

DEPARTMENT OF TRANSPORTATION**National Highway Traffic Safety Administration****49 CFR Part 595**

[Docket No. NHTSA–2011–0108]

RIN 2127–AK22

Make Inoperative Exemptions; Vehicle Modifications To Accommodate People With Disabilities, Head Restraints

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

ACTION: Final rule.

SUMMARY: This final rule updates and expands an existing exemption from certain requirements of our head restraints standard that is available in the context of vehicle modifications to accommodate people with disabilities. The rule facilitates the mobility of drivers and passengers with disabilities by updating the exemption to include the corresponding portions of a new, upgraded version of the standard, the right front passenger seating position, and an exemption for persons with limited ability to support their head.

DATES: *Effective Date:* October 3, 2011.

Petitions for Reconsideration: Petitions for reconsideration of this final rule must be received by the agency by September 19, 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: For technical issues: Ms. Gayle Dalrymple, NHTSA Office of Crash Avoidance Standards, NVS–123, telephone (202–366–5559), fax (202–493–2739).

For legal issues: Mr. 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 one of the “make inoperative exemptions” found in 49 CFR part 595. Specifically, this final rule amends Subpart C, “Vehicle Modifications To Accommodate People With Disabilities,” to update and expand a reference in an exemption relating to our head restraints standard, Federal Motor Vehicle Safety Standard (FMVSS) No. 202. The notice of proposed rulemaking (NPRM), on which this final rule is based, was published in the **Federal Register** (74 FR 67156) on December 18, 2009 (Docket No. NHTSA–2009–0065).

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 (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, “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).

Upgraded Head Restraint Standard and the Exemption in Part 595 Subpart C

Before today's final rule, 49 CFR part 595 subpart C allowed two exemptions from FMVSS No. 202. Under 49 CFR 595.7(c)(8), modifiers were exempted from the entirety of FMVSS No. 202 in any situation where the driver or the front right passenger is seated in a wheelchair and no seat is supplied with the vehicle. Under 49 CFR 595.7(c)(9), modifiers were only exempted from the driver seat (and not passenger seat) head restraint height and width requirements found in paragraphs S4.3(b)(1)–(2) in order to accommodate rearward visibility for drivers who cannot easily turn their head due to a disability.

However, in 2004, this agency published a final rule that made two changes to our head restraints standard which affect the make inoperative exemptions in § 595.7(c)(8)–(9). The 2004 final rule established an upgraded head restraints standard, designated FMVSS No. 202a, to eventually replace FMVSS No. 202, while allowing a several year period during which manufacturers could comply with either standard.¹ Additionally, the 2004 final

¹ 69 FR 74848. We note that the upgraded standard was subsequently amended. FMVSS No.

rule made certain changes to FMVSS No. 202 itself, which included redesignating paragraphs S4.3(b)(1)–(2) (the height and width requirements) as paragraphs S4.2(b)(1)–(2).

Thus, before today's final rule, the make inoperative exemption in § 595.7(c)(8)–(9) did not provide for an exemption to the head restraint requirements for vehicles manufactured and certified under FMVSS No. 202a. Further, § 595.7(c)(9) did not correctly refer to the re-designated height and width requirements of FMVSS No. 202.

Petition for Rulemaking

On January 2, 2007 our agency received a petition for rulemaking from Bruno Independent Living Aids, Inc. (Bruno) requesting that we amend Part 595 to account for FMVSS No. 202a, including adding an exemption for passengers' side head restraint systems. In submitting its petition, Bruno wished to facilitate use of its product, called Turning Automotive Seating (TAS), which provides access to motor vehicles to people with disabilities. Bruno's description of its TAS system in the petition is summarized below:

- The device consists of a rotating, motorized seat, which replaces the OEM seat in a motor vehicle.
- The TAS pivots from the forward-facing driving position to the side-facing entry position and extends outward and lowers to a suitable transfer height, providing the driver and/or passenger easy entry into the vehicle.
- The transfer into the seat takes place while outside the vehicle, and the occupant remains in the seat during the entry process, using OEM seat belts while traveling in the vehicle. Exiting the vehicle is accomplished by reversing the process.

Bruno also described another TAS option that has a mobility base. This system converts the automotive seat into a wheelchair, eliminating the need for transferring from the seat altogether. Bruno states that TAS systems provide mobility-impaired persons with safer and easier ways to enter and exit a vehicle.

In its petition, Bruno states that the TAS provides substantial safety benefits. As a basis for this claim, Bruno cites a NHTSA research report published in 1997.² In this note, the agency stated that between 1991 and

1995, 7,121 wheelchair users were killed or injured due to any of the following reasons: (1) Improper or no securement, (2) lift malfunction, (3) transferring to or from a motor vehicle, (4) falling on or off the ramp, or (5) a collision between the wheelchair and a motor vehicle.³ According to Bruno's petition, the TAS will help prevent 74% of those injuries—which includes all injuries except those occurring when a wheelchair is struck by a motor vehicle. Bruno contends that this is possible because the TAS will provide wheelchair users an easy and safe way to enter and exit these vehicles.

Bruno indicated in its petition that the TAS currently complies with FMVSS No. 202. However, the clearance between the top of the head restraint and the door opening can restrict the number of viable vehicle applications. Bruno also stated that the increased head restraint height required by the new FMVSS No. 202a will significantly reduce the number of available vehicle applications.

To facilitate the installation of the TAS on vehicles, Bruno requested that the make inoperative exemptions of 49 CFR part 595 (for persons not riding in a wheelchair) be expanded and updated to cover both driver and passenger side head restraints. Further, Bruno requested that the make inoperative provisions that provide exemptions to portions of FMVSS No. 202 be extended to cover the equivalent portions of FMVSS No. 202a. Additionally, it requested that the exemptions in Part 595 be expanded to cover several aspects of FMVSS No. 202a that are not currently provided for in FMVSS No. 202. Specifically, Bruno requested more broadly that Part 595 be updated to include an exemption for 49 CFR 571.202a S4.2.1 through S4.2.7. These paragraphs encompass requirements on minimum height, width, backsets, gaps, energy absorption, height retention, backset retention, displacement, and strength. Finally, Bruno also noted the error where § 595.7(c)(9) mistakenly refers to S4.3 of FMVSS No. 202, instead of S4.2.

Notice of Proposed Rulemaking

On December 18, 2009, NHTSA published in the **Federal Register** (74 FR 67156) an NPRM to amend Part 595. The agency proposed the exemptions described in the following paragraphs in order to address two different issues: (1) Amending § 595.7(c)(8)–(9) to reflect the changes to FMVSS No. 202 resulting from the 2004 final rule, and (2) the requested expansion of the exemptions

in order to accommodate accessibility devices such as Bruno's TAS system.

In regards to the first issue, we proposed to extend the exemption for the entirety of FMVSS No. 202, in situations where the driver or the front right passenger is seated in a wheelchair and no seat is supplied with the vehicle, to also cover the entirety of FMVSS No. 202a under 49 CFR 595.7(c)(8).⁴ Additionally, we proposed to exempt driver head restraints from the height and width requirements in S4.3 (for vehicles manufactured before March 14, 2005⁵) and S4.2 (for vehicles manufactured after March 14, 2005) under 49 CFR Part 595.7(c)(9) in order to reflect the re-designation of S4.3 as S4.2 in FMVSS No. 202.⁶ Finally, we proposed to extend the exemption for the height and width requirements in FMVSS No. 202 for the driver head restraint to cover the equivalent provisions of FMVSS No. 202a.

In making these proposals, our agency sought to preserve the original exemptions to FMVSS No. 202. The agency recognized in the NPRM that, after the 2004 final rule, modifiers may seek to apply the exemptions in § 595.7(c)(8)–(9) to vehicles certified under either FMVSS No. 202 or the upgraded FMVSS No. 202a (depending on the date of vehicle manufacture). Thus, the agency sought to extend the exemptions that applied to FMVSS No. 202 to the equivalent portions of FMVSS No. 202a and correct the reference to S4.3 (which had been re-designated as S4.2 by the 2004 final rule).

In regards to the second issue, we proposed to extend the exemption from the height requirements (but not the width requirements) of FMVSS No. 202a to cover the front passenger seat head restraint.⁷ We recognized in the NPRM that this extension may create some additional degradation of whiplash protection beyond the current exemptions. However, the agency tentatively concluded that the benefits of safer ingress and egress for persons with mobility needs would outweigh the potential drawbacks. In spite of this tentative conclusion, the agency sought to propose the narrowest appropriate exemption in order to appropriately balance the mobility needs of people who must have vehicle modifications to

⁴ 74 FR 67156.

⁵ March 14, 2005 was the effective date of the 2004 final rule. We proposed to include the reference to S4.3 for vehicles manufactured before March 14, 2005 because those vehicles would have been certified to FMVSS No. 202 as written before it was amended by the 2004 final rule.

⁶ 74 FR 67156.

⁷ *Id.*

202a is titled *Head restraints; Mandatory applicability begins on September 1, 2009*. FMVSS No. 202 is titled *Head restraints; Applicable at the manufacturers option until September 1, 2009*.

² *Wheelchair Users Injuries and Deaths Associated with Motor Vehicle related Incidents*, September 1997, available at <http://www.nhtsa.dot.gov>.

³ *Id.*, Table 2.

accommodate a disability with the safety benefits of FMVSSs No. 202 and 202a.

Since the exemption sought by the petitioner seemed for the purpose of ensuring that the head restraint on the TAS seat cleared the door frame to provide easy access, we tentatively concluded that the aforementioned exemption only to the height requirements of FMVSSs No. 202 and 202a would be appropriate. Specifically, we were not aware of any rationale that would support extending the exemptions to include the width requirement for the front passenger head restraint or any of the other additional exemptions requested by Bruno.⁸ However, we requested comment in the NPRM in regards to whether the additional exemptions requested by Bruno would be relevant to facilitating the mobility needs of persons with disabilities.

Comment

The agency received one comment on the 2009 NPRM. This comment was submitted by Bruno. Bruno stated that a more expansive exemption is required in order to accommodate the functions of a type of TAS system called the Carony Transportation System (Carony). In its comment, Bruno described the Carony system as a TAS seat that has the ability to detach from the vehicle and convert into a wheelchair. Intended to function as a typical wheelchair outside of the vehicle, the seat portion of the wheelchair detaches from the wheelbase and can reattach to the TAS carriage and be repositioned into the vehicle. Bruno contends that this type of seating device can be used to facilitate the positioning needs of the person with a disability (such as high level quadriplegia, cerebral palsy, or hydrocephalus) through the inclusion of positioning belts, posture vests, body supports, lumbar supports, and specialized head positioning devices devised by therapists.

In subsequent conversations with a NHTSA staff member, Bruno further clarified that it is seeking the additional exemptions from FMVSS No. 202a in order to accommodate the needs of persons that have limited or no muscle tone in the neck and do not have the ability to support the head.⁹ Bruno asserts that such needs generally arise for persons who use the Carony system and that their needs can require the complete replacement of the head

restraint in order to provide head support.

The Final Rule

Based on consideration of the available information, including Bruno's petition and comment, this agency decided to issue this final rule adopting the exemptions as proposed by the NPRM and also further expanding the exemptions to enable modification or replacement of the head restraint of the front passenger seat of a vehicle in order to support or position the passenger's head or neck to accommodate a disability.

Specifically, this final rule amends § 595.7(c)(8)–(9) to: (1) Expand the exemption from all head restraint requirements in situations where a wheelchair is used in place of a vehicle seat, (2) correctly refer to the re-designated S4.2 in FMVSS No. 202, (3) extend the height and width exemptions from the driver head restraint requirements in FMVSS No. 202 to include FMVSS No. 202a, and (4) extend the height exemption for the driver head restraint to cover the passenger head restraint in FMVSS 202a. Further, this final rule also extends the exemption to cover S4.2.1 through S4.2.7 of FMVSS No. 202a (and the corresponding provisions of FMVSS No. 202) in order to accommodate the neck positioning needs of persons with disabilities.

The agency remains concerned about the potential for degradation in head and neck whiplash protection and the negative effect that 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 head restraint requirements of FMVSS No. 202 and FMVSS No. 202a.

Updating § 595.7(c)(8) To Include FMVSS No. 202a

Today's final rule adopts the proposal in the NPRM to update § 595.7(c)(8) to include an exemption for the entirety of FMVSS No. 202 and FMVSS No. 202a in situations where a person with a disability requires the use of a wheelchair in place of a vehicle seat in order to drive or ride in a motor vehicle. As stated in the NPRM, the original purpose of this exemption was to enable wheelchair users to make modifications to the motor vehicle so as to use the wheelchair in place of the vehicle seat. In this situation, FMVSS No. 202 would

be made inoperative because the vehicle seat—along with the head restraint—has been completely removed. The agency believes that this issue continues with FMVSS No. 202a which requires more stringent requirements for head restraints. For these reasons, the agency expands the coverage of the exemption in § 595.7(c)(8) to include FMVSS No. 202a through today's final rule.

Updating and Extending the Height and Width Exemptions in § 595.7(c)(9)

Today's final rule also adopts the proposals in the NPRM to update and expand the exemptions from the height and width requirements for head restraints in FMVSSs No. 202 and 202a. As discussed in the NPRM, the original exemption in § 595.7(c)(9) was established in order to accommodate drivers with a limited range of motion turning their heads. The agency reasoned that this accommodation was necessary in order to facilitate the ability of these drivers to look backwards when conducting lane change or backing maneuvers. As there is a continuing need to accommodate drivers in this manner, we adopt the proposal in the NPRM to extend the height and width exemptions from FMVSS No. 202 to cover the equivalent provision for FMVSS No. 202a.

However, we decline to extend the exemption to cover the width requirements of FMVSS No. 202a for the front passenger seat as Bruno requested in its petition and comments to the NPRM. As the agency desires to grant the narrowest exemption possible to balance both the needs of persons with disabilities and the safety concerns, we decline to extend the width exemption to the front passenger because front passengers are not required to look backwards in the same manner as drivers. In the NPRM, this agency requested comment on whether or not there exists any other reason to expand the width exemption to the front passenger seat. Since this agency did not receive any comments that provided a rationale for extending the width requirement exemption to the front passenger seat, this final rule adopts the proposal from the NPRM which does not extend the width exemption from FMVSS No. 202a to cover the front passenger seat.

However, the advent of new products such as the TAS system by Bruno prompted this agency to tentatively conclude in the NPRM that an extension of the exemption from the height requirement of FMVSS No. 202a to cover the front passenger seat is necessary to accommodate persons who require a chair such as the TAS system

⁸ The NPRM did not propose to include exemptions for paragraphs S4.2.1(a) and S4.2.3 through S4.2.7.

⁹ See Docket No. NHTSA–2009–0065–0003.

in order to ride in a motor vehicle. Users of the TAS system and similar systems require an exemption to the height requirement in FMVSS No. 202a because a compliant head restraint may be too tall and can prevent the seat portion of the TAS system from clearing the A-pillar of a motor vehicle. Since users of these systems may be drivers or passengers in a motor vehicle, this exemption is required for the front passenger seat as well as the driver seat. As we stated in the NPRM, such seating systems allow persons with disabilities to enter the vehicle in a sitting position, without the need to perform the sometimes dangerous act of ascending or descending into the vehicle. Since this exemption may degrade the whiplash protection afforded to users of the TAS system and other similar systems, we adopt in today's final rule the proposal in the NPRM which extends only the exemption from the height requirements of FMVSS No. 202a to the front passenger seat.

Updating § 595.7(c)(9) To Correctly Refer to S4.2 in FMVSS No. 202

Today's final rule also adopts the proposal in the NPRM to update § 595.7(c)(9) to refer to S4.2 in FMVSS No. 202. As discussed in the NPRM, the agency found that § 595.7(c)(9) did not reflect the 2004 final rule's re-designation of the height and width requirements for the head restraints in FMVSS No. 202 from S4.3 to S4.2. As there is a continuing need to exempt driver seats from the height and width requirements of FMVSS No. 202 for the reasons discussed in previous paragraphs, today's final rule updates § 595.7(c)(9) to correctly refer to S4.2 instead of S4.3. However, for vehicles manufactured before the effective date of the 2004 final rule (March 14, 2005), § 595.7(c)(9) will continue to refer to S4.3.

Expanding the Exemption To Account for Persons Who Require Head Positioning Devices

In the NPRM, the agency contemplated denying Bruno's request for exemptions from S4.2.1 through S4.2.7 of FMVSS No. 202a beyond the aforementioned exemptions, but sought public comment on this issue. Today's final rule grants these exemptions (and their equivalent exemptions in FMVSS No. 202) for the limited circumstance in which the head restraint of the front passenger seat must be modified or completely replaced in order to position or support the head of a person with limited or no ability to support his or her head due to a disability.

After explaining that the agency was not aware of any rationale that would support Bruno's request for additional exemptions, the NPRM requested comment on whether any of the additional exemptions requested by Bruno would be relevant in facilitating mobility for persons with disabilities. In its comments, Bruno stated that it offers a type of TAS system seat called the Carony which functions as a "typical wheelchair outside the vehicle" and unlatches from the wheeled base in order to be transferred into the motor vehicle. Bruno further stated in its comments (and clarified through its subsequent conversations) that this system facilitates special positioning needs for their clients with high level quadriplegia, cerebral palsy, or hydrocephalus and can require specialized alterations or replacement head restraints as medically necessary.

Based on this information, we believe that the additional exemptions to S4.2.1 through S4.2.7 requested by Bruno are necessary in order to accommodate the mobility needs of these individuals because these modifications to the head restraint can involve replacing the entire head restraint unit. In addition, NHTSA anticipates that similar exemptions will be required for persons seeking to accommodate similar medical needs for vehicles certified under FMVSS No. 202. Thus, in addition to paragraphs S4.2.1 through S4.2.7 of FMVSS No. 202a, this final rule adds exemption from the entirety of paragraph S4.2 (or paragraph S4.3 for vehicles manufactured before March 14, 2005) of FMVSS No. 202 in situations in which the head restraint must be removed or modified to position or support a passenger's head or neck due to a disability. However, in order to ensure that this exemption does not cover situations beyond the mobility needs of these individuals, this final rule establishes these exemptions for the front passenger seat only and only for situations where the head restraint must be modified or replaced in order to support or position the passenger's head or neck due to a disability.

As this final rule relieves the regulatory burdens on certain entities, the agency believes that an effective date 60 days after publication in the **Federal Register** is appropriate.

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 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 of 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 to read 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 paragraphs (c)(8) and (c)(9) to read as follows:

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

* * * * *

(c) * * *

(8) 49 CFR 571.202 and 571.202a, in any case in which:

(i) A motor vehicle is modified to be operated by a driver seated in a

wheelchair and no other seat is supplied with the vehicle for the driver;

(ii) A motor vehicle is modified to transport a right front passenger seated in a wheelchair and no other right front passenger seat is supplied with the vehicle; or

(9)(i) For vehicles manufactured before March 14, 2005, S4.3(b)(1) and (2) of 49 CFR 571.202, in any case in which the driver's head restraint must be modified to accommodate a driver with a disability.

(ii) For vehicles manufactured on or after March 14, 2005 and certified to FMVSS No. 202, S4.2(b)(1) and (2) of 49 CFR 571.202, in any case in which the head restraint must be modified to accommodate a driver with a disability.

(iii) For vehicles manufactured on or after March 14, 2005 and certified to FMVSS No. 202a, S4.2.1(b) of 49 CFR 571.202a, in any case in which the head restraint must be modified to accommodate a driver or a front outboard passenger with a disability.

(iv) For vehicles manufactured on or after March 14, 2005 and certified to FMVSS No. 202a, S4.2.2 of 49 CFR 571.202a, in any case in which the head restraint must be modified to accommodate a driver with a disability.

(v) For vehicles manufactured before March 14, 2005 and certified to FMVSS No. 202, S4.3 of 49 CFR 571.202, in any case in which the head restraint of the front passenger seat of a vehicle must be modified or replaced by a device to support or position the passenger's head or neck due to a disability.

(vi) For vehicles manufactured on or after March 14, 2005 and certified to FMVSS No. 202, S4.2 of 49 CFR 571.202, in any case in which the head restraint of the front passenger seat of a vehicle must be modified or replaced by a device to support or position the passenger's head or neck due to a disability.

(vii) For vehicles manufactured on or after March 14, 2005 and certified to FMVSS No. 202a, S4.2.1, S4.2.2, S4.2.3, S4.2.4, S4.2.5, S4.2.6, and S4.2.7 of 49 CFR 571.202a, in any case in which the head restraint of the front passenger seat of a vehicle must be modified or replaced by a device to support or position the passenger's head or neck due to a disability.

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Issued on: July 29, 2011.

David L. Strickland,
Administrator.

[FR Doc. 2011-19802 Filed 8-3-11; 8:45 am]

BILLING CODE 4910-59-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 101126521-0640-2]

RIN 0648-XA616

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod for American Fisheries Act Catcher/Processors Using Trawl Gear in the Bering Sea and Aleutian Islands Management Area

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific cod by American Fisheries Act (AFA) trawl catcher/processors in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the 2011 Pacific cod total allowable catch (TAC) specified for AFA trawl catcher-processors in the BSAI.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), August 1, 2011, through 2400 hrs, A.l.t., December 31, 2011.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907-586-7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2011 Pacific cod TAC allocated to AFA trawl catcher/processors in the BSAI is 4,682 metric tons (mt) as established by the final 2011 and 2012 harvest specifications for groundfish in the BSAI (76 FR 11139, March 1, 2011).

In accordance with § 679.20(d)(1)(i) and (d)(1)(ii)(B), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2011 Pacific cod TAC allocated to AFA trawl catcher/processors in the BSAI will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 4,440 mt, and is setting aside the remaining 242