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Regulatory Comment

Comments submitted to the Department of Transportation in the Matter of:

AUTOMATED VEHICLE POLICY SUMMIT

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INTRODUCTION

The Department of Transportation (hereafter, "the Department") and the National Highway Traffic Safety Administration (NHTSA) have made significant positive strides towards the development of an overarching regulatory regime for autonomous vehicles. In the second version of its Federal Automated Vehicle Policy—*Automated Driving Systems: A Vision for Safety 2.0* (hereafter, "*A Vision for Safety*")[1]—the Department promulgated a number of exemplary guidelines, including the explicit reiteration of the document's voluntary, non-binding nature,[2] as well as recommendations that states abstain from codifying its provisions in statute.[3]

In anticipation of the forthcoming update to *A Vision for Safety*, the following comments will address the second objective of the Department's recent public meeting on this matter: to "identify priority Federal and non-Federal activities that can accelerate the safe rollout of AVs."[4]

PART I: GOVERNING AUTONOMOUS VEHICLES

The Niskanen Center reiterates is support for the tone set by the current version of *A Vision for Safety*. The focus on industry-led best practices and voluntary standards strikes the ideal balance between ongoing innovation in autonomous vehicles with the Department's mandate to uphold public safety. We also remain supportive of a "soft law"[5] multistakeholder approach to developing a governance regime for autonomous

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[1] *Automated Driving Systems 2.0: A Vision for Safety*, U.S. Department of Transportation, National Highway Traffic Safety Administration, Sept. 2017, https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/13069a-ads2.0_090617_v9a_tag.pdf. (hereafter, *A Vision for Safety*)

[2] *A Vision for Safety*, p. 2. ("This Guidance is entirely voluntary, with no compliance requirement or enforcement mechanism. The sole purpose of this Guidance is to support the industry as it develops best practices in the design, development, testing, and deployment of automated vehicle technologies.")

[3] *Id.*, p. 18. ("NHTSA strongly encourages States not to codify this Voluntary Guidance (that is, incorporate it into State statutes) as a legal requirement for any phases of development, testing, or deployment of [autonomous vehicles]. Allowing NHTSA alone to regulate the safety design and performance aspects of [autonomous vehicle] technology will help avoid conflicting Federal and State laws and regulations that could impede deployment.")

[4] *Notice of Public Meeting: Automated Vehicle Policy Summit*, Department of Transportation, Office of the Secretary, Docket No. DOT-OST-2018-0017, published Feb. 12, 2018, https://www.federalregister.gov/documents/2018/02/12/2018-02738/notice-of-public-meeting-automated-vehicle-policy-summit. ("The objectives of the public meeting are to: (1) Get feedback on the draft AV 3.0 Framework; and (2) identify priority Federal and non-Federal activities that can accelerate the safe rollout of AVs.")

[5] Soft law generally refers to "instruments or arrangements that create substantive expectations that are not directly enforceable, unlike 'hard law' requirements such as treaties and statutes." Gary E. Marchant & Braden Allenby, *New Tools for Governing Emerging Technologies*, 73 Bulletin of the Atomic Scientists 108, p. 112, 2017. For a more detailed discussion of soft law and emerging technology regulatory governance, *see* Ryan Hagemann, Jennifer Skees, and Adam Thierer, *Soft Law for Hard Problems: The Governance of Emerging Technologies in an Uncertain Future*, Colorado Technology Law Journal, forthcoming, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3118539.

vehicles and recommend that any updates to the new guidance should continue endorsing a focus on co-regulatory efforts.

Although autonomous vehicles occupy a far more safety-critical policy arena than many other new technologies, they are nonetheless ideally situated to benefit from the same type of broad stakeholder engagement models that have served the governance of other emerging technologies so well. Examples of successful emerging technology multistakeholder governance proceedings are legion, and include a wide array of topics, from commercial drones and cybersecurity to facial recognition and the Internet of Things.[6] Indeed, the Department has already broadly embraced a light-touch regulatory approach that mirrors many of the elements of soft law governance, including explicit suggestions that states abstain from technology-specific rules that might otherwise stifle competition. For example, the current version of *A Vision for Safety* is clear in its position that:

> States should not place unnecessary burdens on competition and innovation by limiting [autonomous vehicle] testing or deployment to motor vehicle manufacturers only. For example, no data suggests that experience in vehicle manufacturing is an indicator of the ability to safely test or deploy vehicle technology.[7]

This approach, coupled with non-binding voluntary standards, should continue to serve as a guiding principle in the updated guidance. As we have noted elsewhere:

> Rather than attempt to undermine federal authority by locally preempting safety standards, states, and municipalities are more appropriately situated to continue focusing on their traditional realms of expertise, including licensing and registration, reporting, and communications mechanisms among firms and operators and public safety officials, and reviewing existing traffic statutes, laws, and regulations "that may serve as barriers to operation of" autonomous vehicles.[8]

The ongoing use of soft law measures and co-regulatory proceedings, such as the multistakeholder process, can continue building on the excellent work the Department has already produced on autonomous vehicle guidance. Other agencies have a long-standing commitment to the use of such meetings as means of closing the knowledge gap between innovators and regulators, and could be duplicated for the Department's use in its ongoing development of a regulatory framework for autonomous vehicles. The National Telecommunications Information Administration (NTIA), in particular, has a long history of convening

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[6] *Voluntary Best Practices for UAS Privacy, Transparency, and Accountability*, Consensus, Stakeholder-Drafted Best Practices Created in the NTIA-Convened Multistakeholder Process, May 18, 2016, https://www.ntia.doc.gov/files/ntia/publications/uas_privacy_best_practices_6-21-16.pdf; *Multistakeholder Process: Internet of Things (IoT) Security Upgradability and Patching*, National Telecommunications Information Administration, Sept. 11, 2017, https://www.ntia.doc.gov/other-publication/2016/multistakeholder-process-iot-security; *Multistakeholder Process: Cybersecurity Vulnerabilities*, National Telecommunications Information Administration, Dec. 15, 2016, https://www.ntia.doc.gov/other-publication/2016/multistakeholder-process-cybersecurity-vulnerabilities.

[7] *A Vision for Safety*, p. 21.

[8] Ryan Hagemann, *New Federal Guidelines Clear the Road Ahead for Autonomous Vehicles*, Niskanen Center, Sep. 13, 2017, https://niskanencenter.org/blog/new-federal-guidelines-clear-road-ahead-autonomous-vehicles/.

successful multistakeholder meetings. In the medium- to longer-term, NTIA's experiences could help inform the Department's approach to developing future models of regulatory governance for autonomous vehicles. In the short-term, however, the Department can help advance the regulatory discussion by embracing the same governing framework for autonomous vehicles that the Department of Commerce recently reaffirmed in its approach to the Internet of Things.

In January 2017, the Department of Commerce explicitly reaffirmed its commitment to a set of principles that have helped guide the development of the commercial Internet: *The Framework for Global Electronic Commerce* (hereafter, the *Framework*).[9] In its green paper—*Fostering the Advancement of the Internet of Things*—the Department of Commerce recognized the *Framework*'s value in ushering in the digital age, noting that:

> Dating back at least to the 1997 Framework for Global Electronic Commerce, the U.S. Government has been operating under the principle that the private sector should lead in digital technology advancement. Even where collective action is necessary, the U.S. Government has encouraged multistakeholder approaches and private sector coordination and leadership where possible. When governmental involvement is needed, it should support and enforce a predictable, minimalist, consistent, and simple legal environment for commerce.[10]

As the Niskanen Center noted in previous comments, "we suggest NHTSA and the Department of Transportation follow the [Department of Commerce's] lead and explicitly affirm their commitment to these principles."[11] These principles have helped promote the remarkable success of the Internet and can just as easily apply to the governance of autonomous vehicles. Given the Department has already tacitly embraced a soft law governance framework in *A Vision for Safety*, it should explicitly elucidate its commitment to the *Framework's* principles. In so doing, the Department would merely be codifying the work already done in promoting voluntary best practices, industry-led standards, and co-regulatory efforts for autonomous vehicles.

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[9] *Fostering the Advancement of the Internet of Things*, Department of Commerce, Internet Policy Task Force and Digital Economy Leadership Team, Jan. 12, 2017, p. 40, https://www.ntia.doc.gov/files/ntia/publications/iot_green_paper_01122017.pdf. ("The Department reaffirms its commitment to the policy approach that has made the United States the leading innovation economy. This approach is reflected in the 1997 Framework for Global Electronic Commerce, and has been maintained across all subsequent Presidential administrations. It asserts that policy should generally be industry led, and that regulation, when needed, should be predictable and consistent."); *See also*, White House, *The Framework for Global Electronic Commerce*, July 1997, http://clinton4.nara.gov/WH/New/Commerce.

[10] *Fostering the Advancement of the Internet of Things*, p. 11.

[11] Ryan Hagemann, *Comments submitted to the National Highway Traffic Safety Administration in the Matter of: Automated Driving Systems: A Vision for Safety*, Niskanen Center, Docket No. NHTSA-2017-0082, submitted Oct. 3, 2017, p. 6, https://niskanencenter.org/wp-content/uploads/2017/10/Comments-Autonomous-Vehicle-Guidance-NHTSA.pdf.

In addition, interagency harmonization of these principles can help establish a more unified and formal commitment to the government's perspective on not only autonomous vehicles, but new emerging technologies more broadly. As we noted in previous comments to NHTSA:

> An interagency affirmation of the Framework would help buttress support for not only this guidance, but future versions as well. By harmonizing the regulatory disposition of NHTSA and DOC, other agencies would surely follow suit, helping to expedite the development and deployment of not only autonomous vehicles, but numerous other emerging technologies as well. NHTSA should affirm its support for the Framework in order to help tether its current regulatory governance approach to the certainty provided by these tried-and-true principles. If these principles could help the Internet flourish, they can certainly do the same for autonomous vehicles—and potentially many other technologies.[12]

For all these reasons, the Department should officially affirm an institutional commitment to the *Framework*. The forthcoming update to *A Vision for Safety* would be an ideal and opportune moment for the Department to state, formally and unequivocally, its dedication to these principles.

PART II: POLICY RECOMMENDATIONS

We remain supportive of the tone and tenor of the Department's most recent guidance iteration and would recommend the next version retain the focus on voluntary best practices, industry-led standards, and a friendly disposition towards light-handed regulatory governance. To further improve on articulating these sentiments, however, we would offer the following recommendations for the next version of *A Vision for Safety*.

1. Explicitly embrace the principles of the *Framework for Global Electronic Commerce*, adjusted for application to the Department of Transportation's mission.

For the reasons previously outlined, the Niskanen Center strongly recommends the Department formally commit to an affirmation of the principles of the *Framework*. This language could largely be copied from the Department of Commerce's green paper on the Internet of Things, and could read:

> The Department [of Transportation] affirms its commitment to the policy approach that has made the United States the leading innovation economy. This approach is reflected in the 1997 Framework for Global Electronic Commerce, and has been maintained across all subsequent Presidential administrations. It asserts that policy should generally be industry led, and that regulation, when needed, should be predictable and consistent.[13]

A Vision for Safety already functionally embraces the general tenets of the *Framework*. By making an assertive pledge of commitment to these principles, the Department would further legitimize its governance approach

[12] *Id.*

[13] *Fostering the Advancement of the Internet of Things*, p. 40.

to autonomous vehicles by evoking informal and long-standing governance norms. Additionally, a unified interagency approach towards emerging technologies would ideally position the Department (and the Trump Administration more broadly) to capitalize on ongoing deregulatory efforts, while further entrenching precedent for future efforts aimed at crafting innovation-friendly, market-driven governance solutions.

2. Abstain from mandating the use of the dedicated short range communications vehicle-to-vehicle standard for autonomous vehicles.

During the recent workshop meeting, Secretary Chao communicated the Department's intention to "remain tech neutral, leaving the market to 'determine the most effective solutions.'"[14] While we applaud the focus on technology-neutral rules and market-driven solutions, the Department has yet to make a final decision on its rules that would mandate dedicated short range communications (DSRC) standards for all new light vehicles—including autonomous vehicles. This issue is a perfect example of a *technology-specific* mandate that is unlikely to deliver on its purported benefits, and which could easily be discarded without negatively impacting ongoing developments in safety-critical technologies for connected cars and autonomous vehicles.

In a letter from June 2017, the Niskanen Center articulated many of the concerns with mandating the use of DSRC in new light vehicles, including its serious privacy protection and cybersecurity shortcomings and the existence of better alternative standards.[15] Other automakers, technology organizations, and nonprofits have expressed similar concerns, including BMW, Mercedes-Benz, Tesla, CTIA, Verizon, the Center for Democracy and Technology, the Mercatus Center at George Mason University, and many more.[16]

In order to make good on its promises of a technology-neutral regulatory framework driven by innovators, the Department should withdraw its consideration of the DSRC mandate.

3. Include specific recommendations for federal motor vehicle safety standards that should be amended to accommodate the deployment of autonomous vehicles.

In order to maximize its effectiveness, the next version of *A Vision for Safety* needs to include specific next steps the Department intends to pursue in order to address the various regulatory hurdles confronted by autonomous vehicles. To that end, we would direct the Department's attention to the recent request for comment from NHTSA on "Removing Regulatory Barriers for Vehicles With Automated Driving Systems" (Docket No. NHTSA-2018-0009). The updated guidance on automated vehicles should include specific recommendations for federal motor vehicle safety standards that need to be amended or rescinded to

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[14] Kristin Musulin, *Stakeholder convene for USDOT public hearing on AV policy*, Smart Cities Dive, Mar. 2, 2018, https://www.smartcitiesdive.com/news/usdot-public-hearing-autonomous-vehicle-policy-stakeholders/518232/.

[15] *Letter to Secretary Elaine L. Chao and Chairman Ajit Pai, RE: Federal Motor Vehicle Safety Standards: Vehicle-to-Vehicle (V2V) Communications Docket No. NHTSA-2016-0126*, June 12, 2017, https://niskanencenter.org/wp-content/uploads/2017/09/LetterDSRCMandateFCCandNHTSA-3.pdf.

[16] See the following document, submitted to the Federal Communications Commission, for a comprehensive list of those organizations expressing concern regarding the DSRC mandate: https://ecfsapi.fcc.gov/file/10612871105423/State%20of%20DSRC%20Compendium_FINAL.pdf.

accommodate the introduction of autonomous vehicles on American roadways. Providing this level of statutory clarity is an important and necessary next step in developing the rules of the road that will help, rather than hinder, the research, testing, and eventual deployment of this life-saving technology.

CONCLUSION

Autonomous vehicles hold the promise of significantly reducing the number of lives lost on American roadways. Every day of delay results in lives lost, time wasted, and money squandered. The Niskanen Center is pleased to see the Department is prioritizing the use of market-friendly mechanisms to spur the development and deployment of this technology. We remain supportive of the Department's ongoing commitment to this approach, and respectfully reiterate our belief that embracing the recommendations offered here can help further the goal of all stakeholders involved: safer roads for all Americans.

We would like to thank the Department of Transportation for the opportunity to comment on this issue and look forward to continued engagement on this and other topics.