



This document is scheduled to be published in the Federal Register on 10/26/2012 and available online at <http://federalregister.gov/a/2012-26353>, and on FDsys.gov

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 595

Docket No. NHTSA-2012-0149

RIN 2127-AL17

Make Inoperative Exemptions;

Vehicle Modifications to Accommodate People with Disabilities,

Ejection Mitigation

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This NPRM proposes to amend NHTSA's regulation regarding, "Make Inoperative Exemptions, Vehicle Modifications to Accommodate People With Disabilities," to include a new exemption relating to the Federal motor vehicle safety standard for ejection mitigation. The regulation facilitates the mobility of physically disabled drivers and passengers. This document responds to a petition from Bruno Independent Living Aids.

DATES: You should submit your comments early enough to ensure that the Docket receives them not later than **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments to the docket number identified in the heading of this document by any of the following methods:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- Mail: Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue S.E., West Building Ground Floor, Room W12-140, Washington, D.C. 20590-0001.
- Hand Delivery or Courier: 1200 New Jersey Avenue S.E., West Building Ground Floor, Room W12-140, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- Fax: 202-493-2251.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the Supplementary Information section of this document. Note that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. Please see the Privacy Act heading below.

Privacy Act: Anyone is able to search the electronic form of all comments 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 (65 FR 19477 through 78).

For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> or the street address listed above. Follow the online instructions for accessing the dockets.

FOR FURTHER INFORMATION CONTACT: Gayle Dalrymple, NHTSA Office of Crash Avoidance Standards, NVS-123 (telephone 202-366-5559), or Deirdre Fujita, NHTSA Office of Chief Counsel, NCC-112 (telephone 202-366-2992) The mailing address for these officials is: National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

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) at the time of manufacture. A vehicle manufacturer, distributor, dealer, or repair business, except as indicated below, 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).

FMVSS No. 226 “Ejection Mitigation” and Part 595

On January 19, 2011,¹ the agency published a final rule which established a new Federal Motor Vehicle Safety Standard No. 226, “Ejection Mitigation,” to reduce the partial and complete ejection of vehicle occupants through side windows in crashes, particularly rollover crashes. The standard applies to passenger cars, and to multipurpose passenger vehicles, trucks and buses with a gross vehicle weight rating of 4,536 kg (10,000 pounds) or less, except walk-in vans, vehicles with modified roofs and convertibles. Also excluded from this standard are law enforcement vehicles, correctional institution vehicles, taxis and limousines, if they have a fixed security partition separating the first and second or second and third rows and if they are produced by more than one manufacturer or are altered (within the meaning of 49 CFR 567.7).

To assess compliance with FMVSS No. 226, the agency adopted a test in which an impactor is propelled from inside a test vehicle toward the windows. The ejection mitigation safety system is required to prevent the impactor from moving more than a specified distance beyond the plane of a window. In the test, the countermeasure must retain the linear travel of the impactor such that the impactor must not travel 100 millimeters (mm) beyond the location of the inside surface of the vehicle glazing. This displacement limit serves to control the size of any gaps forming between the countermeasure (e.g., the ejection mitigation side curtain air bag) and the window opening, thus reducing the potential for both partial and complete ejection of an occupant.

¹ 76 FR 3212.

To ensure that the systems cover the entire opening of each window for the duration of a rollover, each side window will be impacted at up to four locations around its perimeter at two time intervals following NHTSA's manual deployment of the countermeasure. The agency anticipated that manufacturers will meet the standard by means of air bag technology, and possibly supplement the technology with advanced glazing. Vehicle manufacturers may newly install ejection mitigation air bag curtains, or will more likely modify existing side impact air bag curtains. The existing side impact air bag curtains will be made larger so that they cover more of the window opening, made more robust to remain inflated longer, and made to deploy in both side impacts and in rollovers using sensors. In addition, after deployment the curtains will be tethered near the base of the vehicle's pillars or otherwise designed to keep the impactor within the boundaries established by the performance test.

We estimated the new requirements will save 373 lives and prevent 476 serious injuries per year. The final rule adopted a phase-in of the new requirements, starting September 1, 2013.

FMVSS No. 226 is a new regulation and currently, 49 CFR Part 595 does not provide for an exemption for vehicles that are modified to accommodate people with disabilities.

Petition for Rulemaking

On May 17, 2011, Bruno Independent Living Aids (Bruno) submitted a petition for rulemaking to amend §595.7 to include an exemption from the requirements of FMVSS No. 226. Bruno manufactures a product line it calls "Turning Automotive

Seating (TAS).” A TAS seat replaces the seat installed by the original equipment manufacturer (OEM). Bruno states that the purpose of the TAS is--

to provide safe access to private motor vehicles for mobility-impaired drivers or passengers, semi-ambulatory or transferring from a wheelchair. The Bruno TAS replaces the OEM seat in a sedan, minivan, van, pickup, or SUV. In its various configurations the Bruno TAS seat pivots from the forward-facing driving position to the side-facing entry position, extends outward and lowers to a suitable transfer height, providing the driver and/or passengers a convenient and safe entry into the vehicle. The transfer into the seat takes place safely, while outside the vehicle, and the occupant remains in the seat during the entry process, using the OEM seatbelts while traveling in the vehicle. Exiting the vehicle is accomplished by reversing the process. A further TAS option is a mobility base, which converts the automotive seat into a wheelchair, that eliminates a need for transferring from the seat altogether.

The petitioner believes that the TAS method of vehicle entry and exit is safer than using a platform lift to enter a vehicle or entering and exiting unassisted.

Bruno refers to a September 2010 notice of proposed rulemaking² (NPRM) that was published in response to a previous petition from Bruno to amend part 595.7(c)(15) to expand a reference in the exemption relating to FMVSS No. 214 “Side impact protection.” In June 2011,³ the agency published a final rule in that rulemaking. The final rule provided an exemption from FMVSS No. 214’s moving deformable barrier and pole tests as applied to a designated seating position that must be modified by changing the restraint system and/or seat at that position to accommodate a person with a disability.

Bruno states in its current petition that FMVSS No. 226 will enhance the side air bag technology of FMVSS No. 214 and that these enhanced side air bags present much of the same difficulties when accommodating the transportation needs of mobility impaired persons as those discussed in the rulemaking for FMVSS No. 214. Bruno states: “Where

² 75 FR 59674.

³ 76 FR 37025.

the FMVSS 226 ejection mitigation system is an OEM seat component (e.g., seat back), it cannot be replaced within [sic] the TAS replacement seat due to the large variety of seat designs and ICU interfaces encountered. Also, the OEM seat can rarely, if ever, be structurally modified to fit the TAS mechanism.” Thus, Bruno believes that an exemption from FMVSS No. 226 is warranted.

Response to Petition

NHTSA proposes to amend §595.7(c) to add an exemption for FMVSS No. 226. However, we request comments on the necessity of the exemption.

In the June 2011 final rule amending 49 CFR 595.7(c) to update and expand a reference in an exemption relating to FMVSS No. 214, we stated:

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.

Bruno states that FMVSS No. 226 will enhance side curtain and torso air bags, and that “these enhanced side curtain and torso air bags present much the same difficulties when accommodating the transportation needs of mobility impaired person as those discussed in the cited [FMVSS No. 214] NPRM.”

We do not quite agree with the petitioner’s statements. FMVSS No. 226 is likely to affect side curtain air bags but will not affect torso air bags or seat components.

Further, there are significant differences between the requirements in FMVSS Nos. 214 and 226. The MDB and pole tests specified in FMVSS No. 214 are full vehicle dynamic crash tests conducted with instrumented 5th percentile adult female and 50th percentile adult male dummies. To meet the performance requirement of FMVSS No. 214, side air bags providing head and torso protection are typically provided in the seat. The seating procedures for locating the dummies in the vehicle are specified in the standard. By removing the seat that contains an air bag to accommodate a person with a disability or installing a seat at a different location when compared to the original seat position, as Bruno does when installing the TAS seat, the vehicle may no longer be compliant with the FMVSS No. 214 requirements.

In contrast, the performance requirements specified in FMVSS No. 226 are based on a component test of the ejection mitigation countermeasure (which heretofore consists of curtain air bags that deploy from the headliner and not the seat). The ejection mitigation air curtain retains the impactor within the vehicle. Impact locations would be determined based on the shape of the window opening and are not dependent on the location of dummies and/or seat position. Therefore, it is possible, and maybe likely, that removing the original seat and replacing it with a seat to accommodate a person with a disability will have no negative impact on the performance of the curtain air bags in the context of FMVSS No. 226. If this were just a matter affecting “those vehicles manufactured in compliance with FMVSS No. 226 where the ejection mitigation system is an OEM seat component” as petitioner describes the order requested, we do not see an obvious need for an exemption.

However, the agency does recognize the possibility that the side impact sensing and electronic architecture system could be integrated with that of the ejection mitigation rollover protection system. Because of this integration, if a seat is modified or replaced to accommodate a person with a disability and the FMVSS No. 214 side impact air bag system is deactivated, tangentially the FMVSS No. 226 rollover ejection mitigation system could also be deactivated. For this reason, even though the ejection mitigation side curtain air bags' performance in a component test would not necessarily be compromised by installing a new seat, the electronics that would deploy the restraint in a rollover could be. Thus, for vehicles in which the seat is modified or replaced, it may not be practical to exempt them from the side impact requirements and not from ejection mitigation requirements.

We realize that FMVSS No. 226 requires side window coverage extending over the first three rows of vehicles, which among other things does help protect rear seat passengers from partial and full ejection. Vehicle manufacturing designs generally utilize one ejection mitigation curtain air bag per side to protect the front and the rear rows. If the side curtain air bag must be made inoperative to accommodate a disabled person in the driver's position or in a rear passenger position (e.g., to install a TAS seat in the driver's position or the rear seat position), ejection mitigation protection provided by the curtain would be made inoperative for the other occupants as well (even those not using a TAS seat). If a TAS seat were installed at the driver's seat, exempting only the front window opening from FMVSS No. 226 requirements would not be possible because the rear seat on the same side where the front seat was modified makes use of the same ejection mitigation curtain air bag.

We thus recognize that the petitioner's request presents a trade-off of substantial ejection mitigation protection in exchange for continued mobility for people with disabilities and some enhancement in easier and possibly safer vehicle entry and exit. Comments are requested on the proposed exemption. To achieve the maximum safety benefit of the regulations, it is our desire to provide the narrowest exemption possible to accommodate the needs of disabled persons, without unreasonably expanding its use to situations where the benefits of the exemption may be outweighed by the drawbacks of nonconformance with the safety standard.

We seek comment on whether the requested exemption is needed. Would deactivating the side impact protection system also deactivate the ejection mitigation system on vehicles? If the ejection mitigation window curtains are controlled by a sensor that is separate from the FMVSS No. 214 side impact sensor system, is the requested exemption needed? If the sensor systems are distinct, could the vehicle seating system be removed or modified without negatively affecting the performance of ejection mitigation curtains? Could the exemption be only for the ejection mitigation countermeasure (curtains) on the side of the vehicle affected by the modification, rather than for both sides?

Dates

We are providing a 60-day comment period. In view of the September 1, 2013 phase-in date for FMVSS No. 226, and because this rulemaking would remove a restriction on the modification of vehicles for persons with disabilities, if a final rule is issued NHTSA anticipates making the amendment effective in less than 180 days following publication of the rule.

Rulemaking Analyses and Notices

Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13563, and DOT Regulatory Policies and Procedures

The agency has considered the impact of this rulemaking action under E.O. 12866, E.O. 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 so minor that a regulatory evaluation is not needed to support the subject rulemaking. This rulemaking would impose no costs on the vehicle modification industry. If anything, there could be a cost savings due to the proposed exemption.

Modifying a vehicle in a way that makes inoperative the performance of ejection mitigation air bags would be detrimental for the occupants of the vehicle in a rollover. However, the number of vehicles potentially modified would be very few in number. This is essentially the trade-off that NHTSA is faced with when increasing mobility for persons with disabilities: when necessary vehicle modifications are made, some safety may unavoidably be lost to gain personal mobility. We have requested comments on how the agency may make the exemption as narrow as reasonably possible.

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). The Small Business Administration's regulations at 13 CFR Part 121 define a small business, in part, as a business entity "which operates primarily within the United States." (13 CFR 121.105(a)). 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 proposed rule under the Regulatory Flexibility Act. Most dealerships and repair businesses are considered small entities, and a substantial number of these businesses modify vehicles to accommodate individuals with disabilities. I certify that this proposed rule would not have a significant economic impact on a substantial number of small entities. While most dealers and repair businesses would be considered small entities, the proposed exemption would not impose any new requirements, but would instead provide 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 proposed 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 proposed 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 proposal 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.” This proposed rule would not impose any requirements on anyone. This proposal would lessen a burden on modifiers.

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). This provision is not relevant to this rulemaking as it does not involve the establishing, amending or revoking of a Federal motor vehicle safety standard.

Second, the Supreme Court has recognized the possibility, in some instances, of implied preemption of State requirements imposed on motor vehicle manufacturers, including sanctions imposed by State tort law. We are unaware of any State law or action that would prohibit the actions that this proposed 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 this proposed 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) (Public Law 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 proposed 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 proposed exemption would 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 this rulemaking action for the purposes of the National Environmental Policy Act. The agency has determined that implementation of this action would 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. This proposal does not contain new reporting requirements or requests for information beyond what is already required by 49 CFR Part 595 Subpart C. An entity taking advantage of the exemption would simply list FMVSS No. 226 in the document described in 49 CFR 595.7(b).

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 include them in your comments on this proposal.

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 propose to amend 49 CFR part 595 to read as follows:

PART 595 – MAKE INOPERATIVE EXEMPTIONS

1. The authority citation for Part 595 would be revised to read as follows:

Authority: 49 U.S.C. 322, 30111, 30115, 30117, 30122 and 30166; delegation of authority at 49 CFR 1.95.

2. Amend §595.7 by adding paragraph (c)(17) to read as follows:

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

* * * * *

(c) * * * * *

(17) S4.2 and S5 of 49 CFR 571.226, on the side of the vehicle where a seat on that side of the vehicle must be changed to accommodate a person with a disability.

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Issued on: October 23, 2012

Christopher J. Bonanti
Associate Administrator
for Rulemaking

Billing Code: 4910-59-P

[FR Doc. 2012-26353 Filed 10/25/2012 at 8:45 am; Publication Date: 10/26/2012]