

Collin (FEMA Docket No.: B-1116).	City of McKinney (09-06-3028P).	November 6, 2009; November 13, 2009; <i>The McKinney Courier-Gazette</i> .	The Honorable Brian Loughmiller, Mayor, City of McKinney, 222 North Tennessee Street, P.O. Box 517, McKinney, TX 75069.	October 28, 2009 .....	480135
Collin (FEMA Docket No.: B-1113).	City of McKinney (10-06-0322P).	February 4, 2010; February 11, 2010; <i>The McKinney Courier-Gazette</i> .	The Honorable Brian Loughmiller, Mayor, City of McKinney, 222 North Tennessee Street, P.O. Box 517, McKinney, TX 75069.	June 11, 2010 .....	480135
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■ 5. On the same page, in the same table, the ninth entry should read:

Texas: Johnson (FEMA Docket No.: B-1162).	City of Mansfield (10-06-0427P).	July 20, 2010; July 27, 2010; <i>The Fort Worth Star-Telegram</i> .	The Honorable David Cook, Mayor, City of Mansfield, 1200 East Broad Street, Mansfield, TX 76063.	November 24, 2010 .....	480606
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## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

#### 49 CFR Part 571

[Docket No. NHTSA-2010-0032]

RIN 2127-AK82

### Federal Motor Vehicle Safety Standards; Side Impact Protection

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

**ACTION:** Final rule; response to petitions for reconsiderations; correction.

**SUMMARY:** This document responds to a petition for reconsideration from the Alliance of Automobile Manufacturers regarding a March 2010 final rule on the Federal motor vehicle safety standard for side impact protection. Today's rule makes minor changes to the standard's testing requirements and clarifies some aspects of the standard.

**DATES:** This rule is effective February 21, 2012.

**FOR FURTHER INFORMATION CONTACT:** For non-legal issues, you may call Christopher J. Wiacek, NHTSA Office of Crashworthiness Standards, telephone 202-366-4801. For legal issues, you may call Deirdre Fujita, NHTSA Office of Chief Counsel, telephone 202-366-2992. The mailing address of these officials is the National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., West Building, Washington, DC 20590.

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### I. Background

On September 11, 2007, NHTSA published a final rule that upgraded Federal Motor Vehicle Safety Standard (FMVSS) No. 214, "Side impact protection," (72 FR 51908, Docket No. NHTSA-2007-29134). Until the final rule, the only dynamic test in FMVSS No. 214 was a moving deformable barrier (MDB) test simulating an intersection collision with one vehicle being struck in the side by another vehicle. The 2007 final rule upgraded FMVSS No. 214 to add a pole test to the standard. The pole test requires all vehicles with a gross vehicle weight rating (GVWR) of 4,536 kilograms (kg) or less (10,000 pounds (lb) or less) to protect front seat occupants in a vehicle-to-pole test simulating 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.

Under the September 11, 2007 final rule, vehicles are tested with two sizes of test dummies. A test dummy known as the ES-2re represents mid-size adult

male occupants. A test dummy known as the SID-IIs represents smaller stature occupants. The SID-IIs is the size of a 5th percentile adult female. Both the ES-2re and the SID-IIs test dummies are used in the new pole test and in the MDB test. (Prior to the rule, only a first-generation side impact dummy (SID) (49 CFR part 572 subpart F), representing a mid-size adult male, was used in the MDB test.)

The agency received petitions for reconsideration on the September 11, 2007 final rule. The agency addressed the petitions for reconsideration in two documents prior to today's document. To respond to petitioners' concerns about lead time as quickly as possible, the lead time issue, and other matters that needed to be resolved or clarified concerning lead time and the phasing-in of the new requirements, were addressed in an initial response to petitions published June 9, 2008 (73 FR 32473, Docket No. NHTSA-2008-0104).

On March 15, 2010 (75 FR 12123, Docket No. NHTSA-2010-0032), the agency addressed the remaining issues raised by the petitions for reconsideration. In that document, the agency clarified or revised aspects of the test procedures relating to, among other matters: vehicle setup (adjusting the non-struck side seat; adjusting head restraints, shoulder belt anchorages, and adjustable steering wheels, clarifying the vehicle test attitude tolerance); test dummy setup (positioning the SID-IIs; removing redundant foot positioning procedures); and other technical matters.

### II. Petition for Reconsideration

The agency received an April 29, 2010 petition for reconsideration of the March 15, 2010 final rule from the Alliance of Automobile Manufacturers

(Alliance).<sup>1</sup> The Alliance sought to address “a small number of areas where the recent FMVSS [No.] 214 requirements are not consistent with the current version of the side impact [New Car Assessment Program] NCAP test procedures.” The issues raised by the petitioner relate to the location of the seat on the non-impact side during testing, the adjustment of the SID–IIs lower neck bracket and the height adjustment specification for the head restraint for the SID–IIs. In addition, the Alliance requested changes to various provisions of the NCAP side impact test procedure.

### III. Response to Petition

#### *a. Location of the Seat on the Non-Impact Side; Correcting Amendment Background*

Prior to the September 1, 2007 final rule, the test procedure for the MDB test in FMVSS No. 214 (S6.3) specified that, when using the SID, “Adjustable seats are placed in the adjustment position midway between the forward most and rearmost positions. \* \* \*” (Emphasis added.) NCAP currently has the same specification for the adult male test dummy in the MDB test.

The September 1, 2007 final rule included the following specification for front seat adjustment in the MDB test using the ES–2re dummy (S8.3.1.3): “If the passenger seat does not adjust independently of the driver seat, the driver seat shall control the final position of the passenger seat.”<sup>2</sup>

If the passenger seat adjusts independently of the driver seat, the final rule was silent on specifying a seat positioning procedure for the non-impacted (or “non-struck”) side of the vehicle.

In a petition for reconsideration of the September 1, 2007 final rule, the Alliance recommended “adding a section that adopts the current FMVSS 214 seat position of the non-impacted side when the driver and passenger seats move independently of each other, which places the front seat on the non-impacted [side] at the same fore/aft location as the struck-side seat.”<sup>3</sup> In response, NHTSA stated in the March 15, 2010 final rule preamble that “[W]e agree with the Alliance that the seat on the non-struck side should be aligned

with the impacted seat, with regard to two adjacent seats with the ability to adjust independently of each other.” However, no regulatory text change was made by the March 15, 2010 final rule.

#### Petition

The Alliance requests in its April 29, 2010 petition for reconsideration that NHTSA amend S8.3.1.3 (testing with the ES–2re) to add the sentence: “If the passenger seat adjusts independently of the driver seat, the fore/aft location of the seat on the non-struck side shall be aligned with the fore/aft location of the seat on the struck side.” The Alliance also requests the provision be placed in the regulatory text pertaining to the MDB test that specifies adjustment of the second row seats when tested with the SID–IIs (S8.3.3.3) and in the pole test for adjusting front row seats with the SID–IIs test dummy (S10.3.2.3).

*Agency Response:* We are clarifying our statement in the preamble to the March 15, 2010 final rule. In doing so, we are mainly denying the Alliance’s requests.

When we agreed in the March 15, 2010 preamble that the seat on the non-struck side should indeed be “aligned” with the impacted seat (75 FR at 12131), we were referring to vehicles in which the driver seat and the front passenger seat have the same seat track configuration (length and relative fore-aft position in the vehicle). Thus, the driver seat and the passenger seat would be set up mid-track and both seats would be “aligned.”

It was our intention that the driver seat and the front passenger seat be in the mid-track position when positioning the 50th percentile adult male dummy in FMVSS No. 214 tests, as it has been done historically. FMVSS No. 214 has always used the mid-track position when positioning the SID dummy in the MDB test.<sup>4</sup> NCAP currently specifies using the mid-track position when positioning the ES–2re 50th percentile adult male dummy in the side impact MDB test.<sup>5</sup> NHTSA did not intend to change that mid-track specification in FMVSS No. 214 and in NCAP when

testing with the 50th percentile adult male test dummies.

If the driver seat track and the front passenger seat track are the same length, and relative fore-aft position in the vehicle, and if the driver and front passenger seats are similar in shape and configuration, “aligning” the seats would result in both being positioned mid-track. However, if the tracks are different lengths, have a different fore-aft location, or if the seats differ in shape, the mid-track positions may differ and it is unclear what “aligning” the seats on the struck side and non-struck side means. For these reasons, in retrospect, we do not believe the term “aligned” should be used to describe how the seats on the struck side and non-struck side should be set up. Instead, we will clarify S8.3.1.3 to specify that if the passenger seat adjusts independently of the driver seat, the procedures of S8.3.1 will be used to position the driver seat and the passenger seat.<sup>6</sup> That is, the seats will be in the mid-track position.

It was also our intention that, for the pole test, the front seat in which the SID–IIs 5th percentile adult female test dummy is placed will be in the most forward position (S10.3.2.3.2). NCAP currently specifies using the most forward position.<sup>7</sup> If the tracks for the driver seat and for the front passenger seat are of different lengths or relative position, the forward-most position will differ. If such seats were to be “aligned,” one of the seats may not be in its forward-most position, which is contrary to our intent. Use of the “aligned” concept also introduces imprecision into the standard as to the meaning of the term as applied to two seats of dissimilar dimension, which we wish to avoid.

We thus deny the Alliance’s specific request. However, we will clarify S10.3.2.3 to specify that if the passenger seat adjusts independently of the driver seat, the procedures of S10.3.2 will be used to position each seat. That means that the front seats will be positioned full-forward when testing with the SID–II (see S10.3.2.3.2).

For the reasons explained above, we also deny the Alliance’s suggestion to incorporate the “aligned” concept in S8.3.3.3. This section specifies how to position an adjustable second row seat for a SID–IIs 5th percentile adult female test dummy in the MDB test. Under

<sup>1</sup> At the time of the petition, the Alliance consisted of BMW group, Chrysler Group LLC, Ford Motor Company, General Motors LLC, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche, Toyota, and Volkswagen.

<sup>2</sup> In S8.3.1.3.2, the first sentence states: “Using only the control that primarily moves the seat fore and aft, move the seat cushion reference point to the mid travel position. \* \* \*”

<sup>3</sup> Docket No. NHTSA–2007–29134–008, p. 20.

<sup>4</sup> See general provision, S6.3 of FMVSS No. 214, before the 2007 final rule: “Adjustable seats. Adjustable seats are placed in the adjustment position midway between the forward most and rearmost positions, and if separately adjustable in a vertical direction, are at the lowest position.” See also NHTSA’s FMVSS No. 214 Test Procedure manual with the SID dummy states: “Adjustable seats (on the impact and non-impact side) are placed in the adjustment position midway between the forward most and rearmost position. \* \* \*” TP214D–08 Part I, K: Adjustable Seats.

<sup>5</sup> Docket No. NHTSA–2008–0141–0016, pages 40–41.

<sup>6</sup> Clarifying S8.3.1.3 will also clarify the pole test procedure with the 50th percentile male dummy. Section S10.3.1 of FMVSS No. 214 specifies that when conducting the pole test with the ES–2re dummy, the driver and front passenger seats are set up as specified in S8.3.1.

<sup>7</sup> Docket No. NHTSA–2008–0141–0015, page 30.

S8.3.3.3, the struck side is adjusted to its full down, full rearward position. We will revise S8.3.3.3 so that it applies to a non-struck seat that adjusts independently of the struck seat. This means that, in an MDB test, adjustable second row seats being tested will be placed full down, full rearward.

*b. SID-IIs Lower Neck Bracket Adjustment*

The March 15, 2010 final rule added the following sentence to the end of S12.3.2(a)(9) for positioning the dummy in the driver's seat: "Adjust the lower neck bracket to level the head as much as possible." This was in response to an Alliance petition for reconsideration on the September 2007 final rule. The purpose of the amendment was to clarify that the lower neck bracket may be used to position the dummy's head if the adjustable seat back cannot achieve the  $\pm 0.5$  degree tolerance for head leveling.

In its petition for reconsideration of the March 15, 2010 final rule, the Alliance suggested the new sentence that was added to S12.3.2(a)(9) should be added to the dummy positioning procedures for both the front and rear seat passengers in S12.3.3(a)(9) and S12.3.4(h), respectively, to keep the head leveling procedure consistent in all seating positions. The Alliance further suggested that S12.3.2(a)(10), S12.3.3(a)(10) and S12.3.4(i) are unnecessary, if the new sentence is added as the petitioner suggested, and should be deleted.

*Agency Response:* We generally agree with the request, but there are aspects with which we do not entirely concur.

We agree that there is some unneeded overlap between S12.3.2(a)(9), adopted by the March 2010 final rule, and S12.3.2(a)(10). Therefore, we have decided to more fully integrate the two sections into a revised S12.3.2(a)(9). The revised section clarifies the head leveling procedure for all seat types (i.e., seats with adjustable seat backs and those with non-adjustable seat backs). The instruction that was in S12.3.2(a)(10) (to "minimize the angle") has not been deleted but is now integrated into the procedures of S12.3.2(a)(9).

Specifications that were related to steering wheel interaction that were previously part of S12.3.2(a)(9) are now moved to S12.3.2(a)(10). Section S12.3.2(a)(11) is changed to remove a reference to S12.3.2(a)(10). S12.3.2(a)(12) remains unchanged.

We also agree with the Alliance's suggestion that the specification—that the lower neck bracket could be used to level the head—should also be included

in the procedures for positioning the front passenger dummy (S12.3.3(a)(9)) and the rear dummy (S12.3.4(h)). The instruction is reasonable because it better ensures that the dummy's head can be leveled. Accordingly, we have incorporated the specification in the head leveling procedures of those two sections, along with clarifying the head leveling procedures. Yet, as noted above for S12.3.2(a)(10), the instruction that was in S12.3.3(a)(9) and S12.3.4(h) (to "minimize the angle") has not been deleted but is now integrated into the procedures of S12.3.3(a)(9) and S12.3.4(h). The remainder of S12.3.3(a) and S12.3.4 remain basically the same. Our changes are consistent with the Alliance's request, while not a verbatim implementation of it.

*c. SID-IIs Head Restraint Position*

In the March 2010 final rule, the agency agreed with the Alliance that the potential exists where the lowest possible detent position may not be the lowest possible position for the head restraint adjustment. It was the agency's intent to position the head restraint in contact with the top of the seat back as the seat back may provide a "stop" for the downward adjustment of the head restraint, just as a detent does at other positions of adjustment. To further clarify the position of the head restraint when testing with the SID-IIs dummy, we revised the standard to state that if it is possible to achieve a position lower than that associated with the detent range, the head restraint will be set to its lowest possible position. The change was consistent with the positioning of head restraints for testing in FMVSS No. 202, "Head restraints."<sup>8</sup>

The Alliance petitioned the agency to make clear that we were referring to in-use positions and not stowed positions, to be consistent with the NCAP test procedure. The NCAP laboratory test procedure states that the head restraint is to be placed at its lowest and most full forward in-use position, not including stowed positions.<sup>9</sup>

*Agency Response:* We are granting the request to specify in the regulatory text (S8.3.3.2 and S10.3.2.2) that the allowable positions of head restraint adjustment excludes non-use positions.

<sup>8</sup> We note that for a certain compliance option, FMVSS No. 202 measures the height of the head restraint when adjusted to its lowest position. In a 2007 letter to the Lear Corporation, the agency interpreted this position to potentially be the position that the head restraint is in when it is in contact with the top of the seat back and below the lowest adjustment detent. A copy of this letter can be found on the NHTSA Web site at <http://isearch.nhtsa.gov/files/07-001357drn.htm>.

<sup>9</sup> Docket Nos. NHTSA-2008-0141-0015, page 31 and NHTSA-2008-0141-0016, page 41.

"Non-use positions" are as specified by S4.4 of FMVSS No. 202a, "Head restraints." Under this section of FMVSS No. 202a, there are three kinds of non-use positions under which it is not necessary to meet the minimum head restraint height requirement. This change will provide greater clarity when positioning the head restraint when testing with the SID-IIs dummy.

*d. Changes to the NCAP Test Procedures*

In addition to the requested changes in its petition for reconsideration of the FMVSS No. 214 final rule, the Alliance requested changes to NCAP's side impact test procedure. Changes were suggested for the positioning of the SID-IIs in vehicles with small rear seats and the seat adjustment procedure for the SID-IIs, in addition to other issues.

*Agency Response:* The purpose of this final rule is to address the petition for reconsideration related to the FMVSS No. 214 rulemaking. The Alliance's suggestions related to the NCAP test procedure will be addressed separately and in the context of that program. A copy of the agency's response to these issues is included in the docket for the NCAP test procedure, Docket No. NHTSA-2008-0141.

**IV. Corrections**

The agency has learned of the following technical errors that are in need of correction. These are corrected by today's document.

*a. Deleted Text*

In the 2010 final rule the agency modified S12.2.1 to address petitions on shoulder belt anchorage positioning for the ES-2re. In so doing, we inadvertently removed S12.2.1(a)-(d). Today we are restoring those sections to the standard.

*b. Hm Stamp*

Section S12.2.1(b)(2) (as set forth in the September 11, 2007 final rule) stated that the correct position of the dummy pelvis may be checked relative to the H-point of the H-point Manikin by using the "M3 holes" in the ES-2re pelvis. In the last two sentences of S12.2.1(b)(2), there was a statement that the M3 holes are indicated with an "Hm" stamp and a statement as to where the Hm stamp may be found on the dummy. These statements were in error because 49 CFR part 572 subpart U does not require the Hm stamp to be marked on the ES-2re dummy. Further, the test dummy can be positioned without the stamp, so there was no need for the reference to the stamp.

Accordingly, as noted above, while today's document maintains the first

sentence of S12.2.1(b)(2), we have edited the remainder of the section by removing the statements concerning the Hm stamp.

#### *c. Seat Back Adjustment*

While reviewing the Alliance's petition, the agency saw a need for the following correction. S8.3.3.2 and S10.3.2.2 state that for seats with adjustable seat backs, the seat back is adjusted to the manufacturer's nominal design riding position, or if not specified, the first detent rearward of 25 degrees from the vertical. We have determined that the seat back adjustment provisions specified in S8.3.3.2 and S10.3.2.2 are unnecessary in the test procedure since the seat back is fully reclined in S12.3.3(2) and S12.3.4(b), prior to placement of the test dummy in the seat. Therefore, we have deleted the last two sentences in S8.3.3.2 and 10.3.2.2. We believe this change will have no effect on the MDB or pole test.

#### *d. Typographical Errors*

In S5(a)(1), the reference to "S8.4" is in error. S8.4 is the steering wheel adjustment procedure. We are replacing the reference to S8.4 with a reference to "S8.3." S8.3 is the appropriate section for seat back adjustment procedures.

In S12.3.3(b)(3), the last word ("possible") is missing ("\* \* \* place the lower leg as perpendicular to the thigh as possible"). We are correcting the text.

### **V. 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 was not reviewed by the Office of Management and Budget under E.O. 12866, "Regulatory Planning and Review." The rulemaking action has also been determined to be not significant under the Department's regulatory policies and procedures.

This document corrects or clarifies aspects of the test procedures specified by the September 11, 2007 and March 15, 2010 final rules or makes minor adjustments to those procedures. The minimal impacts of today's amendment do not warrant preparation of a regulatory evaluation.

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act of 1980, as amended, requires agencies to

evaluate the potential effects of their proposed and final rules on small businesses, small organizations and small governmental jurisdictions. I hereby certify that this rule will not have a significant economic impact on a substantial number of small entities. This final rule will not significantly affect small manufacturers since it simply corrects or clarifies aspects of the test procedures specified by the September 11, 2007 and March 15, 2010 final rules, or makes minor adjustments to those procedures. Small organizations and small governmental units will not be significantly affected since there are not likely to be any cost impacts associated with this action on the price of new motor vehicles.

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

NHTSA has examined today's rule pursuant to Executive Order 13132 (64 FR 43255, August 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 rulemaking does not have sufficient federalism implications to warrant consultation with State and local officials or the preparation of a federalism summary impact statement. The rule will 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."

NHTSA rules can preempt 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 addressing the same aspect of performance.

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 such 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 there being 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 and 12988, 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, like many NHTSA rules, would prescribe only a minimum safety standard. As such, NHTSA does not intend that this final rule would 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 minimum standard proposed here. Without any conflict, there could not be any implied preemption of a State common law tort cause of action.

#### *Unfunded Mandates Reform Act*

The Unfunded Mandates Reform Act of 1995 (UMRA) requires Federal 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 annually for inflation, with base year of 1995). This final rule 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 this final rule for the purposes of the National Environmental Policy Act. The agency has determined that implementation of this action will not have any significant impact on the quality of the human environment.

#### *Civil Justice Reform*

With respect to the review of the promulgation of a new regulation, section 3(b) of Executive Order 12988, "Civil Justice Reform" (61 FR 4729, February 7, 1996) requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect; (2) clearly specifies the effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct, while promoting simplification and burden reduction; (4) clearly specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. This document is consistent with that requirement.

Pursuant to this Order, NHTSA notes as follows.

The issue of preemption is discussed above in connection with E.O. 13132. 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.

#### *Paperwork Reduction Act (PRA)*

Under the PRA of 1995, 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 final rule has no "collections of information" (as defined at 5 CFR 1320.3(c)).

#### *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 International Organization for Standardization (ISO) and the Society of Automotive Engineers. The NTTAA directs us to provide Congress, through OMB, explanations when we decide not to use available and applicable voluntary consensus standards.

There are no voluntary consensus standards applicable to this final rule.

#### *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 write to us with your views.

#### **List of Subjects in 49 CFR Part 571**

Imports, Motor vehicle safety, Motor vehicles, Rubber and rubber products, and Tires.

In consideration of the foregoing, NHTSA amends 49 CFR Chapter V as set forth below.

#### **PART 571—FEDERAL MOTOR VEHICLE SAFETY STANDARDS**

- 1. The authority citation for Part 571 continues to read as follows:

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

- 2. Section 571.214 is amended by:
- a. Revising S5(a)(1), S8.3.1.3, S8.3.3.2, S8.3.3.3, S10.3.2.2, and S10.3.2.3;
  - b. Adding S12.2.1(a) through S12.2.1(d)(2); and,
  - c. Revising S12.3.2(a)(9), S12.3.2(a)(10), S12.3.2(a)(11); S12.3.3(a)(9), S12.3.3(a)(10),

S12.3.3(a)(11), S12.3.3(b)(3), and S12.3.4(h); and,

- d. Removing S12.3.3(a)(12).

The added and amended text read as follows:

#### **§ 571.214 Standard No. 214; Side impact protection.**

\* \* \* \* \*

S5 *General exclusions.*

(a) \* \* \*

(1) Any side door located so that no point on a ten-inch horizontal longitudinal line passing through and bisected by the H-point of a manikin placed in any seat, with the seat adjusted to any position and the seat back adjusted as specified in S8.3, falls within the transverse, horizontal projection of the door's opening,

\* \* \* \* \*

S8.3.1.3 *Seat position adjustment.* If the driver and passenger seats do not adjust independently of each other, the struck side seat shall control the final position of the non-struck side seat. If the driver and passenger seats adjust independently of each other, adjust both the struck and non-struck side seats in the manner specified in S8.3.1.

\* \* \* \* \*

S8.3.3.2 *Other seat adjustments.* Position any adjustable parts of the seat that provide additional support so that they are in the lowest or non-deployed adjustment position. Position any adjustable head restraint in the lowest and most forward in-use position. If it is possible to achieve a position lower than the effective detent range, the head restraint should be set to its lowest possible position. A non-use position as specified by S4.4 of FMVSS No. 202a, is excluded from being considered as the lowest possible position.

\* \* \* \* \*

S8.3.3.3 *Seat position adjustment.* Using only the controls that primarily move the seat and seat cushion independent of the seat back in the fore and aft directions, move the seat cushion reference point (SCRCP) to the rearmost position. Using any part of any control, other than those just used, determine the full range of angles of the seat cushion reference line and set the seat cushion reference line to the middle of the range. Using any part of any control other than those that primarily move the seat or seat cushion fore and aft, while maintaining the seat cushion reference line angle, place the SCRCP to its lowest position. Mark location of the seat for future reference. If the non-struck side seat adjusts independently of the struck side seat,

adjust the seat in the manner specified in this section.

\* \* \* \* \*

#### S10.3.2.2 *Other seat adjustments.*

Position any adjustable parts of the seat that provide additional support so that they are in the lowest or non-deployed adjustment position. Position any adjustable head restraint in the lowest and most forward in-use position. If it is possible to achieve a position lower than the effective detent range, the head restraint should be set to its lowest possible position. A non-use position as specified by S4.4 of FMVSS No. 202a, is excluded from being considered as the lowest possible position.

\* \* \* \* \*

#### S10.3.2.3 *Seat position adjustment.*

If the driver and passenger seats do not adjust independently of each other, the struck side seat shall control the final position of the non-struck side seat. If the driver and passenger seats adjust independently of each other, adjust both the struck and non-struck side seats in the manner specified in S10.3.2.

\* \* \* \* \*

#### S12.2.1 \* \* \*

##### (a) *Upper torso.*

(1) The plane of symmetry of the dummy coincides with the vertical median plane of the specified seating position.

(2) Bend the upper torso forward and then lay it back against the seat back. Set the shoulders of the dummy fully rearward.

(b) *Pelvis.* Position the pelvis of the dummy according to the following:

(1) Position the pelvis of the dummy such that a lateral line passing through the dummy H-points is perpendicular to the longitudinal center plane of the seat. The line through the dummy H-points is horizontal with a maximum inclination of  $\pm 2$  degrees. The dummy may be equipped with tilt sensors in the thorax and the pelvis. These instruments can help to obtain the desired position.

(2) The correct position of the dummy pelvis may be checked relative to the H-point of the H-point Manikin by using the M3 holes in the H-point back plates at each side of the ES-2re pelvis. Position the dummy such that the M3 holes are located within a circle of radius 10 mm (0.39 in.) around the H-point of the H-point Manikin.

(c) *Arms.* For the driver seating position and for the front outboard passenger seating position, place the dummy's upper arms such that the angle between the projection of the arm centerline on the mid-sagittal plane of the dummy and the torso reference line is  $40^\circ \pm 5^\circ$ . The torso reference line is defined as the thoracic spine centerline.

The shoulder-arm joint allows for discrete arm positions at 0, 40, and 90 degree settings forward of the spine.

(d) *Legs and Feet.* Position the legs and feet of the dummy according to the following:

(1) For the driver's seating position, without inducing pelvis or torso movement, place the right foot of the dummy on the un-pressed accelerator pedal with the heel resting as far forward as possible on the floor pan. Set the left foot perpendicular to the lower leg with the heel resting on the floor pan in the same lateral line as the right heel. Set the knees of the dummy such that their outside surfaces are  $150 \pm 10$  mm ( $5.9 \pm 0.4$  inches) from the plane of symmetry of the dummy. If possible within these constraints, place the thighs of the dummy in contact with the seat cushion.

(2) For other seating positions, without inducing pelvis or torso movement, place the heels of the dummy as far forward as possible on the floor pan without compressing the seat cushion more than the compression due to the weight of the leg. Set the knees of the dummy such that their outside surfaces are  $150 \pm 10$  mm ( $5.9 \pm 0.4$  inches) from the plane of symmetry of the dummy.

\* \* \* \* \*

#### S12.3.2 *5th percentile female driver dummy positioning.*

(a) *Driver torso/head/seat back angle positioning.*

\* \* \* \* \*

##### (9) *Head leveling.*

##### (i) *Vehicles with fixed seat backs.*

Adjust the lower neck bracket to level the transverse instrumentation platform angle of the head to within  $\pm 0.5$  degrees. If it is not possible to level the transverse instrumentation platform to within  $\pm 0.5$  degrees, select the neck bracket adjustment position that minimizes the difference between the transverse instrumentation platform angle and level.

(ii) *Vehicles with adjustable seat backs.* While holding the thighs in place, rotate the seat back forward until the transverse instrumentation platform angle of the head is level to within  $\pm 0.5$  degrees, making sure that the pelvis does not interfere with the seat bight. (If the torso contacts the steering wheel, use S12.3.2(a)(10) before proceeding with the remaining portion of this paragraph.) If it is not possible to level the transverse instrumentation platform to within  $\pm 0.5$  degrees, select the seat back adjustment position that minimizes the difference between the transverse instrumentation platform angle and level, then adjust the neck

bracket to level the transverse instrumentation platform angle to within  $\pm 0.5$  degrees if possible. If it is still not possible to level the transverse instrumentation platform to within  $\pm 0.5$  degrees, select the neck bracket angle position that minimizes the difference between the transverse instrumentation platform angle and level.

(10) If the torso contacts the steering wheel, adjust the steering wheel in the following order until there is no contact: telescoping adjustment, lowering adjustment, raising adjustment. If the vehicle has no adjustments or contact with the steering wheel cannot be eliminated by adjustment, position the seat at the next detent where there is no contact with the steering wheel as adjusted in S10.5. If the seat is a power seat, position the seat to avoid contact while assuring that there is a maximum of 5 mm (0.2 in) distance between the steering wheel as adjusted in S10.5 and the point of contact on the dummy.

(11) Measure and set the dummy's pelvic angle using the pelvic angle gage. The angle is set to 20.0 degrees  $\pm 2.5$  degrees. If this is not possible, adjust the pelvic angle as close to 20.0 degrees as possible while keeping the transverse instrumentation platform of the head as level as possible by adjustments specified in S12.3.2(a)(9).

\* \* \* \* \*

#### S12.3.3 *5th percentile female front passenger dummy positioning.*

(a) *Passenger torso/head/seat back angle positioning.*

\* \* \* \* \*

##### (9) *Head leveling.*

##### (i) *Vehicles with fixed seat backs.*

Adjust the lower neck bracket to level the transverse instrumentation platform angle of the head to within  $\pm 0.5$  degrees. If it is not possible to level the transverse instrumentation platform to within  $\pm 0.5$  degrees, select the neck bracket adjustment position that minimizes the difference between the transverse instrumentation platform angle and level.

(ii) *Vehicles with adjustable seat backs.* While holding the thighs in place, rotate the seat back forward until the transverse instrumentation platform angle of the head is level to within  $\pm 0.5$  degrees, making sure that the pelvis does not interfere with the seat bight. If it is not possible to level the transverse instrumentation platform to within  $\pm 0.5$  degrees, select the seat back adjustment position that minimizes the difference between the transverse instrumentation platform angle and level, then adjust the neck bracket to level the transverse instrumentation platform angle to within  $\pm 0.5$  degrees if possible. If it is

still not possible to level the transverse instrumentation platform to within  $\pm 0.5$  degrees, select the neck bracket angle position that minimizes the difference between the transverse instrumentation platform angle and level.

(10) Measure and set the dummy's pelvic angle using the pelvic angle gage. The angle is set to 20.0 degrees  $\pm 2.5$  degrees. If this is not possible, adjust the pelvic angle as close to 20.0 degrees as possible while keeping the transverse instrumentation platform of the head as level as possible by adjustments specified in S12.3.2(a)(9).

(11) If the dummy is contacting the vehicle interior after these adjustments, move the seat rearward until there is a maximum of 5 mm (0.2 in) between the contact point of the dummy and the interior of the vehicle or if it has a manual seat adjustment, to the next rearward detent position. If after these adjustments, the dummy contact point is more than 5 mm (0.2 in) from the vehicle interior and the seat is still not in its forwardmost position, move the seat forward until the contact point is 5 mm (0.2 in) or less from the vehicle interior, or if it has a manual seat adjustment, move the seat to the closest detent position without making contact, or until the seat reaches its forwardmost position, whichever occurs first.

(b) *Passenger foot positioning.*

\* \* \* \* \*

(3) If either foot does not contact the floor pan, place the foot parallel to the floor pan and place the lower leg as perpendicular to the thigh as possible.

\* \* \* \* \*

S12.3.4 *5th percentile female in rear outboard seating positions.*

\* \* \* \* \*

(h) Head leveling.

(1) Vehicles with fixed seat backs. Adjust the lower neck bracket to level the transverse instrumentation platform angle of the head to within  $\pm 0.5$  degrees. If it is not possible to level the transverse instrumentation platform to within  $\pm 0.5$  degrees, select the neck bracket adjustment position that minimizes the difference between the transverse instrumentation platform angle and level.

(2) Vehicles with adjustable seat backs. While holding the thighs in place, rotate the seat back forward until the transverse instrumentation platform angle of the head is level to within  $\pm 0.5$  degrees, making sure that the pelvis does not interfere with the seat bight. If it is not possible to level the transverse instrumentation platform to within  $\pm 0.5$  degrees, select the seat back adjustment position that minimizes the difference between the transverse instrumentation

platform angle and level, then adjust the neck bracket to level the transverse instrumentation platform angle to within  $\pm 0.5$  degrees if possible. If it is still not possible to level the transverse instrumentation platform to within  $\pm 0.5$  degrees, select the neck bracket angle position that minimizes the difference between the transverse instrumentation platform angle and level.

\* \* \* \* \*

Issued on: August 18, 2011.

David L. Strickland,  
Administrator.

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 635

[Docket No. 110210132-1275-02]

RIN 0648-XA630

#### Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Fisheries

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

**ACTION:** Temporary rule; inseason General category retention limit adjustment.

**SUMMARY:** NMFS has determined that the Atlantic tunas General category daily Atlantic bluefin tuna (BFT) retention limit should be adjusted from one to three large medium or giant BFT for the September, October-November, and December time periods of the 2011 fishing year, based on consideration of the regulatory determination criteria regarding inseason adjustments. This action applies to Atlantic tunas General category (commercial) permitted vessels and Highly Migratory Species (HMS) Charter/Headboat category permitted vessels (when fishing commercially for BFT).

**DATES:** Effective September 1, 2011, through December 31, 2011.

**FOR FURTHER INFORMATION CONTACT:** Sarah McLaughlin or Brad McHale, 978-281-9260.

**SUPPLEMENTARY INFORMATION:** Regulations implemented under the authority of the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) governing the harvest of BFT by

persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 635. Section 635.27 subdivides the U.S. BFT quota recommended by the International Commission for the Conservation of Atlantic Tunas (ICCAT) among the various domestic fishing categories, consistent with the allocations established in the Consolidated Highly Migratory Species Fishery Management Plan (Consolidated HMS FMP) (71 FR 58058, October 2, 2006) and subsequent rulemaking.

The 2011 BFT fishing year began on January 1, 2011, and ends December 31, 2011. The 2011 BFT quota specifications (76 FR 39019, July 5, 2011) established a quota of 435.1 mt for the General category fishery (the commercial tunas fishery in which handgear is used). Each of the General category time periods (January, June-August, September, October-November, and December) is allocated a portion of the annual General category quota, thereby ensuring extended fishing opportunities in years when catch rates are high and quota is available. The General category fishery is open until December 31, 2011, or until the General category quota is reached.

#### Adjustment of General Category Daily Retention Limit

Starting on September 1, the General category daily retention limit (§ 635.23(a)(2)), is scheduled to revert back to the default retention limit of one large medium or giant BFT (measuring 73 inches (185 cm) curved fork length or greater) per vessel per day/trip. This default retention limit applies to General category permitted vessels and HMS Charter/Headboat category permitted vessels (when fishing commercially for BFT).

Under 50 CFR 635.23(a)(4), NMFS may increase or decrease the daily retention limit of large medium and giant BFT over a range of zero to a maximum of three per vessel based on consideration of the criteria provided under § 635.27(a)(8), which include: The usefulness of information obtained from catches in the particular category for biological sampling and monitoring of the status of the stock; effects of the adjustment on BFT rebuilding and overfishing; effects of the adjustment on accomplishing the objectives of the fishery management plan; variations in seasonal distribution, abundance, or migration patterns of BFT; effects of catch rates in one area precluding vessels in another area from having a reasonable opportunity to harvest a portion of the category's quota; and a review of dealer reports, daily landing