



**Before the
California Department of Motor Vehicles
Sacramento, California**

In the Matter of)	
)	OAL File Number Z-2017-0227-02
Request for Written Comments on)	
Driverless Testing and Deployment Regulations)	Calif. Veh. Code Section 38750
)	

**COMMENTS OF
THE R STREET INSTITUTE, THE COMPETITIVE ENTERPRISE INSTITUTE, TECHFREEDOM, AND THE
INTERNATIONAL CENTER OF LAW & ECONOMICS**

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INTRODUCTION

On behalf of the R Street Institute, the Competitive Enterprise Institute, TechFreedom, and the International Center for Law & Economics, we respectfully submit these comments in response to the California Department of Motor Vehicles' proposed Driverless Testing and Deployment Regulations released on March 10, 2017. We believe the proposed regulations better serve the people of California—not only in terms of safety, but in terms of consumer welfare more generally. We are particularly cognizant of the DMV's demonstrable commitment to an iterative approach to this rulemaking.¹ On that basis and in that spirit, we believe that further revisions are necessary.

GENERAL CONSIDERATIONS

These comments deal with specific provisions of the proposed regulations, but there are also general considerations that defy categorization on the basis of a section-by-section analysis. Those considerations are addressed here.

Department authority, misplaced reliance on Vehicle Code 1651: As a general matter, the Department's reliance on Section 1651 for authority to promulgate rules beyond the scope of the authority provided by Section 38750 is misplaced. While agencies are granted broad discretion to interpret statutes in areas in which they have expertise, that authority is not without limit and is neither conclusive nor binding.^{2 3} *State Board of Equalization v. Board of Supervisors* (1980) 105 Ca. App. 3d 813, 819 states that "An administrative officer may not make a rule or regulation that alters or enlarges the terms of a legislative enactment." These proposed regulations both alter and enlarge the terms of California Vehicle Code Section 38750.

Section 38750 includes robust and specific provisions, subsections 38750(d)(1)-(4), concerning the adoption of regulations governing the deployment and operation of autonomous vehicles. Yet, while the authority to promulgate regulations in Section 38750 is broad, it is focused specifically on steps related to the "safe operation" of autonomous vehicles.

It is a well established rule of statutory interpretation in California that when two statutes are on the same subject they are to be interpreted together, and that the more recent or particular statute should control over the more general statute.⁴ Section 1651 is the Department's "catch-all" statute concerning the adoption of rules to enforce the vehicle code. Yet, when the legislature adopted Section 38750, it

¹ Previously submitted comments by R Street, CEI, TechFreedom, and ICLE are available here: <http://www.rstreet.org/wp-content/uploads/2016/10/RSI-Coalition-CA-AV-Reg-Comments-FINAL.pdf>

² Michael Pappas, "Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the Chevron Doctrine." *McGeorge Law Review*, Vol. 39, pp.1011 *available at* http://www.mcgeorge.edu/Documents/Publications/03_Pappas_MasterMLR39.pdf

³ Carolina C. Rose, "Research & Practice Guide: California Legislative History & Intent" *available at* http://www.lrihistory.com/lridocuments/Legislative.Intent.Practice.Guide_001.pdf

⁴ *Id.* at 10.

specifically included a section concerning the adoption of regulations in the context of autonomous vehicles. Thus, Section 38750, the more recent and particular statute, supersedes the more general authority of Section 1651 in the context of regulating the technology. Any regulations adopted not directly tied to the safe operation of autonomous vehicles must rest on independent authority - beyond Section 1651.

The infirmity caused by reliance on Section 1651 permeates the proposed regulations. In its “Initial Statement of Reasons,” the Department repeatedly offers rationales for proposed rules unrelated to the safe operation of autonomous vehicles and cites both Section 38750 and Section 1651. Since regulations not directly related to the safe operation of autonomous vehicles plainly fall beyond the scope of Section 38750, the Department is relying on the authority of Section 1651 for such pronouncements.

The following sections are unrelated to the safe operation of autonomous vehicles, are beyond the scope of the Department’s delegated authority, and require enabling legislation to pursue:

- 227.38(a) - Interaction with local authorities.
- 227.38(b) - Certification of liability during driverless testing.
- 227.50 - Reporting disengagement of autonomous mode
- 228.28 - Driver and manufacturer responsibility during permitted deployment.

Inconsistently stated safety standards: throughout the proposed rules, the Department uses different standards of safety. Such inconsistency is not only problematic in the event that the Department actually does have the authority to apportion liability between parties, but also insofar as the Department’s rules are used to establish standards by which liability is judged. Here are all of the different safety standards that the Department articulates throughout the proposed regulations:

- 227.18(b) - reasonably determined that it is safe
- 227.42(a)(3) - unreasonable risk
- 228.06(a)(10) - safe
- 228.08(e)(2) - safe
- 228.12 - unreasonable risk
- 228.16(b) - a safety risk to the public
- 228.20(b)(6) - not safe
- 228.28(a), (b) - safe operation

We would urge the Department to seek both consistency and the most flexible definition of “safe” supportable under the remit of Calif. Veh. Code 38750.

SPECIFIC COMMENTS

Requirements for a manufacturer's testing permit, Section 227.04(c): As in the previously circulated draft regulations, Sections 227.04(c) (Requirements for a Testing Permit) and 227.08 (Instrument of Insurance), as written, include an inconsistency concerning the scope of products that surplus lines insurers may be able to provide.

Section 227.04(c)'s reference to "instrument of insurance" fails to include surplus lines insurers for anything outside of providing a surety bond, while Section 227.08 has no such limitation and specifies simply that an "instrument of insurance" may be provided by a surplus lines insurer.

In practice, it appears that the DMV has treated the requirements of the two sections as coterminous. Thus, complying with the requirement under 227.08(a) would be satisfactory to fulfill the requirement under 227.04(c). The proposed regulations address the confusion that exists in novel sections (see 228.04(a)(3)) by simply stating that meeting the requirements of Section 227.08 is satisfactory evidence of compliance. The ambiguity concerning Section 227.04(c) should be resolved in a similar manner and is important to ensure that non-admitted insurers may be able to offer a full range of products without a cloud of regulatory uncertainty.

We recommend the following amendment:

Revise Section 227.04(c) to read: "...in the form of: an instrument of insurance that meets the requirements of Section 227.08, a surety bond issued by an admitted surety insurer or an eligible surplus lines insurer...."

Identification of autonomous test vehicles, Section 227.16: The additions made to this section that provide for flexible identification methods for test vehicles are necessary and welcome. Given the fluid nature of the development environment, the need for rules that define clearly the outer bounds of acceptable behavior is great.

Term of Permit, Section 227.22: By increasing the term of testing permits from one year to two years, the Department has diminished the administrative burden on both itself and industry. That is a favorable development.

However, given the requirements laid out in Section 227.30(b) - for testing with a driver - and Section 227.38(j) - for testing without a driver - to amend testing permits when material changes are made, we would recommend that the timeline be either extended further or, preferably, removed completely. This would bring Section 227.22 into alignment with Section 228.14, in the context of deployment permits, which includes no expiration date.

On the basis of the requirement for compulsory updates and the demonstrated belief that permits need not expire, permit renewal in the context of testing serves no clear purpose.

Vehicles Excluded from Testing and Deployment, Section 227.28: This section seeks to protect public safety by prohibiting the testing and deployment of certain vehicles, including:

- Trucks of three axles with a gross vehicle weight rating of more than 10,000 pounds.
- Buses and paratransit vehicles.
- Semis and many commercial vehicles.

Such a prohibition is unjustified on technical and safety grounds, and ignores promising commercial motor vehicle applications of automated systems of varying levels of automation. Perhaps some limitation on the operational design domain of driving automation system-equipped heavy trucks may be justified, such as requiring testing to be conducted outside of urbanized areas and deployment to be limited to certain routes, but there is no basis for a statewide ban.

We recommend that Section 227.28 be eliminated.

Local Authorities, 227.38(a): As referenced in Section 227.38(a), the term “local authorities” remains undefined. As in our previously submitted comments, we believe such an omission may lead to serious problems in the execution of the section’s requirements. Specifically, the section requires that a manufacturer “certify” that local authorities, within a testing area, have been notified of the applicable operational design domains and further requires the manufacturer to “coordinate” testing with local authorities. As written, there are three problems with such an approach.

First, ambiguity. The term “local authorities” is not defined in Section 227.38 or in Section 227.02 (“Definitions”). Given that the regulations requires both “notification” and “coordination” with local authorities, it is crucial that the regulations provide certainty about the public bodies that it expects manufacturers to certify interaction with. Do special districts, along with various municipal governments, require notification and coordination? Without certainty, an inadvertent omission or oversight could lead to a scenario in which a testing permit is not granted, is suspended, or is revoked.

Further, the scale of the burden, both administrative and insofar as compliance is concerned, caused by this ambiguity is potentially enormous. California has a total of 4,435 local governments, a term inclusive of counties, towns/municipalities, special districts, and school districts.⁵ Taking into account only towns/municipalities and counties, a manufacturer seeking to test throughout California would have to notify and coordinate with 539 “local authorities.” And, then, provide the DMV with “written notification” of each interaction. The burden associated with such a requirement will be enormous.

Second, insofar as the regulations contemplate a testing regime in which local authorities coordinate with manufacturers, the explicit veto power of local authorities, present in the draft regulations, has been removed. However, a constructive ability to inhibit testing remains. Should a local authority refuse

⁵ U.S. Census Bureau, “2012 Census of Governments” available at <https://www.census.gov/govs/cog/>

to” coordinate” with a manufacturer, a manufacturer will be unable to fully satisfy the requirements of Section 227.38 and will be unable to obtain a permit that allows them to test in that region.

While it is unlikely that such a refusal would stand in the way of a permit being issued, on the basis of the availability of other testing jurisdictions willing to coordinate, the ability of localities to opt-out of testing remains problematic and should be actively eliminated. Just as a national “patchwork” or regulation is being avoided, so too should a local patchwork of regulation. What’s more, to deploy an autonomous vehicle under Section 228.06(c)(7), data must be submitted demonstrating the autonomous technology’s testing in the design domains in which it is seeking to deploy, inclusive of all locations where the vehicle tested. A constructive refusal by a local government may prevent a manufacturer from complying with Section 228.06(c)(7).

Third, the “Initial Statement of Reasons” states that the section is necessary to ensure that local authorities are “aware of and consulted” regarding testing on public streets.⁶ Yet, there is no such obligation within Section 38750, or any other relevant statute, and does not relate to the “safe operation” of autonomous vehicles. Thus, the realization of such an objective has no basis in current code and is beyond the scope of the authority delegated to the Department.

For this technology to be developed and refined in the safest possible manner, it will need to experience all possible conditions. Necessarily, this means that access to all publicly available roads is vital.

We suggest three possible amendments, in decreasing order of desirability:

1. Remove all references to “local authority” within the regulations;
2. Affirmatively restrict the authority of bodies other than the state to govern the testing or operation of autonomous vehicles;
3. Clarify the definition of “local authority.”

Amendment number two could take the form of law already adopted in Tennessee⁷ and use the following language:

- (a) No political subdivision may by ordinance, resolution, or any other means prohibit the use of a motor vehicle within the jurisdictional boundaries of the political subdivision solely on the basis of being equipped with autonomous technology if the motor vehicle otherwise complies with all safety regulations of the political subdivision.

Assumption of Liability, Section 227.38(b): Subdivision (b) of Section 227.38 requires a manufacturer to certify, as a testing permit condition, that they will assume “liability” for any “at-fault” collision that occurs as they test their driverless vehicle. As written, this section is problematic for three reasons.

⁶ Initial Statement of Reasons at 13.

⁷ *Tenn. Code Ann. Section 55-8-202.*

First, it is superfluous. By definition, a party at-fault in an automobile collision is liable for the expenses associated with making affected parties whole. The same goes for an “at fault” manufacturer in the context of a product liability action, should such a theory be applied to autonomous vehicles. In that way, subsection (b) serves no clear purpose and is merely a restatement of existing law.

Second, it is ambiguous. Taken in consort with Sections 228.28(a) and (b), related to “Driver and Manufacturer Responsibility” in the context of deployment, some confusion may arise. In Section 228.28, the manufacturer is not only constructively responsible for at-fault collisions, they are additionally responsible for the “safe operation” of the vehicle. It is not clear what liability is imposed by such a requirement, or if such liability exceeds that already ensconced in law. Is it the Department’s intention to have two — or more — distinct liability standards as between testing and deployment?

Third, it is without ground in delegated authority. Assuming that Section 227.38(b) actually does confer novel liability, it is not clear that the Department has the authority to create such liability via a promise to accept liability under Section 38750.

We suggest that the Department remove Section 227.38(b).

Production of a NHTSA Safety Assessment Letter, Section 227.38(g): This section requires a manufacturer to submit a copy of a “Safety Assessment Letter” discussed in NHTSA’s “Federal Automated Vehicle Policy.” In its current form, the section incorrectly states that the production of such a document to NHTSA is “specified” in the FAVP.

As we have articulated in previous comments, any requirement related to the FAVP’s Safety Assessment Letter is problematic.⁸ Though the regulations no longer require manufacturers to “certify” accordance with the FAVP, which is an improvement, compelling the production of a “Safety Assessment Letter” still rests on the assumption that the provision of such a document is required by federal law to test or operate an autonomous vehicle. This is not the case.

The Federal Automated Vehicle Policy, concerning provision of the Safety Assessment Letter to NHTSA, reads: “...the Agency will request that manufacturers and other entities voluntarily provide reports regarding how the Guidance has been followed. This reporting process may be refined and made mandatory through a future rulemaking.”⁹

While we understand that NHTSA is likely to promulgate rules making reporting compulsory at some future date, unless and until NHTSA makes the filing of a Safety Assessment Letter mandatory via

⁸ National Highway Traffic Safety Administration of the U.S. Department of Transportation, “Federal Automated Vehicles Policy,” September 2016, *available at* <https://www.transportation.gov/AV/federalautomated-vehicles-policy-september-2016>

⁹ FAVP at 17.

rulemaking, this provision compels manufacturers to treat the voluntary provision of a Safety Assessment Letter to NHTSA as compulsory. Insofar as the Department's action transforms NHTSA's voluntary guideline into a compulsory standard, this is a *de facto* infringement on NHTSA's exclusive authority to oversee vehicle safety standards and is in direct conflict with the Department's own stated recognition of the division between state and federal regulatory responsibility.¹⁰

At the moment, it is not clear whether NHTSA will continue to use or reference the FAVP, specifically. In fact, in the Initial Statement of Reasons, the Department recognizes that NHTSA advised state governments that they may request an alternative document confirming consideration of the principles set forth in the FAVP.¹¹ Given NHTSA's guidance, Section 227.38(g) is needlessly specific and will require subsequent rulemaking to update should the federal government commence the use of a different controlling document or standard.

We suggest three possible amendments, in decreasing order of desirability:

1. Make reference to federal regulatory actions broader, so that the manufacturers may certify attention to other federal enactments and mandates that may supersede the Safety Assessment Letter.
2. Make the provision of the FAVP Safety Assessment Letter permissive;
3. Remove all requirements related to the FAVP Safety Assessment Letter.

For instance, Section 227.38(g) could be amended to read:

(g) A manufacturer shall provide documents that have been submitted to the National Highway Traffic Safety Administration (NHTSA) and other relevant federal authorities related to their automated technologies concerning vehicle safety and vehicle performance, excluding any confidential business information.

Data-collection notice, Section 227.38(h): This subsection requires a manufacturer to provide notice to members of the public riding in autonomous test vehicles, as opposed to seeking their consent, about the type of personal information, if any, that is being collected by the vehicle. We commend the Department for the use of this standard with regard to members of the public riding in autonomous vehicles, but would suggest the Department reevaluate other aspects of its data collection and notice policy (see comments on Section 228.24).¹²

Reporting Disengagement of Autonomous Mode, Section 227.50: This section creates a requirement for manufacturers to report to the Department instances in which their automated driving system was forced to disengage.

¹⁰ Initial Statement of Reasons at 2.

¹¹ Initial Statement of Reasons at 24.

¹² October comments at 6.

While facially desirable, this requirement creates a perverse disincentive that discourages firms from addressing particularly challenging operational scenarios. A company that chooses to test a large number of miles driven in urban centers, surrounded by traffic and pedestrians, likely will report more frequent disengagements than one that chooses to focus its testing on freeways.

In practice, the Department's reporting requirement penalize firms that undertake tasks with a higher degree of difficulty by subjecting them to additional reputational risk. Predictably, in the wake of the disclosures, much has been/and will continue to be made of the "poor" performers. At this juncture, the last thing public policy should do is discourage efforts to tackle the hardest problems likely to confront self-driving technologies.

To date, the Department has offered no analysis of the collected data and, moving forward, will continue to lack the expertise necessary to evaluate such data. On that basis, the argument that the Department needs this information to ensure the safe operation of autonomous vehicles is specious. Thus, there is no authority under Section 38750 that supports the inclusion of such a requirement.

We recommend that Section 227.50 be removed.

Application for a Permit for Post-Testing Deployment of Autonomous Vehicles on Public Roads, Section 228.06(d): this section lays out the certifications that a manufacturer must make to the Department to deploy an autonomous vehicle on public roads in California. As discussed in our comment concerning 227.38(g), requiring production of a Safety Assessment Letter needlessly infringes on federal authority by making mandatory a hitherto voluntary process and is also substantively unnecessary.

In Section 228.06, alone, there are four certifications that relate to compliance with federal safety standards (228.06(a)(6),(7); 228.06(b)(3); 228.06(c)(6)) exclusive of the certification related to the explicitly optional Safety Assessment Letter.

As before, we suggest three possible amendments, in decreasing order of desirability:

1. Make reference to federal regulatory actions broader, so that the manufacturers may certify attention to other federal enactments and mandates that may supersede the Safety Assessment Letter.
2. Make the provision of the FAVP Safety Assessment Letter permissive;
3. Remove Section 228.06(d)'s requirements related to the FAVP Safety Assessment Letter.

For instance, Section 228.06(d) could be amended to read:

(d) A manufacturer shall provide documents that have been submitted to the National Highway Traffic Safety Administration (NHTSA) and other relevant federal authorities related to their

automated technologies concerning vehicle safety and vehicle performance, excluding any confidential business information.

Review of Application, Section 228.08(e)(2): this section sets-out the terms on which applications for autonomous vehicle deployment shall be approved. It reserves for the Department the authority to determine whether the autonomous vehicle in question is safe to operate on public roads.

It is not clear, from the text of the regulation, how a manufacturer must “satisfy” to the Department that a vehicle is safe to operate on public roads. Thus, as written, the section is overly-broad, includes no metric by which a manufacturer can judge its performance, and blurs the line between state and federal authority over vehicle safety.

As a general matter, the use of performance-based regulation is a light-touch approach to accomplishing vital safety-objectives. NHTSA, the federal regulator of autonomous vehicles, has moved in this direction with some Federal Motor Vehicle Safety Standards. Yet, the effectiveness of such standards depends largely on the existence of an unambiguous metric by which regulated entities can evaluate their performance. Because the Department lacks the technical expertise to establish such standards, the power to grant a permit based on an evaluation of vehicle performance made by the Department is entirely discretionary and susceptible to misapplication.

The Department finds itself in something of a “Catch-22” when it comes to reserving itself authority to grant permits on the basis of vehicle performance. Clearly, the state of California, insofar as it has given the Department the authority to ensure the “safe operation” of autonomous vehicles within the state must have some control over the terms on which permits are issued, suspended, and revoked. Yet, because a performance-based standard for permit approval, suspension and revocation would have the same practical effect as an FMVSS, the Department is unable to articulate an objective standard of its own.

As currently written, Section 228.08(e)(2) blurs the line between state and federal authority and is an example of an area in which deference to federal regulatory authority is warranted. For that reason, the Department should demonstrate forbearance here and rely upon Sections 228.04 and 228.06, which each include terms upon which the state looks to the federal government, and avoid the creation of an amorphous and uncertain standard at the gateway of autonomous vehicle deployment.

We recommend that Section 228.20(e)(2) be removed.

Amendment of Application, Section 228.10(b),(c): this section sets out that any time a manufacturer makes a “material change” to their vehicles, they must first have it approved via a new application to the Department before that change may be deployed. The definition of “material change” provided in the section is “...any hardware, software, or other significant update to the autonomous vehicle’s autonomous technology that the manufacturer has determined will have a material impact on the

capability or safety of that technology.” This section creates, in essence, a pre-market approval mechanism for the Department and is problematic for four reasons.

First, in-built delays associated with permit approval. Because Vehicle Code Section 38750(e)(2) has a mandatory 180 day (six month) period of delay between the submission of an application and its ultimate approval, requiring manufacturers to submit a new application every time there is an update impacting the way the vehicle performs will build in a six month delay to every safety update that a manufacturer seeks to install. Since the Department is not qualified to evaluate the performance metrics associated with an update necessitating a new application, there is no compelling reason for such a delay to be associated with what amounts to a restatement of certifications.

Second, the creation of a needless delay on safety updates. When a manufacturer becomes aware of a safety improvement that can meaningfully improve the performance of a vehicle, they will be prevented from deploying it. In this way, the provision will create a state of affairs in which less-safe vehicles are allowed to operate while safer vehicles wait for approval. If manufacturers discover a possible improvement and are not allowed to deploy an update immediately, any additional injuries that result are - effectively - the Department's responsibility.

Third, ambiguity and overbreadth. In spite of the Department's effort to define what constitutes a “material change,” it is not at all clear what sort of activity would necessitate a new application.

This section, as drafted, is the most harmful addition that has been made to the proposed regulations. The goal of the section, to keep the Department apprised of developments related to vehicles that it has issued permits for, is laudable. Yet, the Department can achieve that goal without introducing a rigid period of delay.

For instance, the Department already requires updates related to compliance with traffic laws (Section 228.06(a)(6)), the use of mapping software (Section 228.06(a)(8)(b)), and the use of the manufacturer's latest software (Section 228.06(a)(8)(c)), without triggering a renewed permit process. On those matters, the Department reserves the ability to verify compliance but does not seek to approve the nature of the change.

The Department should consider a similar approach to other changes related to already approved permit applications. When manufacturers make material changes to their vehicles that modify the hardware or software in a manner that would alter the terms of the permit application that they submitted for the Department's approval, the manufacturer should be compelled to notify the Department of the change. At that point, aware of the change, the Department could begin a process of review akin to its permit approval process and subsequently raise concerns. Such an approach is similar to the sort of “file and use” regulation that is not uncommon in the context of insurance rate review.¹³

¹³ Investopedia, “File-and-use rating laws.” *available at* <http://www.investopedia.com/terms/f/fileanduse-rating-laws.asp>

We recommend the following changes in decreasing order of desirability:

1. Revise Section 228.10(b) and (c) in a manner that allows for material changes without first seeking Department approval.
2. Adopt a “file and use” approach to reviewing material changes made to permitted vehicles.
3. Create a new and less sensitive definitional trigger for restarting the permit approval process by further clarifying the meaning of “material change” and add it to Section 227.02 (definitions).

We also recommend the creation of a new section specifically concerning the contemplated authority because, as an organizational matter, this authority does not actually pertain to the amendment of an application as the section’s title suggests. That’s because an application ceases to be when it becomes a permit, because a permit incorporates the terms and representations of an application. Thus, this section relates to the modification of a permit and the circumstances under which a permit modification must become an entirely new permit application. This distinction is important as the line between modifications that necessitate an update and modifications that require an entirely new application is better defined. Thus, for the sake of clarity, the authority should be dealt with in an entirely separate section.

Suspension or Revocation of a Permit, Section 228.20(b)(6): this section is a “catch-all” provision related to suspension of a permit based on the performance of the permitted deployed vehicles. Like section 228.08(e)(2), it is overly-broad, includes no metric by which a manufacturer can judge its performance, and blurs the line between state and federal authority over vehicle safety. Because the Department lacks the technical expertise to establish such standards, the power to suspend a permit based on vehicle performance is entirely discretionary and susceptible to misapplication.

The Department should limit the circumstances under which a permit may be suspended to those related to the terms on which the permit itself was issued. Sections 228.20(b)(4)-(5), related to suspension of a permit when federal law is either violated or a federal recall has been issued, each accomplish the safety goals of the section without encroaching into an area better left to the federal government.

We recommend that Section 228.20(b)(6) be removed.

Information Privacy, Section 228.24: This section concerns the consent that manufacturers must obtain, or steps that they must take absent such consent, to collect information from operators of autonomous vehicles and to use that information. The section is drawn from authority granted by California Vehicle Code Section 38750(h) which directs manufacturers to provide a “written disclosure to the purchaser of an autonomous vehicle that describes what information is collected by the autonomous technology equipped on the vehicle.” As written, as its predecessor Section 227.78 was problematic, so too is this section. To that end, we largely reiterate our previously articulated opposition and offer an alternative approach to ensuring information privacy.

In general, the Department should defer to federal and state privacy regulators (including primarily the Federal Trade Commission (“FTC”) and the California Attorney General’s Office). 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 the Department itself drafting specific privacy regulations or supplanting expert agencies in enforcing privacy rules.

We recommend that, whatever specific language the Department 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 autonomous vehicles, 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 the California Attorney General.¹⁴

Bringing the Department’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 draft regulations—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.¹⁵ 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 uses of data require largely frictionless collection and sharing of broad bases of information.¹⁶

¹⁴ See, e.g., Federal Trade Commission, Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers (March 2012), *available at* <https://www.ftc.gov/reports/protecting-consumer-privacy-era-rapid-change-recommendations-businessespolicymakers>; California Office of the Attorney General, Privacy on the Go: Recommendations for the Mobile Ecosystem (January 2013), *available at* 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 (April 2008), *available at* https://oag.ca.gov/sites/all/files/agweb/pdfs/privacy/COPP_bus_reportinfo_sharing1.pdf.

¹⁵ 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

¹⁶ 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,

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 generally 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.¹⁷ 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 the DMV embrace the framework for determining notice, consent, and disaffirmation that is currently employed by the Federal Trade Commission.¹⁸ Its basic supposition is that consent should be required only where it 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.”¹⁹ 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.”²⁰ The focus of the current draft rules 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

Remarks at the Privacy 2001 Conference (Oct. 4, 2001), *available at* <https://www.ftc.gov/publicstatements/2001/10/protecting-consumers-privacy-2002-and-beyond>.

¹⁷ See Nicklas Lundblad and 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”* 1 (2003), *available at* <http://home.uchicago.edu/~mferzige/fallacyofoptin.pdf>.

¹⁸ See Federal Trade Commission, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* (March 2012), *available at* <https://www.ftc.gov/reports/protecting-consumer-privacy-era-rapid-change-recommendations-businessespolicymakers>.

¹⁹ *Id.*

²⁰ *Id.*

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 nature²¹ and linkable to a particular person or device (i.e., non-anonymized).

We propose a new approach for the Department that is consistent the FTC standards, compliant with existing California law and sensitive to the Department’s heightened concern for consumer protection given the newness and significance of transactions surrounding autonomous vehicles.²²

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 Department’s proposed rules implicitly acknowledge): its collection and use are inherently part of the transaction. At the other 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 the Department to clarify that the draft regulation’s 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, insurance, logistical, 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, for internal use, and sharing of data about vehicle operation necessary for safety purposes—understood by consumers to be

²¹ *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”).

²² *Calif. Veh. Code § 38750(h)*.

inherent in manufacturing, selling, maintaining and operating an autonomous vehicle. Moreover, all states, including California, 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, California has already concluded that safety and insurance are inextricably intertwined, that 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 autonomous vehicles, that requires sharing operation 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...	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

To summarize, this means that neither disclosure nor consent would be required for data that is:

- Necessary, used internally, sensitive or not, and anonymized or not²³
- Not necessary, used internally, sensitive or not, but *anonymized*²⁴

Disclosure would be required, but no consent would be required for data that is:

- Not necessary, used internally, sensitive or not, and *not* anonymized
- Necessary, shared with third-parties, sensitive or not, and anonymized or not

Disclosure and opt-out would be required for data that is:

- Not necessary, shared with third-parties, sensitive or not, and anonymized

And disclosure and opt-in would be required for data that is:

- Not necessary, shared with third-parties, sensitive, and *not* anonymized

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.

We recommend that Section 227.24 be redrafted to read:

(a) The manufacturer shall:

- (i) 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.
- (ii) Indicate in the disclosure required in subsection (a)(1) whether collected data is
 - (1) Necessary for the safe operation of the vehicle;
 - (2) Shared;
 - (3) Sensitive; and/or

²³ Note that this data would typically not require disclosure under the FTC's guidelines.

²⁴ Again, this data would typically not require disclosure under the FTC's guidelines.

(4) 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.

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