

Reporting and recordkeeping requirements.

**Authority:** This action is issued under the authority of sections 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act as amended 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: June 8, 2011.

**Al Armendariz,**

*Regional Administrator, Region 6.*

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## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

#### 49 CFR Part 595

[Docket No. NHTSA-2011-0079]

RIN 2127-AK77

#### Make Inoperative Exemptions; Vehicle Modifications To Accommodate People With Disabilities, Side Impact Protection

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** This final rule amends regulations concerning vehicle modifications which accommodate people with disabilities to update and expand a reference in an exemption relating to the Federal motor vehicle safety standard for side impact protection. The expanded exemption facilitates the mobility of drivers and passengers with disabilities.

**DATES:** *Effective Date:* August 23, 2011. As this final rule relieves the regulatory burdens on certain entities and involves Federal Motor Vehicle Safety Standard (FMVSS) requirements that have recently become effective, the agency believes that the above effective date is appropriate.

*Petitions for Reconsideration:* Petitions for reconsideration of this final rule must be received by the agency by August 8, 2011.

**ADDRESSES:** If you wish to petition for reconsideration of this rule, you should refer in your petition to the docket number of this document and submit your petition to: Administrator, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., West Building, Washington, DC 20590. The petition will be placed in the docket. Anyone is able to search the electronic form of all documents received into any of our dockets by the name of the individual

submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78).

For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> and follow the online instructions for accessing the docket. You may also visit DOT's Docket Management Facility, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12-140, Washington, DC 20590-0001 for access to the docket.

#### FOR FURTHER INFORMATION CONTACT:

Gayle Dalrymple, NHTSA Office of Crash Avoidance Standards, NVS-123, telephone (202-366-5559), fax (202-493-2739), or Jesse Chang, NHTSA Office of Chief Counsel, NCC-112, telephone (202-366-2992), fax (202-366-3820). The mailing address for these officials is: National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:** This final rule amends 49 CFR Part 595, Subpart C, "Make Inoperative Exemptions, Vehicle Modifications to Accommodate People With Disabilities," to update and expand a reference in an exemption relating to FMVSS No. 214. The notice of proposed rulemaking (NPRM) on which this final rule is based was published on September 28, 2010 (75 FR 59674) (Docket No. NHTSA-2010-0133).

#### Regulatory Background

The National Traffic and Motor Vehicle Safety Act (49 U.S.C. Chapter 301) ("Safety Act") and NHTSA's regulations require vehicle manufacturers to certify that their vehicles comply with all applicable Federal motor vehicle safety standards (FMVSSs) (*see* 49 U.S.C. 30112; 49 CFR Part 567). A vehicle manufacturer, distributor, dealer, or repair business generally may not knowingly make inoperative any part of a device or element of design installed in or on a motor vehicle in compliance with an applicable FMVSS (*see* 49 U.S.C. 30122). NHTSA has the authority to issue regulations that exempt regulated entities from the "make inoperative" provision (49 U.S.C. 30122(c)). The agency has used that authority to promulgate 49 CFR Part 595 Subpart C, "Make Inoperative Exemptions, Vehicle

Modifications to Accommodate People with Disabilities."

49 CFR Part 595 Subpart C sets forth exemptions from the make inoperative provision to permit, under limited circumstances, vehicle modifications that take the vehicles out of compliance with certain FMVSSs when the vehicles are modified to be used by persons with disabilities after the first retail sale of the vehicle for purposes other than resale. The regulation was promulgated to facilitate the modification of motor vehicles so that persons with disabilities can drive or ride in them. The regulation involves information and disclosure requirements and limits the extent of modifications that may be made.

Under the regulation, a motor vehicle repair business that modifies a vehicle to enable a person with a disability to operate or ride as a passenger in the motor vehicle and that avails itself of the exemption provided by 49 CFR Part 595 Subpart C must register itself with NHTSA. The modifier is exempted from the make inoperative provision of the Safety Act, but only to the extent that the modifications affect the vehicle's compliance with the FMVSSs specified in 49 CFR 595.7(c) and only to the extent specified in 595.7(c). Modifications that would take the vehicle out of compliance with any other FMVSS, or with an FMVSS listed in 595.7(c) but in a manner not specified in that paragraph are not exempted by the regulation. The modifier must affix a permanent label to the vehicle identifying itself as the modifier and the vehicle as no longer complying with all FMVSS in effect at original manufacture, and must provide and retain a document listing the FMVSSs with which the vehicle no longer complies and indicating any reduction in the load carrying capacity of the vehicle of more than 100 kilograms (220 pounds).

#### 2007 Amendments to FMVSS 214 and Effects on Exemption in Part 595 Subpart C

Before today's final rule, 49 CFR Part 595 Subpart C set forth an exemption from "S5 of 49 CFR 571.214 [FMVSS No. 214] for the designated seating position modified, in any cases in which the restraint system and/or seat at that position must be changed to accommodate a person with a disability." 49 CFR 595.7(c)(15). However, the reference to S5 of FMVSS No. 214 became outdated as a result of a 2007 amendment to Standard 214. Prior to 2007, S5 had referred to the dynamic performance requirements that vehicles must meet when subjected to a

moving deformable barrier (MDB) test.<sup>1</sup> In 2007, NHTSA upgraded FMVSS No. 214 and reorganized the standard.<sup>2</sup> The MDB test was redesignated from S5 to S7 and was upgraded with the adoption of new technically-advanced test dummies representing a 5th percentile adult female and a 50th percentile adult male and enhanced injury criteria.

In addition, the 2007 rule added a new vehicle-to-pole test to the standard (see S9, 49 CFR 571.214). The pole test simulates a vehicle crashing sideways into narrow fixed objects, such as utility poles and trees. The pole test requires vehicle manufacturers to assure head and improved chest protection in side crashes for a wide range of occupant sizes and over a broad range of seating positions. Manufacturers are meeting the upgraded requirements of the standard by vehicle modifications that include installing side air bags in vehicle seats and/or door panels and side roof rails. The phase-in of the upgraded MDB and pole test requirements began on September 1, 2010.

#### Petition for Rulemaking

On February 12, 2009, Bruno Independent Living Aids (Bruno) submitted a petition for rulemaking to expand the specified requirements of FMVSS No. 214 referenced in § 595.7. Bruno manufactures a product line called "Turning Automotive Seating (TAS)" which replaces the seat installed by the original equipment manufacturer (OEM). Bruno believes that their product affords disabled persons a safer method of vehicle entry and exit when compared to using a platform lift or entering and exiting unassisted. However, in their petition, Bruno expressed concern that: "\* \* \* torso side air bags are commonly installed in the outboard side of the OEM seat backrest" and would be removed when installing a TAS system. For these reasons, Bruno sought in their petition to update Part 595 to maintain a similar exemption from the MDB test (to reflect the new designation under S7), and to expand Part 595 to allow an exemption from the new S9 vehicle-to-pole test requirements.

#### NPRM and Response

On September 28, 2010, NHTSA published an NPRM in the **Federal Register**. In that document, we proposed to amend § 595.7(c)(15) to reference the

upgraded MDB requirements and to expand the exemption to include the pole test requirements. In support of the NPRM, the agency expressed the belief that, due to the nature of the modifications, there exists a continuing need for exemption from the MDB requirements and that there is a need to exempt vehicles modified to accommodate disabled persons from the pole test requirements.

We recognized in the NPRM that the proposed exemption presents a trade-off of substantial side impact protection in exchange for continued mobility for people with disabilities and some enhancement in easier and possibly safer vehicle entry and exit.<sup>3</sup> Thus, we requested comments on how the agency should proceed in order to achieve the maximum safety benefit with the narrowest exemption possible to accommodate the needs of disabled persons. However, the agency received no comments on the NPRM.

#### The Final Rule

The agency remains concerned about the negative effect an exemption may have on the safety benefits afforded to disabled persons who require modifications to their vehicles. However, we are unaware at this time of any other reasonable alternatives that can appropriately balance the mobility needs of people who must have vehicle modifications to accommodate a disability with the MDB and pole test requirements of FMVSS No. 214. Thus, for the reasons provided in the NPRM, we amend § 595.7(c)(15) to add references to both S7 and S9 and to remove any reference to S5.

#### MDB Test Requirements

Since § 595.7(c)(15)'s reference to S5 is no longer valid, today's final rule updates that paragraph's reference from S5 to S7. We believe that there is a continuing need for the exemption from the MDB requirements. Since the upgraded FMVSS No. 214 incorporates enhanced MDB requirements, compliance with these requirements could continue to be affected by an alteration of the restraint system and/or the seat.

Many vehicles will depend on side impact air bag technology to meet all of the injury criteria of the standard when tested with the 5th percentile female and 50th percentile male dummies.

Since many modifiers make alterations that include removing the side air bags in vehicles designed to the new requirements, the agency believes that these modifications could take the vehicles out of compliance with the MDB test.

The agency also believes that the compliance with the injury criteria for the MDB test could be affected even if vehicle seats with seat-mounted air bags are not removed but are instead changed in a less significant way to accommodate a person with a disability (e.g., an OEM seat is mounted on a 6-way power seat base). This is because countermeasures that were designed to protect the occupant at the OEM seating position that may no longer be as protective at the position at which the seat is placed after the modification. Thus, NHTSA believes that there is a continuing need to exempt modifiers from the MDB test requirements for the purpose of accommodating persons with disabilities.

#### Pole Test Requirements

This final rule also expands § 595.7(c)(15) to include S9 of FMVSS No. 214. This change exempts modifications that affect the vehicle's compliance with the pole test requirements of FMVSS No. 214 in any case in which the restraint system and/or seat position must be changed to accommodate a person with a disability.

Removing an OEM seat that has a side air bag and replacing it with an aftermarket seat that does not would likely make inoperative the system installed in compliance with FMVSS No. 214. Making some other substantive modification of the OEM seat or restraint system to accommodate a person with a disability could also affect the measurement of the injury criteria specified in the standard. We believe that an exemption from the make inoperative provision with regard to the pole test in FMVSS No. 214 is needed to permit modification of the vehicle's seating system to accommodate a person with a disability. This is comparable to the position taken by NHTSA with regard to the make inoperative exemption for frontal air bags required by FMVSS No. 208. See 595.7(c)(14). Thus, we conclude today that the inclusion of S9 of FMVSS No. 214 in § 595.7(c)(15) is needed.

#### Rulemaking Analyses and Notices

*Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures*

NHTSA has considered the impact of this rulemaking action under Executive

<sup>1</sup> The MDB test simulates an intersection collision with one vehicle being struck in the side by another vehicle.

<sup>2</sup> 72 FR 51908, September 11, 2007; response to petitions for reconsideration, 73 FR 32473, June 9, 2003; 75 FR 12123, March 15, 2010.

<sup>3</sup> NHTSA estimated in the FMVSS No. 214 rulemaking that side head and torso air bags result in a 24 percent reduction in fatality risk for nearside occupants and an estimated 14 percent reduction in fatality risk by torso bags alone. See Docket No. NHTSA-29134, NHTSA's Final Regulatory Impact Analysis.)

Order 12866, Executive Order 13563, and the Department of Transportation's regulatory policies and procedures. This rulemaking document was not reviewed by the Office of Management and Budget under E.O. 12866, "Regulatory Planning and Review." It is not considered to be significant under E.O. 12866 or the Department's Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). NHTSA has determined that the effects are minor and that a regulatory evaluation is not needed to support the subject rulemaking. Today's final rule imposes no costs on the vehicle modification industry. If there is any effect, it will be a cost savings due to the exemptions.

#### *Regulatory Flexibility Act*

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of proposed rulemaking or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions). No regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

NHTSA has considered the effects of this final rule under the Regulatory Flexibility Act. Many dealerships and repair businesses would be considered small entities, and some of these businesses modify vehicles to accommodate individuals with disabilities. I certify that this final rule does not have a significant economic impact on a substantial number of small entities. While many dealers and repair businesses are considered small entities, this exemption does not impose any new requirements, but instead provides additional flexibility. Therefore, the impacts on any small businesses affected by this rulemaking would not be substantial.

#### *Executive Order 13132 (Federalism)*

NHTSA has examined today's final rule pursuant to Executive Order 13132 (64 FR 43255; Aug. 10, 1999) and concluded that no additional consultation with States, local

governments, or their representatives is mandated beyond the rulemaking process. The agency has concluded that the final rule does not have sufficient federalism implications to warrant consultation with State and local officials or the preparation of a federalism summary impact statement. The final rule does not have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Today's final rule does not impose any additional requirements. Instead, it lessens burdens on the exempted entities.

NHTSA rules can have preemptive effect in two ways. First, the National Traffic and Motor Vehicle Safety Act contains an express preemption provision:

When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter.

49 U.S.C. 30103(b)(1). It is this statutory command by Congress that preempts any non-identical State legislative and administrative law address the same aspect of performance. However, this provision is not relevant to this final rule as this rule does not involve the establishing, amending or revoking or a Federal motor vehicle safety standard.

The express preemption provision described above is subject to a savings clause under which "[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." 49 U.S.C. 30103(e) Pursuant to this provision, State common law tort causes of action against motor vehicle manufacturers that might otherwise be preempted by the express preemption provision are generally preserved. However, the Supreme Court has recognized the possibility, in some instances, of implied preemption of State common law tort causes of action by virtue of NHTSA's rules—even if not expressly preempted.

This second way that NHTSA rules can preempt is dependent upon the existence of an actual conflict between an FMVSS and the higher standard that would effectively be imposed on motor vehicle manufacturers if someone obtained a State common law tort judgment against the manufacturer—notwithstanding the manufacturer's compliance with the NHTSA standard.

Because most NHTSA standards established by an FMVSS are minimum standards, a State common law tort cause of action that seeks to impose a higher standard on motor vehicle manufacturers will generally not be preempted. However, if and when such a conflict does exist—for example, when the standard at issue is both a minimum and a maximum standard—the State common law tort cause of action is impliedly preempted. See *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000).

Pursuant to Executive Order 13132, NHTSA has considered whether this rule could or should preempt State common law causes of action. The agency's ability to announce its conclusion regarding the preemptive effect of one of its rules reduces the likelihood that preemption will be an issue in any subsequent tort litigation.

To this end, the agency has examined the nature (*e.g.*, the language and structure of the regulatory text) and objectives of today's rule and finds that this rule merely increases flexibility for certain exempted entities. As such, NHTSA does not intend that this rule preempt state tort law that would effectively impose a higher standard on motor vehicle manufacturers than that established by today's rule. Establishment of a higher standard by means of State tort law would not conflict with the exemption announced here. Without any conflict, there could not be any implied preemption of a State common law tort cause of action. Further, we are unaware of any State law or action that would prohibit the actions that this final rule would permit.

#### *Civil Justice Reform*

When promulgating a regulation, agencies are required under Executive Order 12988 to make every reasonable effort to ensure that the regulation, as appropriate: (1) Specifies in clear language the preemptive effect; (2) specifies in clear language the effect on existing Federal law or regulation, including all provisions repealed, circumscribed, displaced, impaired, or modified; (3) provides a clear legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction; (4) specifies in clear language the retroactive effect; (5) specifies whether administrative proceedings are to be required before parties may file suit in court; (6) explicitly or implicitly defines key terms; and (7) addresses other important issues affecting clarity and general draftsmanship of regulations.

Pursuant to this Order, NHTSA notes as follows. The preemptive effect of today's final rule is discussed above. NHTSA notes further that there is no requirement that individuals submit a petition for reconsideration or pursue other administrative proceeding before they may file suit in court.

*National Technology Transfer and Advancement Act*

Under the National Technology Transfer and Advancement Act of 1995 (NTTAA) (Pub. L. 104-113), "all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments." Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies, such as the Society of Automotive Engineers (SAE). The NTTAA directs us to provide Congress, through OMB, explanations when we decide not to use available and applicable voluntary consensus standards. No voluntary standards exist regarding this exemption for modification of vehicles to accommodate persons with disabilities.

*Unfunded Mandates Reform Act*

The Unfunded Mandates Reform Act of 1995 requires agencies to prepare a written assessment of the costs, benefits and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of more than \$100 million annually (adjusted for inflation with base year of 1995). This exemption will not result in expenditures by State, local or tribal

governments, in the aggregate, or by the private sector in excess of \$100 million annually.

*National Environmental Policy Act*

NHTSA has analyzed today's final rule for the purposes of the National Environmental Policy Act. The agency has determined that implementation of today's final rule will not have any significant impact on the quality of the human environment.

*Paperwork Reduction Act*

Under the Paperwork Reduction Act of 1995 (PRA), a person is not required to respond to a collection of information by a Federal agency unless the collection displays a valid OMB control number. Today's final rule does not contain new reporting requirements or requests for information beyond what is already required by 49 CFR part 595 subpart C.

*Plain Language*

Executive Order 12866 requires each agency to write all rules in plain language. Application of the principles of plain language includes consideration of the following questions:

- Have we organized the material to suit the public's needs?
- Are the requirements in the rule clearly stated?
- Does the rule contain technical language or jargon that isn't clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rule easier to understand?

If you have any responses to these questions, please notify the agency in writing.

*Regulation Identifier Number (RIN)*

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

**List of Subjects in 49 CFR Part 595**

Motor vehicle safety, Motor vehicles.

In consideration of the foregoing, we amend 49 CFR part 595 as follows:

**PART 595—MAKE INOPERATIVE EXEMPTIONS**

- 1. The authority citation for part 595 continues to read as follows:

**Authority:** 49 U.S.C. 322, 30111, 30115, 30117, 30122 and 30166; delegation of authority at 49 CFR 1.50.

- 2. Amend § 595.7 by revising paragraph (c)(15) to read as follows:

**§ 595.7 Requirements for vehicle modifications to accommodate people with disabilities.**

\* \* \* \* \*

(c) \* \* \*

(15) S7 and S9 of 49 CFR 571.214, for the designated seating position modified, in any cases in which the restraint system and/or seat at that position must be changed to accommodate a person with a disability.

\* \* \* \* \*

Issued on: June 16, 2011.

**David L. Strickland,**  
*Administrator.*

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