

Senate Takes the On-Ramp for Autonomous Vehicles

Senate to propose companion legislation to House's SELF DRIVE Act.

Key Points:

- The Senate Commerce Committee passed a self-driving car bill that is similar but not identical to a version recently passed by the House of Representatives.
- The next step is for the full Senate to consider the legislation.

The Senate Commerce Committee's passage of a new autonomous vehicles bill signals that the likely contours of federal legislation for self-driving cars are coming into focus. As Latham previously wrote in a [Law360 article](#) and a [Client Alert](#), technologies and investments for highly autonomous vehicles (HAVs) are accelerating rapidly, and Congress is working to catch up.

By way of background, on September 6, the full House of Representatives passed the Safely Ensuring Lives Future Deployment and Research in Vehicle Evolution Act, or SELF DRIVE Act. Then on October 4, the Senate Commerce Committee voted to send the American Vision for Safer Transportation through Advancement of Revolutionary Technologies Act, or the AV START Act, for full Senate consideration. Senators John Thune (R-SD) and Gary Peters (D-MI) introduced the bipartisan AV START Act on September 28, addressing federal preemption of state authority, safety regulation, and other issues related to HAVs. This *Client Alert* analyzes the Senate bill, comparing it with the House's SELF DRIVE Act in advance of the AV START Act's debut on the full Senate floor.

The Senate's AV START Act

The Senate legislation has been under development for some time, in parallel with the House effort leading to the passage of the SELF DRIVE Act. The Senate Commerce Committee first held a hearing in May 2016 to examine advances in autonomous vehicle technology and the appropriate role for government in regulating self-driving cars. The Senate Commerce Committee has held two further hearings in 2017 — one in June, and another focused on self-driving trucks in September. Senators Thune and Peters have worked on major principles for HAVs legislation since early 2017.

The Senate Commerce Committee voted unanimously to send the AV START Act to the Senate floor only six days after the bill's introduction. However, the full committee markup did show that some members have yet to agree on how to address self-driving trucks. While the committee held a hearing on autonomous trucks on September 13, commercial vehicles were not included in the AV START Act. During markup, Sen. Jim Inhofe (R-OK) introduced — but later withdrew — an amendment to the bill that would have allowed for the testing and deployment of self-driving trucks. For the time being, the Senate seems more focused on moving an autonomous car bill closer to becoming law.

Federal Preemption

One closely watched provision in the AV START Act addresses federal preemption. Identical to the preemption provision in the House bill, the Senate provision would bar states and local governments from maintaining, enforcing, prescribing, or continuing in effect any law or regulation regarding the design, construction, or performance of HAVs, automated driving systems, or components of such systems, unless identical to an applicable Federal Motor Vehicle Safety Standards (FMVSS) promulgated by National Highway Traffic Safety Administration (NHTSA). The bill includes several savings clauses, one of which would preserve state and local authority to regulate registration, licensing, insurance, and safety and emissions inspections, among other areas. Another provides that compliance with an FMVSS does not exempt a person from common law (e.g., tort) liability and that the Safety Act's preemption provision does not preempt common law claims. Unlike the House bill, however, the Senate bill would prohibit states from issuing a license for operation of an HAV in a manner that discriminates on the basis of disability.

Safety Requirements

The AV START Act would also require modernization of vehicle safety requirements to address HAVs. When the Department of Transportation's (USDOT's) NHTSA originally wrote most of the FMVSS, beginning with the enactment of the National Traffic and Motor Vehicle Safety Act in 1966, self-driving cars were the stuff of science fiction. Recognizing that we are now in a new age of technology, the Senate legislation first directs USDOT to undertake an expedited process to update the FMVSS. The agency must first determine which existing FMVSS may require or reference a human driver, recommend any revisions to such standards within 180 days of the AV START Act's enactment, and within one year thereafter complete a rulemaking to revise the FMVSS as needed.

The bill would also require manufacturers to submit safety evaluation reports in specific subject areas, including system safety, data issues, cybersecurity, and the human-machine interface. In addition, the bill would require the establishment of an HAVs Technical Committee, which among other responsibilities would be required within five years to make recommendations to USDOT regarding "consensus-based, feasible, and objective standards" for potential rulemaking addressing safety issues for HAVs. USDOT must, within one year of receiving the recommendations, begin a rulemaking to address any recommendation that it approves. The bill does not specify a deadline for completion of any such rulemaking.

Exemption Authority

The AV START Act aims to hasten the deployment of HAVs by expanding NHTSA's exemption authority. The AV START Act would authorize NHTSA to exempt up to 50,000 HAVs per manufacturer from safety standards during the one-year period following the legislation's enactment. This cap would increase to 75,000 vehicles per manufacturer in the second year, and to 100,000 for the third year. After an exemption has been in place for five years, manufacturers could apply to raise the exemption cap to greater than 100,000 HAVs. The bill would provide that HAV exemptions are not subject to the time limit applicable to other exemptions under the current Safety Act, and would require NHTSA to approve or disapprove a petition for an HAV exemption within 180 days. These are big changes from the current system, in which each manufacturer is limited to 2,500 exemptions per year, with a two-year time limit.

Cybersecurity

The Senate bill also has a section addressing cybersecurity — including requiring manufacturers to develop and implement cybersecurity plans — reflecting the prominence of these issues in the debate over HAVs thus far. The legislation would also establish a working group, charged with making recommendations related to the education of, and responsible marketing to, consumers.

Like the House's SELF DRIVE Act, the AV START Act does not address automated trucks. Trucks were included in an earlier, publicly released Senate staff draft, sparking significant debate — including at a Senate Commerce hearing dedicated to this issue on September 13. The exclusion of automated trucks

from the recently released bill may indicate that the Senate sponsors are looking to minimize controversy or headwinds for the legislation.

Comparison to the House's SELF DRIVE Act

While the Senate sponsors drafted the AV START Act to be similar to the House's SELF DRIVE Act, and some provisions are identical (notably the preemption provisions), the bills contain some important differences that ultimately will need to be reconciled if the Senate bill or something close to it is passed.

Most notably, the bills' approaches to safety regulation are distinct. Each requires some form of vehicle safety assessments for HAVs, but the two frameworks differ — with the House bill requiring a USDOT rulemaking to prescribe requirements for safety assessment "certifications," and the Senate bill establishing (potentially) self-executing requirements for manufacturers' safety evaluation reports. As explained above, the Senate bill prescribes an "expedited" process for identifying issues related to references to human drivers in the FMVSS and making revisions to address them. The House bill does not. The House bill tasks USDOT with establishing and implementing a potentially broader plan to update the FMVSS as needed to address HAV issues, whereas the Senate bill creates a technical advisory committee to make recommendations upon which USDOT must act if it approves.

The bills' approaches to cybersecurity requirements are similar, but not identical. And the bills differ with regard to the NHTSA exemption provisions, with the Senate bill providing greater flexibility and higher caps.

Each bill also contains provisions in areas unaddressed by the other chamber's bill. As noted, the Senate bill includes protections against licensing discrimination and for the creation of a working group to examine disability needs and best practices, whereas the House bill does not. The House bill includes a section addressing privacy issues, requiring manufacturers to develop plans addressing consumer privacy and tasking the Federal Trade Commission with writing a report to Congress on consumer data and privacy issues. The AV START Act does not include analogous provisions.

Next Steps

The release of the Senate bill, and the pace of bipartisan Congressional action on HAVs generally, are promising signs for the industry, against the backdrop of rapid growth. Analysts project that the market for partially and fully automated vehicles could rise to US\$42 billion by 2025 and to US\$77 billion by 2035, with worldwide sales increasing to up to 12 million fully automated vehicles. As traditional manufacturers and startups move to take advantage of a new market, industry players are concerned that they will encounter outdated automobile safety regulations or a patchwork of conflicting federal and state rules. A broad range of industry stakeholders have been involved in the development of the House and Senate legislation. The next step is an important hurdle: passage by the full Senate. If that can be cleared, the Senate and House bills would then need to be reconciled through a conference committee (unless the House were to simply pass the Senate bill). If enacted, the legislation could play a critical role in supporting innovation and expansion of the US market.

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