington, D.C.

That meal is a regulatory framework — the rulemaking process — that will address the many issues on which stakeholders need guidance, Lynch said.

"Failure to do so will undermine the very goal of a consistent and flexible regulatory regime that DOT has carefully cultivated," he said. "Failure to do so in a timely manner will likely result in those same stakeholders looking elsewhere to develop and market their products and services."

Meanwhile, supporters of the feds' approach to regulation at this juncture say it's a smart and deliberate move that can better inform future rules.

"When you're dealing with something this significant and this revolutionary, to take the cautious approach and let things unfold a little bit before we jump in with a bunch of rules, regulations, requirements and restrictions, I like that approach," said Eric Kennedy, co-chair of Buchalter PC's autonomous and intelligent systems and automotive industry practice groups. "Maybe I have too much trust or faith in tech, but I honestly believe that everyone wants what's best. It doesn't do any of the manufacturers ... [any good] to put out a product that's not as safe as it could possibly be."

--Editing by Kelly Duncan and Brian Baresch.