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AUTONOMOUS VEHICLES

CONGRESS HAS GOTTEN WAY AHEAD OF NHTSA ON DRAFTING STANDARDS FOR SAFE HIGHLY AUTOMATED VEHICLES

by Richard Wilhelm

In 2017, the US Senate introduced the American Vision for Safer Transportation through Advancement of Revolutionary Technologies Act (the "AV START Act"). The Act, among other things, seeks to

1. legislate the time frame for establishing safety standards for Highly Automated Vehicles¹ ("HAVs"), and
2. substantially increase the number of exemptions that could be granted to manufacturers permitting the sale or introduction into interstate commerce of HAVs that may not comply with existing safety standards (e.g., HAVs lacking steering wheels and pedals) while limiting how long NHTSA has to grant or deny such exemptions.

The proposed time frame is 6 years - 5 years for a technical committee to consider and recommend new safety standards, and 1 year for NHTSA to commence rulemaking on HAV safety standards based on the recommendations.

The Bill has been stalled in the Senate over several concerns, including a concern that the timeframe laid out in the legislation for the establishment of safety standards is, ironically, too long. However, recent rulemaking action by NHTSA strongly suggests that both of these aspects of the act need to be reconsidered as unrealistic.

On October 10, 2018, NHTSA published an Advanced Notice of Proposed Rulemaking ("ANPRM") called the Pilot Program for Collaborative Research on Motor Vehicles With High or Full Driving Automation. In that ANPRM, NHTSA is proposing establishing a yet-to-be defined Pilot Program of yet-to-be determined duration to evaluate, monitor and learn about HAV performance for the purpose of using the knowledge gained from the program to develop and establish safety standards for HAVs. The ANPRM is Step 1 in the establishment of those standards. It essentially seeks comment about how to design such a pilot program.

As an ancillary issue, NHTSA also seeks comment about how it should evaluate petitions seeking exemptions to permit the sale or introduction into interstate commerce of non-complying HAVs. Specifically, NHTSA states that it "seeks comments on the nature of the safety and any other analyses that it should perform in assessing the merits of individual exemption petitions and on the types of terms and conditions it should consider attaching to exemptions to protect public safety and facilitate the Agency's monitoring and learning from the testing and deployment, while preserving the freedom to innovate."

NHTSA doesn't take a position on whether exemptions are necessary to conduct the pilot program but is nonetheless reviewing the issue.

NHTSA's ANPRM brings into question those sections of the AV START Act

- 1) establishing the timeline for promulgating HAV safety standards and
- 2) substantially increasing the number of allowable exemptions while at the same time limiting NHTSA's review of petitions for exemption to 180 days. The issue in both cases is unrealistic timing.

The AV START Act's 6-year time frame for new HAV safety standards is not realistic.

The ANPRM is the first step in the process of considering and promulgating new safety standards. There are many more steps to follow.

- The comment period expires in December. (NHTSA granted an extension)
- Then, NHTSA must evaluate the comments.
- Then, NHTSA has to design the pilot program.
- Then, NHTSA must draft a notice of proposed rulemaking for the pilot program.
- Then, NHTSA must evaluate comments on the NPRM
- Then, NHTSA must undertake the logistics necessary to set up the pilot program.
- Then, NHTSA has to conduct the pilot program.
- Then, NHTSA has to consider and evaluate the results of the pilot program.
- Then, NHTSA must decide what type of standards to draft (it is considering traditional and so-called non-traditional standards, that is, standards using simulations or standards expressed in terms of mathematical functions).
- Then, NHTSA must begin to draft proposed standards (assuming no other testing is deemed necessary before drafting can begin).
- Then, NHTSA must issue a NPRM for any proposed standards.
- Then, NHTSA must obtain and review comments on the proposed standards.
- Then, NHTSA must draft and publish the final version of the standards and consider any requests for reconsideration while providing the industry with sufficient lead-time to come into compliance with the new standards.

A comparison with the time necessary for NHTSA to conduct rulemaking (i.e., the last three bullet points) for a recently promulgated safety standard on minimum sound levels for electric vehicles provides an indication of how long this entire process could last. The NPRM for that standard was filed January 14, 2013. The Final Rule was published December 14, 2016. The Final Rule in response to petitions for reconsideration was filed February 26, 2018. The process took just over 5 years. In light of this comparison, rulemaking for HAV safety standards will not happen anytime soon, especially considering the fact that the pilot program being proposed is a mere thought at this point. Also, the minimum sound level standard involved a discrete issue addressing a single concern – ensuring that blind, visually impaired and other pedestrians are able to detect hybrid and electric vehicles operating nearby, not a range of standards applicable to all aspects of safe operation and performance of HAVs. Thus, the 6-year scheme envisioned by the AV START Act is not realistic.

CLIENT ALERT

The AV START Act's increase in the number of allowable exemptions and its truncated NHTSA review period is premature and unrealistic.

The AV START Act would increase the allowable number of exemptions from compliance with safety standards from 2,500 to 100,000 HAVs per manufacturer, while at the same time; it mandates the approval or rejection of such petitions by NHTSA within 180 days of receipt, inclusive of the notice and comment period. Establishing a 180-day time limit for consideration for a petition is premature and unrealistically short.²

NHTSA's request for comments on how it should evaluate petitions for exemption of HAVs after having encouraged the use of such exemptions by manufacturers of HAVs two years ago is somewhat surprising. See [Federal Automated Vehicles Policy – Accelerating the Next Revolution in Roadway Safety](#), September 2016. But, it explains why NHTSA has not taken any action on GM's January 2018 Petition for Exemption. NHTSA has not even published a Notice of Receipt of the Petition. If NHTSA has not yet determined how to evaluate a petition for exemption concerning HAVs³, Congress should not be drastically increasing the number of vehicles for which exemptions can be granted and limiting the time for their review. Such legislation is at best premature and at worst unrealistic to the point any review could only be perfunctory.

It is surprising how far away NHTSA appears to be from possessing the knowledge base necessary for it to draft standards and properly consider petitions for exemptions to ensure that HAV's are safely operating on the roads in the US. This is not to criticize the effort by NHTSA to create that knowledge base. The AV START Act simply does not reflect this reality.

¹ HAVs are SAE level 4 and 5 vehicles. They either drive themselves within specific operational design domains or without restriction.

² Currently, exemption review for 2500 vehicles can take anywhere from 6 months to 2.5 years and that's to permit evaluation of comparatively limited non-compliance issues.

³ The exemptions allow for the evaluation of new safety features that don't comply with existing standards but which provide the same level of safety as vehicles that do comply.

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