THE TRUMP ADMINISTRATION'S AUTOMATED VEHICLES GUIDANCE HITS THE GAS PEDAL ON INNOVATION

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Further accelerating federal regulation of automated vehicles, last week the U.S. Department of Transportation and the National Highway Traffic Safety Administration ("NHTSA") announced highly anticipated new guidance for the testing and development of automated driving technologies. *Automated Driving Systems 2.0: A Vision for Safety* ("ADS 2.0") replaces the *Federal Automated Vehicles Policy* ("FAVP") released under the Obama administration in September 2016 and includes a number of significant revisions and clarifications of the earlier policy.

The revised policy offers broad federal guidance on how auto manufacturers, technology companies, artificial intelligence developers, and others should go about testing automated vehicle technologies to get them ready for mainstream America. Issued as Congress is in the midst of considering federal legislation that attempts for the first time to regulate automated vehicles, the guidance offers additional regulatory clarity while recognizing that flexibility is necessary to allow the industry to continue to innovate around automated driving technologies.

NHTSA is seeking comments from stakeholders on the new policy. The K&L Gates CarTech team is available to assist in the preparation of comments, as well as to advise clients about the new policy's impact on the development and commercialization of automated vehicles.

ADS 2.0 is similar to the policy that preceded it (which we summarized here). However, it also makes a number of important changes, many of which were suggested in the more than 160 stakeholder comments to the FAVP. The most significant change is the elimination of the FAVP's discussion of NHTSA's current and potential future regulatory tools to address automated driving technologies. NHTSA's guidance to vehicle manufacturers regarding the revised policy notes that information about the agency's current regulatory authorities will be made available on its website and makes no mention of potential new authorities. Beyond these wholesale revisions, other changes reflected in ADS 2.0 are more nuanced — but also important.

VOLUNTARY GUIDANCE

The "Voluntary Guidance" portion of ADS 2.0 identifies 12 safety elements for consideration in the testing and deployment of automated driving technologies. NHTSA encourages industry "to consider each safety element in the design of their systems and have a self-document process for assessment, testing, and validation of the various elements." This section of the revised policy broadly parallels the FAVP's "Vehicle Performance Guidance," which encouraged consideration of a similar list of safety factors (with some important exceptions, as detailed below). However, while the FAVP invited industry to submit Safety Assessment Letters to NHTSA

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detailing their efforts to address these factors, ADS 2.0 proposes that entities publish a "Voluntary Safety Self-Assessment" without any submission to the agency. The revised policy stresses that publication of such assessments is entirely voluntary but may be "an opportunity to showcase their approach to safety, without needing to reveal proprietary intellectual property."

Other important distinctions between ADS 2.0 and the FAVP in this area include:

- **Applicability:** While the FAVP applied to vehicles at levels L2–L5 on the SAE International scale of automation, ADS 2.0 focuses on vehicles at automation level L3 and higher.
- **Safety Factors:** The list of factors to be considered by industry no longer includes privacy, ethical considerations, registration, or data sharing (other than crash data). The agency's guidance to manufacturers states that these factors "remain important and are areas for further discussion and research."
- **Clarification:** In an apparent response to comments submitted regarding the Safety Assessment Letters suggested by the FAVP, ADS 2.0 stresses that its Voluntary Safety Self-Assessments are entirely voluntary and not a prerequisite to vehicle testing or deployment. In fact, the revised policy as a whole makes a concerted effort to communicate that it is voluntary and nonbinding — what NHTSA deems a "nonregulatory" approach.

TECHNICAL ASSISTANCE TO STATES

The "Technical Assistance to States" portion of ADS 2.0 expands on the FAVP's "Model State Policy," which delineated roles and regulatory responsibilities between the federal government, on the one hand, and state and local governments, on the other. The revised policy reaffirms the basic division of regulatory responsibilities outlined in the FAVP, stating, "NHTSA is responsible for regulating motor vehicles and motor vehicle equipment, and States are responsible for regulating the human driver and most other aspects of motor vehicle operation." ADS 2.0 goes further by identifying best practices for state legislatures and highway safety officials to facilitate the safe introduction of automated driving technologies on their roadways. The latter suggestions reflect NHTSA's ongoing collaboration with the American Association of Motor Vehicle Administrators.

Other important revisions include:

- **Codification:** Responding to another area of uncertainty identified in comments to the FAVP, ADS 2.0 "strongly encourages States not to codify [its] Voluntary Guidance . . . as a legal requirement for any phases of development testing or deployment of [automated driving systems]." Stakeholders had raised concerns that certain states had taken steps to require compliance with the FAVP, despite its intended nonbinding, voluntary nature.
- **Technology Neutrality:** NHTSA's advice to state legislatures encourages the creation of a "technology neutral" policy environment, noting, "States should not place unnecessary burdens on competition and innovation by limiting ADS testing or deployment to motor vehicle manufacturers only." This is an important endorsement of a principle that is frequently advocated for by technology industry stakeholders.

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As noted above, NHTSA is seeking stakeholder comments on ADS 2.0. The comment solicitation notes that the "agency expects and intends the voluntary guidance to continue to be updated based upon public comment; the experience of the agency, manufacturers, suppliers, consumers, and others; and further research findings and technological innovations." Indeed, the Transportation Department and NHTSA have indicated that work on "ADS 3.0" has already begun. This is an important opportunity for stakeholders to have a voice in the future regulation of this emerging industry.

Further iterations of NHTSA policies will also likely be influenced by developments occurring in Congress. Earlier this month, the U.S. House of Representatives passed the first significant legislation addressing automated driving technologies, which included provisions relating to federal preemption, vehicle testing, and future regulation, among other intersection points with ADS 2.0. Our summary of that legislation is available here. The Senate continues to work on its version of the legislation, with a goal of advancing a bill into law in the near future. Notably, Senate Commerce, Science, and Transportation Committee Chairman John Thune has stated that the Senate's version of legislation regulating self-driving vehicles could be considered in his committee before Columbus Day. These developments underscore the interest and excitement in automated driving technologies at the federal level, which Transportation Secretary Elaine Chao captured in her remarks introducing ADS 2.0, saying, "the safe deployment of automated vehicle technologies means we can look forward to a future with fewer traffic fatalities and increased mobility for all Americans."

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