

**Before the  
NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION  
Washington, D.C. 20590**

In the Matter of	)	
	)	Docket No. NHTSA-2016-0090
Request for Comments on	)	
Federal Automated Vehicles Policy	)	81 Fed. Reg. 65703
	)	

**COMMENTS OF  
THE COMPETITIVE ENTERPRISE INSTITUTE, R STREET INSTITUTE, &  
TECHFREEDOM**

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## Introduction

On behalf of the Competitive Enterprise Institute (“CEI”), the R Street Institute (“R Street”), and TechFreedom, we respectfully submit these comments in response to the National Highway Traffic Safety Administration’s (“NHTSA”) Request for Comments on the Federal Automated Vehicles Policy (“RFC”).<sup>1</sup> CEI is a nonprofit, nonpartisan public interest organization that focuses on regulatory policy from a pro-market perspective, R Street is a free-market think tank with a pragmatic approach to public policy challenges, and TechFreedom is a think tank with a mission to promote the progress of technology that improves the human condition and expands individual capacity to choose.<sup>2</sup>

Our comments are divided into the following sections, which correspond to the sections of the Federal Automated Vehicles Policy subject to the RFC:

- I. Vehicle Performance Guidance for Highly Automated Vehicles;
- II. Model State Policy;
- III. NHTSA’s Current Regulatory Tools; and
- IV. New Tools and Authorities.

### I. Vehicle Performance Guidance for Highly Automated Vehicles

In September 2016, NHTSA released its long-awaited Federal Automated Vehicles Policy (“FAVP”).<sup>3</sup> Beyond discarding the automation levels published in NHTSA’s 2013 “Preliminary Statement of Policy Concerning Automated Vehicles”<sup>4</sup> in favor of the six levels of automation contained in SAE International’s Recommended Practice J3016,<sup>5</sup> the most important change in NHTSA policy was the recommended 15-point Safety Assessment.

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1. Request for Comments on the Federal Automated Vehicles Policy, *Notice*, NHTSA-2016-0090, 81 Fed. Reg. 65703 (Sep. 23, 2016).
  2. See About CEI, <https://cei.org/about-cei> (last visited Nov. 21, 2016); About R Street, <http://www.rstreet.org/about/why-r-street/> (last visited Nov. 21, 2016); About TechFreedom, <http://techfreedom.org/about> (last visited Nov. 21, 2016).
  3. National Highway Traffic Safety Administration, “Federal Automated Vehicles Policy,” U.S. Department of Transportation (Sep. 20, 2016), *available at* <https://www.nhtsa.gov/av> [hereinafter FAVP].
  4. National Highway Traffic Safety Administration, “Preliminary Statement of Policy Concerning Automated Vehicles,” U.S. Department of Transportation (May 30, 2013), at 4-5, *available at* [https://www.nhtsa.gov/staticfiles/rulemaking/pdf/Automated\\_Vehicles\\_Policy.pdf](https://www.nhtsa.gov/staticfiles/rulemaking/pdf/Automated_Vehicles_Policy.pdf).
  5. See SAE J3016:SEP2016, § 4, *available at* [http://standards.sae.org/j3016\\_201609/](http://standards.sae.org/j3016_201609/).

NHTSA states in the FAVP that the purpose of the Safety Assessment is to “aid NHTSA in monitoring [highly automated vehicles]”<sup>6</sup> by “request[ing] that manufacturers and other entities voluntarily provide reports regarding how the Guidance has been followed.”<sup>7</sup>

While many of the recommendations broadly conform to current industry best practices, there are some troubling aspects that NHTSA should reconsider in its future revisions of the FAVP.

### 1. Data/Information Privacy

First, NHTSA should clarify its seemingly conflicting positions on data recording and sharing, and privacy guidance. With respect to data recording and sharing, NHTSA recommends that manufacturers collect a wide variety of automated vehicle use and user data for purposes including tracking “the occurrence of malfunctions, degradations, or failures,”<sup>8</sup> “crash reconstruction,”<sup>9</sup> and analysis of “positive outcomes.”<sup>10</sup> The agency notes that all this information “should be decertified (i.e., stripped of elements that make the data directly or reasonably linkable to a specific HAV owner or user).”<sup>11</sup>

Yet, in the following recommendation on privacy, NHTSA requests that manufacturers “offer vehicle owners choices regarding the collection, use, sharing, retention, and deconstruction of data, including geolocation, biometric, and driver behavior data that could be reasonably linkable to them personally.”<sup>12</sup>

Allowing automated vehicle owners to opt out of the mere collection of personally identifiable information could undermine data analysis of all kinds, including crash reconstruction. Denying to manufacturers the ability to collect necessary data could also negatively impact co-evolving tort liability and insurance products, and in doing so could undermine the separation of regulatory authority with the states by restricting the terms under which state-mandated financial responsibility products may be offered, sold, settled, and enforced. The impact of restrictions such as these will be to raise the cost of vehicle automation system deployment and, in turn, delay the realization of potential safety benefits. NHTSA must better consider each of these elements as it continues forward.

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6. FAVP, *supra* note 3, at 15.

7. *Id.*

8. *Id.* at 17.

9. *Id.*

10. *Id.* at 18.

11. *Id.*

12. *Id.* at 19.

In general, NHTSA should defer to federal and state privacy regulators (including primarily the Federal Trade Commission (“FTC”)). While there is merit in an expert agency offering guidance to suggest how general privacy regulations might apply to situations within its purview, there is little benefit in NHTSA itself drafting specific privacy regulations or supplanting expert agencies in enforcing privacy rules.

We recommend that, whatever specific language NHTSA adopts, it clarify that the language is intended to offer its advice regarding the application of existing and generally applicable privacy regulations and consumer protection laws to vehicle automation systems, rather than to offer specific regulatory obligations.

Further, whether the Department adopts privacy language as guidance or regulation, we recommend that it conform its privacy language as closely as possible to the existing “notice and consent” privacy framework that guides the FTC and state privacy regulators.<sup>13</sup>

Bringing NHTSA’s proposed language into conformity with the prevailing federal and state frameworks requires, in particular, rethinking the underlying assumptions concerning the relevance of collection versus use of data and of the sensitivity of data.

Generally speaking, data restrictions—such as those contemplated in the FAVP—should target harmful uses of information, rather than mere possession or collection, and privacy rules should regulate information flows only as necessary to protect against harmful uses of information. Because the vast majority of data uses tend to be positive, people are unlikely to be harmed by the mere collection of information.<sup>14</sup> Moreover, it is not always clear what data could be used for harmful purposes, or when beneficial uses might outweigh potential harms. And, at the same time, some of the most consumer-protective

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13. See, e.g., Federal Trade Commission, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* (Mar. 2012), available at <https://www.ftc.gov/reports/protecting-consumer-privacy-era-rapid-change-recommendations-businesses-policymakers>; California Office of the Attorney General, *Privacy on the Go: Recommendations for the Mobile Ecosystem* (Jan. 2013), available at [https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/privacy\\_on\\_the\\_go.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/privacy_on_the_go.pdf); California Office of Privacy Protection, *Recommended Practices on California Information-Sharing Disclosures and Privacy Policy Statements* (Apr. 2008), available at [https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/COPP\\_bus\\_reportinfo\\_sharing1.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/COPP_bus_reportinfo_sharing1.pdf).
14. An obvious exception to this general proposition is that unutilized data, once collected, may become a security hazard. However, manufacturers have meaningful disincentives from collecting data that they do not intend to use based upon existing data security regulations.

uses of data require largely frictionless collection and sharing of broad bases of information.<sup>15</sup>

Businesses, consumers and society generally stand to benefit immensely from both current and as-yet unidentified data flows. Thus, consumers are likely better off on net when the collection of data from them in voluntary transactions remains generally unencumbered; rather than requiring repeated consumer affirmations, the better way to protect consumers is usually to require (i) general disclosure as to what data is being collected that consumers might not expect to be collected, (ii) that users may opt out in certain circumstances, and (iii) that affirmative action by the consumer be required only when the potential harm is great enough to outweigh the benefits.

A system requiring repeated disclosures and repeated affirmative express consent by users would needlessly burden the evolving collection and use of valuable information without obvious corresponding benefit. Not only would it deter experimentation and innovation in data collection and use (and, thus, product design and development), but, as a function of human psychology, it would unnecessarily dull the seriousness with which consumers take such updates and operate to exclude many consumers from the benefits of technological progress—particularly relatively poorer, and less-technology-literate, citizens.<sup>16</sup> For these reasons, the draft regulations should be amended to more appropriately balance the potential harms and benefits of the collection and use of consumer data.

We propose that NHTSA embrace the framework for determining when notice, consent, and disaffirmation are required that is currently employed by the Federal Trade Commission.<sup>17</sup> Its basic supposition is that consent should be required only where it

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15. For example, “[t]he credit reporting system “works because, without anybody’s consent, very sensitive information about a person’s credit history is given to the credit reporting agencies. If consent were required, and consumers could decide—on a creditor-by-creditor basis—whether they wanted their information reported, the system would collapse.” Timothy J. Muris, *Protecting Consumers’ Privacy: 2002 and Beyond*, Remarks at the Privacy 2001 Conference (Oct. 4, 2001), available at <https://www.ftc.gov/public-statements/2001/10/protecting-consumers-privacy-2002-and-beyond>.

16. See Nicklas Lundblad & Betsy Masiello, *Opt-in Dystopias*, SCRIPTED, § 5.1 (2010), available at <http://www2.law.ed.ac.uk/ahrc/script-ed/vol7-1/lundblad.asp>; Fred H. Cate & Michael E. Staten, *Protecting Privacy in the New Millennium: The Fallacy of “Opt-In”* at 1 (2003), available at <http://home.uchicago.edu/~mferzige/fallacyofoptin.pdf>.

17. See Federal Trade Commission, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* (Mar. 2012), available at <https://www.ftc.gov/reports/protecting-consumer-privacy-era-rapid-change-recommendations-businesses-policymakers>.

cannot be inferred from the nature of the transaction itself, and, generally, only when sensitive and personally identifiable data is involved.

The FTC recommends that “companies do not need to provide choice before collecting and using consumer data for practices that are consistent with the context of the transaction or the company’s relationship with the consumer.”<sup>18</sup> In addition, notice and choice is not required for “(1) product and service fulfillment; (2) internal operations; (3) fraud prevention; (4) legal compliance and public purpose; and (5) first-party marketing.”<sup>19</sup> The focus of the FAVP on the distinction between data “necessary for the safe operation of the vehicle” and data “not necessary” for such purpose is a useful starting point for determining when consumer assent to data collection and use should be inferred. But, as noted above, there is a range of other situations where consent should be inferred, as well: essentially, where data is used internally (as opposed to being shared with third parties).

Further, as the FTC notes, for those remaining situations where consumer choice is recommended, consumers should be given an opportunity for “affirmative express consent” (that is, “opt-in” consent), as opposed to merely an opportunity to opt out, only when they involve data that is both of a sensitive nature<sup>20</sup> and linkable to a particular person or device (i.e., non-anonymized).

We propose a new approach for NHTSA that is consistent with the FTC’s standards.

Four characteristics of the collected data are relevant to this approach:

1. Whether it is necessary for the safe operation of the vehicle or for insurance purposes (essentially mapping onto the FTC’s “(1) product and service fulfillment; and (2) internal operations” categories);
2. Whether it is sensitive;
3. Whether it is shared with third-parties; and
4. Whether it is anonymized.

Data used internally for purposes necessary to the vehicle’s safe operation, regardless of the other characteristics, requires neither disclosure nor consent (as the FAVP implicitly acknowledges): its collection and use are inherently part of the transaction. At the other

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18. *Id.*

19. *Id.*

20. *Id.* at 58 (noting that there is a “general consensus that information about children, financial and health information, Social Security numbers, and precise, individualized geolocation data is sensitive and merits heightened [opt-in] consent methods”).

end of the spectrum, opt-in consent should be required for data that is used for purposes not necessary to the safe operation of the vehicle and that is sensitive, non-anonymized, and shared with third-parties. Data with other combinations of these four characteristics will fall into various middle grounds.

In particular, we urge NHTSA to clarify that the FAVP concept of “necessary” information includes not only that information necessary for operation of the vehicle, but also that necessary for “product and service fulfillment” and “internal operations.” A car doesn’t run on mechanical systems alone. The legal, marketing, insurance, logistics, IT, etc., systems employed by manufacturers are also essential, even if not directly responsible for making a vehicle go.

Insurance presents a particularly important example. Insurance data will necessarily be shared with third parties: insurance companies. Such data sharing is—like the collection, internal use, and sharing of data about vehicle operation necessary for safety purposes—understood by consumers to be inherent in manufacturing, selling, maintaining and operating an automated vehicle. Moreover, all states require operators of any motorized vehicle to carry insurance adequate to pay for damage that they may cause in the course of the vehicle’s operation. In short, states have already concluded that safety and insurance are inextricably intertwined, that it is impossible to safely operate a vehicle without insurance and, further, that insurance cannot function properly if users can opt out. In the case of vehicle automation systems, that requires sharing operations data with insurance companies. Such sharing should not require consent—like the sharing of information necessary for safety purposes. But, like the sharing of data necessary for safety purposes, sharing of data for insurance purposes should require disclosure.

Thus, we propose the following taxonomy of data, use and corresponding rules:

**A Spectrum of Consent & Disclosure Tailored to Serve Consumers**

Data that is... /Example	Necessary	Shared	Sensitive	Anonymized	Requires
Vehicle location data	Y	N	Y or N	Y or N	No Disclosure; No Consent
Aggregated data used for product development	N	N	Y or N	Y	No Disclosure; No Consent
Personally identifiable data for first-party marketing	N	N	Y or N	N	Disclosure; No Consent
Shared vehicle location, diagnostic or insurance data	Y	Y	Y or N	Y or N	Disclosure; No Consent
Aggregated data for third-party marketing	N	Y	Y or N	Y	Opt-Out
Personally identifiable billing data for third-party add-on services	N	Y	Y	N	Opt-In

Data that is necessary for the safe operation of the vehicle (whether shared with third-parties or not) or that is used internally for ancillary purposes (e.g., first-party marketing) does not require consent. Other data requires varying degrees of consent depending on sensitivity, anonymization and whether it is shared with third parties.

Under this approach, excessive disclosure and consent requirements are minimized, but, in those cases where operators may tend to have heightened privacy concerns, they would be aware of what information is being collected, and, where concerns are further heightened (say, because personally identifiable information is being shared with third-parties), would have an appropriate opportunity to exercise consent.



Our approach could be summarized with something like the following, which we submitted as a proposed revision to the California Department of Motor Vehicles's recommendation.<sup>21</sup>

- (a) The manufacturer shall:
  - (1) Provide a written or electronic disclosure to the operator of an autonomous vehicle that describes all of the data collected by the vehicle that will be shared with third parties, regardless of whether it is sensitive data or not, or that will not be shared, but is used internally without anonymization. The disclosure shall be conspicuous and separate from other disclosures.
  - (2) Indicate in the disclosure required in subsection (a)(1) whether collected data is
    - (i) Necessary for the safe operation of the vehicle;
    - (ii) Shared;
    - (iii) Sensitive; and/or
    - (iv) Anonymized
- (b) In the event that a manufacturer wishes to share an operator's personally-identifiable information with a third-party on an anonymized basis, the operator may opt-out of such a use by the manufacturer.
- (c) In the event that a manufacturer wishes to share an operator's personally-identifiable information with a third-party on a non-anonymized basis for a purpose that is not necessary for the safe operation of the vehicle, the operator must be enabled to opt-in to such a use by the manufacturer.

## 2. Operationalizing Ethical Considerations

NHTSA's claims about ethical considerations assume vehicle automation system developers are capable of meaningfully addressing them at this time and that their attempting to do so would be socially desirable, yet fail to demonstrate that this is in fact the case.<sup>22</sup> It has been argued that the vehicle automation "Trolley Problem" discussions

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21. Comments of R St. Inst., Competitive Enter. Inst., TechFreedom, & Int'l Ctr. for Law & Econ. to Mr. Brian Souble, Gen. Counsel, Cal. Dept. of Motor Vehicles (Oct. 14, 2016), available at <https://cei.org/sites/default/files/RSI%20Coalition%20CA%20AV%20Reg%20Comments%20-%20FINAL.pdf>.

22. *Id.* at 26.

that have received lopsided media coverage in recent years is “high on the list of questions that are interesting for philosophical class debate, but that’s not the same as reality.”<sup>23</sup>

Instead of prodding developers to delve into areas in which they have little expertise and to devote significant resources and attention to very rare problems, a better approach would be to modernize the rules of the road in a manner that eases safe vehicle automation compliance with those rules. Conflicts between mobility and legal compliance objectives may still arise, but this offers a much more productive and cost effective framework—and one which is far less likely to impose unrealistic goals on developers that could delay the realization of vehicle automation system safety benefits.

### 3. Assessing Future Compliance

While many of the 15 points do represent industry best practices, in their current form, they would prove difficult to adhere to from a compliance perspective. This is of particular concern given that NHTSA has signaled that it may codify the 15-point safety assessment into law.<sup>24</sup> To wit, while NHTSA’s flexible approach to the guidelines is to be commended, the ambiguity inherent in that flexibility also makes the 15 points ill-suited as a barometer by which to measure compliance with the agency’s wishes.

NHTSA envisions a scenario in which manufacturers will complete a brief summary letter in which they will signal their compliance with the 15 points in one of three ways: “1) meets the guidance area; 2) does not meet this guidance area; 3) this guidance area is not applicable.” In practice, given the liberal presence of precatory language in the guidance, manufacturers will be compelled to offer lengthy and legalistic interpretive responses which will make compliance effectively impossible to discern. Further, it is unclear what will constitute actual compliance with the 15 points. For instance, for a manufacturer to be “in compliance,” will it be necessary for them self-certify that they have “met” the guidance in each area? Will NHTSA make a finding of compliance on the basis of the manufacturers’ responses? As discussed below in greater detail, such confusion will prove particularly problematic given the guidance the FAVP currently gives the states.

However, the alternative here is not for NHTSA to promulgate objective standards at this early point in the development of vehicle automation systems. Rather, NHTSA should focus on continually revisiting and refining the voluntary 15 points. While the guidelines represent the best practices of today, it is likely that they—and the suggestions embodied within them—will evolve as more is learned by manufacturers. For that reason, the urge

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23. Brad Templeton, *Enough with the Trolley problem, already*, BRAD IDEAS BLOG (Oct. 10, 2010), available at <http://ideas.4brad.com/enough-trolley-problem-already>.

24. FAVP, *supra* note 3, at 15.

to cement in law more restrictive standards should be resisted at least until a meaningful amount of deployment and testing at scale has occurred, if not entirely.

## II. Model State Policy

In its introduction to Section II, Model State Policy, “DOT strongly encourages States to allow DOT alone to regulate the performance of HAV technology and vehicles.”<sup>25</sup> NHTSA goes on to note that “DOT and the Federal Government are 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.”<sup>26</sup> Such explicit statements on the respective roles of NHTSA and state legislators and motor vehicle authorities are welcome.

But despite repeated assurances earlier in the FAVP that “[t]his Guidance is not mandatory”<sup>27</sup> and “is not intended for States to codify as legal requirement for the development, design, manufacture, testing, and operation of automated vehicles,”<sup>28</sup> NHTSA then requests that states mandate compliance with the Safety Assessment letter discussed in Section I as a condition for testing operations: “Mandate Safety Assessment: Implement a rule mandating the submission of the Safety Assessment letter identified in this guidance.”<sup>29</sup>

This apparent contradiction is concerning for a few reasons:

First, NHTSA explicitly recognizes that this guidance document does not carry the force of federal law, yet then argues that states should mandate “voluntary” guidance on their behalf. This suggests the agency is not playing above board and may be attempting to avoid conducting the notice-and-comment rulemaking required under the Administrative Procedure Act while still forcing manufacturer compliance. If NHTSA’s goal is to maintain credibility on emerging vehicle automation systems, giving the public reason to doubt its integrity by attempting to circumvent federal law is not the way to go about it.

Second, as we note above, there remain problematic recommendations contained in the 15-point Safety Assessment which are worthy of the scrutiny provided by a notice-and-comment process. As NHTSA is only now accepting comments on the non-binding FAVP, any suggestion from the agency that the states should seek to mandate elements contained in its unfinished, voluntary guidance document creates regulatory uncertainty

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25. FAVP, *supra* note 3, at 37.

26. *Id.* at 38.

27. *Id.* at 11.

28. *Id.*

29. *Id.* at 35.

that may increase the cost of vehicle automation system development and deployment. Ultimately, such an approach may delay and reduce the potential life-saving benefits of the technology.

Third, NHTSA's contradictory guidance is already causing confusion in the states. In the days following the release of the FAVP, the California Department of Motor Vehicles released its latest draft autonomous vehicle deployment rules.<sup>30</sup> The latest draft added Section 227.04(d), which requires manufacturers to “certify that testing will be conducted in accordance with the National Highway Traffic Safety Administration’s ‘Vehicle Performance Guidance for Automated Vehicles’” as a prerequisite for obtaining a testing permit.<sup>31</sup> As discussed above, given that the FAVP does not provide a metric by which adherence to the 15-points can be measured, the notion that a state like California would be asked to predicate the issuance of a testing permit on “accordance” with the guidelines is facially problematic. In the absence of a measurable federal standard, does NHTSA imagine that the California Department of Motor Vehicles will discern whether a manufacturer is acting in accordance with NHTSA’s 15 points? Given NHTSA’s statements on the respective regulatory roles of the states and the federal government, that is both hard to imagine and undesirable.

For those reasons, as it considers revising the FAVP, NHTSA should make clear that it is inappropriate for states to attempt to mandate compliance with a non-binding federal guidance document.

One final issue with FAVP Section II, Model State Policy, is NHTSA’s failure to include a driver license reciprocity provision. Currently, the FAVP states “[t]he operators testing the vehicles must hold a valid State driver’s license.”<sup>32</sup> This could be reasonably interpreted by states that potential test drivers should possess a valid driver license issued by the testing state. This unnecessarily restricts the potential test driver labor pool while providing no discernable safety benefits, and poses additional problems for developers wishing to test their vehicle automation systems in metropolitan areas that span across state lines, such as Washington, D.C., New York City, and St. Louis. NHTSA should clarify its recommendation to cover a test driver licensed by any state.

### III. NHTSA’s Current Regulatory Tools

We appreciate NHTSA’s thorough discussion of its existing regulatory authorities. However, we do believe Section III, NHTSA’s Current Regulatory Tools, could be

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30. California Department of Motor Vehicles, “Revised Draft Deployment Regulations: Autonomous Vehicles Express Terms,” (Sep. 30, 2016), *available at* [https://www.dmv.ca.gov/portal/wcm/connect/211897ae-c58a-4f28-a2b7-03cbe213e51d/avexpressterms\\_93016.pdf](https://www.dmv.ca.gov/portal/wcm/connect/211897ae-c58a-4f28-a2b7-03cbe213e51d/avexpressterms_93016.pdf).

31. *Id.* at 3.

32. FAVP, *supra* note 3, at 43.

improved in future updates to the FAVP by including a summary table containing information on requests for letters of interpretation, requests for temporary exemptions from existing standards, and petitions for rulemaking regarding vehicle automation systems, as well as enforcement actions NHTSA has taken against vehicle automation system manufacturers. The table should contain relevant information including dates, the statutory and regulatory provisions at issue, the vehicle component at issue, and a description of any actions NHTSA has taken.

#### IV. New Tools and Authorities

NHTSA's discussion of potential new regulatory tools and authorities is likely the most controversial element of the FAVP. In a variety of ways, NHTSA proposes to upend five decades of federal auto safety policy. While a few of the items contained in Section IV, New Tools and Authorities, are sensible, such as amending NHTSA's exemption authority to raise the cap on the number of exempt vehicles and extend the temporary exemption period,<sup>33</sup> others should deeply concern developers and those wishing to realize the safety benefits as rapidly as possible.

First, NHTSA's discussion of potential safety assurance authority fails to indicate why pre-market manufacturer submission of data and to agency testing would offer benefits over the existing self-certification regime under which, historically, NHTSA notes "instances of non-compliance, especially non-compliance having substantial safety implications, are rare."<sup>34</sup> NHTSA's Office of Vehicle Safety Compliance currently has authority to conduct inspections of manufacturers' certification data and vehicles and equipment "at any stage of the manufacturing, distribution, and sales chain."<sup>35</sup> This existing authority should be more than adequate to ensure future vehicle automation system federal motor vehicle safety standards are honored by manufacturers and certainly does not justify the "large increase in agency resources" contemplated by the FAVP.<sup>36</sup>

Second, NHTSA's discussion of potential pre-market approval authority vis-à-vis the Federal Aviation Administration's ("FAA") aircraft certification regime fails to note that FAA is currently attempting to move away from its traditional, rigid pre-market approval technical regulations in light of new advances in unmanned aircraft systems, many of which rely on or will rely on automation systems similar to those that would be regulated by NHTSA.<sup>37</sup> To its credit, NHTSA does discuss the many differences between the

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33. *Id.* at 76.

34. *Id.* at 70-71.

35. 49 C.F.R. § 554.4.

36. FAVP, *supra* note 3, at 73.

37. See Stephanie Beasley, *FAA to Loosen Reins on Small-Airplane Certifications*, BLOOMBERG BNA (Sep. 23, 2016), available at <http://www.bna.com/faa-loosen-reins-n57982077478/>.

automotive and aircraft manufacturing industries in Appendix II, while noting that “FAA deals with only a few manufacturers and only rarely needs to approve an entirely new model of an airliner”<sup>38</sup> and that attempting to adopt an FAA-style pre-market approval regime “might create challenges for the industry due to potential delays in the beginning of production of vehicle models caused by the length of the approval process.”<sup>39</sup>

Third, NHTSA’s discussion of potential hybrid certification/pre-market approval authority represents the most dangerous, precautionary regulatory approach to automated vehicle systems proposed to date. This authority would go well beyond European-style type approval, which applies pre-market approval only to vehicle components covered by safety standards, and require manufacturers to face pre-market approval for vehicle automation system “features that are not covered by [a federal motor vehicle safety standard].”<sup>40</sup> It is unclear how a hybrid certification/approval authority could speed life-saving technology to market or why the public should have faith in NHTSA’s ability to conduct pre-market approval of vehicle systems beyond the scope of its expertise. Such a regime is not in place anywhere in the world, and for good reason.

NHTSA’s comparison of this hypothetical authority with the Pipeline and Hazardous Materials Safety Administration’s (“PHMSA”) certification and approval regime is inapt.<sup>41</sup> The purpose of PHMSA’s certification and approval program is to mitigate against the highest-risk cargo being introduced into the transportation system. In contrast, the automated vehicle system technologies NHTSA deems to be the highest risk (i.e., systems that achieve higher levels of automation) are those same systems that have the potential to mitigate the greatest degree of existing auto safety risk by mostly or entirely eliminating the largest auto safety risk factor: the human driver. Adopting the most stringent approach toward the technologies with the largest potential risk benefits turns risk management on its head, greatly delaying and reducing the potential life-saving benefits of these technologies.

Finally, with respect to NHTSA’s discussions of potential cease-and-desist authority and its existing authority to regulate post-sale software changes,<sup>42</sup> we believe NHTSA’s existing recall authority adequately addresses the new risks that could be introduced to the vehicle fleet by vehicle automation systems and that no new authorities are needed to abate these potential risks.

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38. FAVP, *supra* note 3, at 73.

39. *Id.*

40. *Id.* at 74.

41. *Id.*

42. *Id.* at 75-77.

To date, the vast majority of auto safety recalls have been voluntary or influenced, rather than being ordered by NHTSA. There is no reason to believe automakers or suppliers of vehicle automation systems would adopt a less cautious approach than current producers, where NHTSA's existing recall authority has proven adequate. If anything, given a likely shift in liability away from vehicle users and toward manufacturers, future manufacturers will likely take an even more cautious approach,<sup>43</sup> steps which could include direct wireless owner notification and remedy as a voluntary supplement to actions required under existing recall notification requirements.

### Conclusion

We appreciate the opportunity to comment on NHTSA's Federal Automated Vehicles Policy and look forward to further participation.

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43. See Bryant Walker Smith, *Proximity-Driven Liability*, 102 GEO. L.J. 1777 (2014).