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Background

In a negotiated rulemaking, an agency invites interested parties that are likely to be affected by a regulation to work with each other and the agency on a negotiating committee to develop a consensus draft of a proposed rule. That proposed rule would then be published by the agency for public comment under customary regulatory procedures.

The FHWA believes cooperative problem solving should be given serious consideration. An agency must determine whether an appropriate advisory committee can be assembled that would fairly represent all affected interests and negotiate in good faith. The FHWA has, therefore, retained two convenors (Charles Pou, Jr. and Alana Knaster) to undertake the initial stage in the negotiated rulemaking process.

The neutral convenors will interview affected interests, including drivers, motor carriers, safety advocacy groups, enforcement officials, insurers, and others. The convenors will, among other things, examine the potential for adequate and balanced representation of these varied interests on an advisory committee that would be convened to negotiate the regulation. The convenors will then submit a written report of findings and recommendations to the agency. The convenors' report will provide a basis for the FHWA to decide whether to proceed with negotiated rulemaking, and, if so, to determine the scope of the issues the committee would be charged with addressing. In the alternative, the FHWA may decide to proceed with traditional informal rulemaking. Toward this latter end, the agency continues to consider and evaluate various options for revising the hours-of-service rules.

Any comments the FHWA may receive in reaction to this notice will be provided to the convenors and filed in the public docket.

Should the FHWA decide to proceed with a negotiated rulemaking process, the agency would follow the procedures set forth in the Negotiated Rulemaking Act of 1996, 5 U.S.C. 561 *et seq.* This would include the establishment of a negotiating committee under the Federal Advisory Committee Act (5 U.S.C. Appendix 2), and a **Federal Register** notice setting forth full particulars about the process and public participation.

Authority: 5 U.S.C. 561 *et seq.*; 49 U.S.C. 31136, 31502; and 49 CFR 1.48

Issued on: December 7, 1998.

Kenneth R. Wykle,
Federal Highway Administration
Administrator.

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

Federal Motor Vehicle Safety Standards; Denial of Petition for Rulemaking

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

ACTION: Denial of petition for rulemaking.

SUMMARY: This document denies a petition for rulemaking submitted by the National Mobility Equipment Dealers Association (NMEDA). NMEDA sought to extend the duration of the exclusion (now expired) of light trucks and vans (LTVs) "manufactured for operation by persons with disabilities" from the dynamic test requirements for manual seat belts and automatic restraints in the Federal occupant crash protection standard. The petition also sought to expand the exclusion to apply to all types of vehicles manufactured to be operated by individuals with disabilities.

The exclusion was established for businesses that either manufacture light trucks and vans designed to be operated by persons with disabilities or alter those vehicles before their first retail sale. In the absence of the exclusion, these businesses would have been required to certify that their vehicles met the dynamic and automatic crash protection requirements. The exclusion indirectly benefitted another group of businesses, ones that modify vehicles, after their first retail sale, so that they can be operated by persons with disabilities. In the absence of the exclusion, a statutory prohibition against making federally-required safety equipment inoperative would have prevented this second group of businesses from modifying or removing equipment required by the dynamic and automatic crash protection requirements.

The agency is denying the petition because the exclusion is no longer needed by the businesses that were subject to it. Data from a representative number of manufacturers and alterers of light trucks and vans for persons with

disabilities demonstrate their ability to comply with the dynamic testing requirements.

In a separate but related notice, the agency has proposed a limited exemption from the make inoperative prohibition. The proposal addresses NMEDA's concerns to the extent that it would allow businesses to modify vehicles after the first retail sale in a manner that adversely affects the vehicle's compliance with specified safety standards so that persons with disabilities can drive or ride in them. Standard 208, Occupant Crash Protection, is one of those standards.

FOR FURTHER INFORMATION CONTACT:

For non-legal issues: Lou Molino or Clarke Harper, Office of Crashworthiness Standards, NPS-11, National Highway Traffic Safety Administration, 400 Seventh Street, S.W., Washington, D.C., 20590. Telephone: (202) 366-2264. Facsimile (202) 493-2739.

For legal issues: Nicole Fradette, Office of Chief Counsel, NCC-20, National Highway Traffic Safety Administration, 400 Seventh Street, S.W., Washington, D.C. 20590. Telephone: (202) 366-2992. Facsimile (202) 366-3820.

SUPPLEMENTARY INFORMATION:

I. Background

The National Highway Traffic Safety Administration (NHTSA) issues Federal motor vehicle safety standards (Standards) that specify performance requirements that apply to new motor vehicles and items of motor vehicle equipment before their first sale for purposes other than resale. 49 USC § 30101, *et seq.* Vehicle and equipment manufacturers must certify that their products comply with all applicable Standards before they sell their products. For vehicles manufactured by two or more manufacturers, the final-stage manufacturer is ultimately responsible for certifying the vehicle.¹ If a completed, certified vehicle is modified before its first retail sale (other than by the addition, substitution, or removal of readily attachable components), the person making the modification is an alterer and is required to certify that, as altered, the vehicle continues to comply with all applicable Standards. 49 CFR Part 567.7.

Businesses that modify a vehicle after its first retail sale are not required to certify that the vehicle, as modified,

¹ A final-stage manufacturer is defined as a person who performs such manufacturing operations on an incomplete vehicle that it becomes a completed vehicle. 49 CFR Part 568.3.

continues to comply with the Standards. After the first retail sale, however, manufacturers, distributors, dealers² and motor vehicle repair businesses³ are prohibited from knowingly making inoperative any part of a device or element of design installed on or in a motor vehicle in compliance with an applicable Standard. 49 U.S.C. § 30122. Violations of this prohibition are punishable by civil penalties of up to \$1,100 per violation.⁴

A. Exclusion From Dynamic Test Requirements of FMVSS 208 for Manufacturers and Alterers of LTVs Designed To Be Driven by Persons With Disability

In 1993, in response to a petition from the Recreation Vehicle Industry Association (RVIA) and a letter from Braun Corporation (a manufacturer of vehicles for persons with disabilities), NHTSA amended Standard 208 to provide manufacturers (including alterers) of light trucks and vans (LTVs) "designed to be driven by persons with disabilities" the alternative of installing integrated lap and shoulder belts in lieu of complying with the dynamic testing requirement for manual seat belts and automatic restraints at outboard seating positions.⁵ (58 FR 11975; March 2, 1993) NHTSA excluded these manufacturers

because they were not then able to certify compliance with Standard 208's dynamic test requirements for manual seat belts and automatic restraints. In the notice establishing the exclusion, NHTSA explained that final stage manufacturers and alterers who produce these vehicles could not readily certify compliance with the dynamic test requirements for manual belts and automatic restraints by passing through the certification of the manufacturer of the incomplete or previously certified vehicle because of the types of modifications they made to these vehicles. (58 FR 11975; March 2, 1993) NHTSA concluded that because the final stage manufacturers and alterers of these vehicles were small businesses, they could not individually "take the alternative course of independently certifying compliance with the dynamic test requirements for these vehicles" at that particular time. (58 FR 11975; March 2, 1993) In the same notice, NHTSA declined to grant Ford Motor Company's request to extend the exclusion to passenger cars manufactured for drivers with disabilities because the request was beyond the scope of the rulemaking. However, the agency stated that it did not believe that an exclusion was needed for passenger cars because it did not know of any passenger cars that were being manufactured for drivers in wheelchairs that would need to be excluded from the dynamic testing requirements of Standard 208.

The agency specified in the final rule that the exclusion would expire September 1, 1997. As scheduled, the exclusion expired on that date, the same date on which requirements for air bags at both front outboard seating positions were statutorily required to take effect.

In a September 23, 1997 letter to manufacturers and alterers of vehicles for operation by persons with disabilities, NHTSA noted that the exclusion had expired on September 1, 1997, and that trucks and multipurpose passenger vehicles manufactured for operation by persons with disabilities would now have to comply with the dynamic test and automatic crash protection requirements of Standard 208. NHTSA asked various sized manufacturers and alterers to provide the agency with any information pertaining to the tests performed to ensure that the vehicles complied with the performance requirements contained in Standard 208. NHTSA also asked respondents to describe any other actions they were taking that related to Standard 208.

In response to NHTSA's request, alterers and other manufacturers of

vehicles for the disabled provided NHTSA with information that demonstrated their ability to certify compliance with the dynamic test and automatic crash protection requirements of Standard 208. According to the information submitted to the agency, manufacturers and alterers of vehicles for persons with disabilities are performing vehicle crash tests or using other engineering analysis to determine compliance with Standard 208's dynamic test and automatic crash protection requirements. Alterers and final stage manufacturers supplied NHTSA with the name of the organization who performed the Standard 208 compliance test, the date of the test, and the year, make and model of the vehicle that was tested. All of the vehicles that were tested met the requirements of Standard 208.⁶

B. Make Inoperative Prohibition and Vehicle Modifications for Persons With Disabilities

As noted above in the summary, while the exclusion from Standard 208 applied to manufacturers and alterers of LTVs designed to be driven by persons with disabilities, the exclusion indirectly benefitted another group of businesses, i.e., those who modify LTVs after the first retail sale to accommodate a driver with a disability. Although businesses that modify a vehicle after its first retail sale are not required to certify that the vehicle, as modified, continues to comply with the Standards, they are prohibited from knowingly making inoperative any part of a device or element of design installed on or in a motor vehicle in compliance with an applicable Standard. This means that businesses that modify vehicles, after their first retail sale, to accommodate persons with disabilities must ensure that their modifications do not violate the prohibition.

Under a long line of interpretations issued by the agency, modifications that make inoperative federally-required safety devices and have the effect of converting a vehicle from one vehicle class to another (e.g., from a hard-top to a convertible) do not, however, necessarily violate the "make inoperative" prohibition. Whether there is a violation in this circumstance depends on whether the vehicle, as converted into a new class of vehicle, has the safety devices that would have been required had the vehicle been originally manufactured as a vehicle in

²Section 30102 defines "dealer" as "a person selling and distributing new motor vehicles or motor vehicle equipment primarily to purchasers that in good faith purchase the vehicles or equipment other than for resale."

³Section 30122(a) defines "motor vehicle repair business" as "a person holding itself out to the public to repair for compensation a motor vehicle or motor vehicle equipment." NHTSA has interpreted this term to include businesses that service vehicles by adding features or components to or otherwise customizing those vehicles.

⁴The statute, however, allows the agency to prescribe regulations to exempt a person from the "make inoperative" provision if such an exemption is consistent with safety concerns. 49 U.S.C. § 30122(1).

⁵To qualify for this exclusion, a vehicle had to:

- Be a light truck or van manufactured before September 1, 1997,
- Incorporate a level change device (e.g., lift or ramp) for on loading or off loading an occupant in a wheelchair,
- Have an interior element of design intended to provide the vertical clearance necessary to permit a person in a wheelchair to move between the lift or ramp and the driver's position or to occupy that position (e.g., a raised roof or dropped floor), and
- Have either an adaptive control or special driver seating accommodation (e.g., an easily removable driver's seat for driving from a wheelchair, or a power seat base for those who transfer) to enable persons who have limited use of their arms or legs to operate the vehicle.

NHTSA amended the rule in 1994 to allow the installation of Type 2A belts (separate lap and shoulder belts) instead of Type 2 belts (integrated lap and shoulder belt) for the driver's seating position because a Type 2 belt cannot be positioned properly for some wheelchairs. (50 FR 25826; May 18, 1994)

⁶Most manufacturers and alterers have performed tests using a Hybrid III test dummy in the driver's seat. Further, at least one alterer also conducted a crash test with a dummy in a wheel chair. The vehicle met the requirements of Standard 208.

the new class instead of as a vehicle in the original class. For example, if a repair business converts a hard-top passenger car into a convertible passenger car after the vehicle's first retail sale, the business would not be regarded as having violated the make inoperative prohibition if the converted vehicle has all the safety features that would have been required had the vehicle originally been manufactured as a convertible passenger car.

NHTSA applied this line of interpretation to LTVs modified after first retail sale for drivers with disabilities. It stated that if an LTV were modified so that it met the criteria in Standard 208 for an LTV "designed to be driven by persons with disabilities," there would be no violation of the "make inoperative" prohibition even if the modifications caused the vehicle to cease to comply with the dynamic test and automatic restraint requirements of the Standard. For example, a repair business could, without violating the make inoperative provision, convert an LTV into an "LTV designed to be operated by a person with a disability" by raising the vehicle's roof and installing a wheelchair lift, a power seat base, replacing the air bag equipped steering wheel with special adaptive control and Type 2A manual belts in the vehicle. As long as the vehicle met the requirements necessary to qualify for the exclusion, removal of the air bag would not violate the make inoperative prohibition.

II. NMEDA Petition

By petition dated July 18, 1997, NMEDA requested the agency to initiate rulemaking to extend the duration of the exclusion from Standard 208's dynamic test and automatic crash protection requirements for LTVs and to extend the exclusion to include all vehicles modified to be operated by individuals with disabilities. In support of its petition, NMEDA stated that its members,⁷ the majority of whom modify vehicles after the first retail sale, and others modify thousands of passenger cars and light trucks every year to enable persons with disabilities to operate them. NMEDA explained that modifiers often install, for example:

- Wheelchair/scooter hoists,
- Hand controls, joysticks, horizontal steering controls, foot operated steering systems and reduced diameter steering

⁷ According to the petition, NMEDA's members include businesses that structurally modify large and small vans, those that manufacture separate components such as wheelchair lifts, ramps, hand-controls, and car-top wheelchair storage devices, those that install adaptive equipment and those that instruct the customer in its appropriate use.

wheels to allow persons with disabilities to drive,

- Transfer seats to assist a person with a disability to transfer from a wheelchair to the driver or passenger seat, and
- Power seat bases in vehicles.

According to the petition, many of these modifications compromise the vehicle's compliance with the dynamic testing requirements of Standard 208.⁸ The petition stated that manufacturers and alterers are unable to certify compliance with these requirements by passing through the certification of the manufacturer of the incomplete or previously certified vehicle. In addition, the petition stated that because these manufacturers and alterers are small businesses, they cannot individually certify the vehicle's compliance with the dynamic test requirements.

The petition also explained that certain necessary modifications could not be made without removing or disabling one or more components of the automatic restraint system. For example, NMEDA explained that, in certain vehicles, the air bag sensor may have to be removed to accommodate the installation of a six-way power seat base. In other vehicles, the original steering wheel and the driver's side air bag may have to be replaced by a reduced diameter steering wheel.

The petition also stated that the air bag should be disabled if certain modifications, such as the addition of certain adaptive equipment, are made to the vehicle. The petition explained that persons with disabilities who must use adaptive equipment to drive, such as hand controls, are at risk of injury from a deploying air bag. The petition noted that the American Automobile Manufacturers Association (AAMA) had advised against placing certain equipment, such as steering devices, in the air bag deployment zone because of the potential risk of harm to the occupant. NMEDA also noted that research conducted at the University of Virginia (UVA) found that drivers using tri-pin steering devices could be injured by a deploying air bag.⁹ The UVA study

⁸ The agency notes that many of these modifications may also compromise the vehicle's compliance with other standards set out in 49 CFR Part 571.

⁹ Petition for Rulemaking to Amend FMVSS 208 in Support of Persons With Disabilities, National Mobility Equipment Dealers Association at 7-9 (July 18, 1997).

The agency notes that the UVA study cited by NMEDA found that of all the steering control devices (SCD) tested, the tri-pin was the only SCD that showed the possibility of interacting with air bag deployment and needed further study. See Air Bag Interaction With and Injury Potential from Common Steering Control Devices; DOT-HS-808-

advised against installing steering devices that spanned the steering wheel and recommended sitting as far back as possible from the air bag. The petition explained that in certain cases the modifier has no choice but to place equipment in the air bag deployment zone because of the person's specific disability. In addition, the petition noted that some individuals' disabilities require them to sit close to the air bag. The petition stated that until there was sufficient evidence that air bags do not pose a risk to persons using adaptive driving equipment, "NHTSA should grant authority, via appropriate exclusion, to disable or remove air bags."

III. Denial of Petition

In the 1993 final rule establishing the exclusion, NHTSA stated that "the goal of providing all individuals with an equivalent level of occupant protection must be balanced with the goal of providing mobility for all Americans . . . [and] that the exclusion from the dynamic testing requirements should be no broader than necessary to accommodate the mobility needs of persons with disabilities." (58 FR 11975; March 2, 1993) At the time the agency established the exclusion, alterers and final stage manufacturers who were small businesses stated that they could not then comply with the certification requirements of Standard 208. NHTSA established the exclusion so that manufacturers and alterers could continue to produce these LTVs for use by persons with disabilities. As discussed above, the agency now has information that demonstrates that manufacturers and alterers of LTVs for persons with disabilities are now able to comply with Standard 208's dynamic testing requirements.

In response to the agency's September 23, 1997 letter, 16 manufacturers and alterers of vehicles for persons with disabilities explained that they were complying with Standard 208 in a variety of ways. The largest of these manufacturers and alterers (which produce from 200 to 1,600 vehicles per year) stated that they were performing crash tests to ensure compliance with Standard 208's dynamic and automatic crash protection requirements.¹⁰ These

580; Pilkey et al., University of Virginia for NHTSA; Nov. 1996. Additional research was conducted at the University of Virginia which revealed that tri-pins do not interact significantly with the deployment of the air bag. Air Bag Interaction With and Injury Potential from Common Steering Control Devices, Phase II, Final Report; Pilkey et al., University of Virginia for NHTSA; DTRS-57-93-C-00105; March 1998.

¹⁰ Most manufacturers and alterers have performed tests using a Hybrid III test dummy in

manufacturers and alterers provided NHTSA with the name of the organization that performed the Standard 208 compliance test, the date of the test, and the year, make and model of the vehicle that was tested. All of the vehicles that were tested met the requirements of Standard 208. Two alterers (which produce between 20 and 65 vehicles per year) stated that they did not believe that their modifications affected the performance of the vehicle in such a way that the vehicle's original certification to Standard 208 was affected. They explained that they were, therefore, basing their certification on the original manufacturer's certification to Standard 208.

NHTSA notes that NMEDA did not submit any information with its petition that demonstrated that alterers and manufacturers could not comply. The agency also notes that the RVIA, which originally petitioned the agency to establish the exclusion, did not ask the agency to extend the exclusion. Moreover, Braun, which also asked the agency to establish the exclusion and is a member of NMEDA, provided the agency with dates on which it tested its vehicles for compliance with Standard 208's dynamic test requirements. All of the vehicles passed.

The agency believes that not renewing the exclusion will enhance the safety of persons with disabilities while not adversely affecting their ability to obtain vehicles modified for their use. As of September 1, 1998, all LTVs are required to be equipped with air bags at both front outboard seating positions. NHTSA believes that persons who can transfer from a wheelchair to the original vehicle seat are much safer with an operational air bag in a vehicle that has been certified as meeting Standard 208's dynamic test requirements than in a vehicle that has not been required to certify to those requirements. In addition, the agency believes that persons driving while seated in a wheelchair can also benefit from an air bag, provided the original steering wheel remains in the vehicle and the person is seated an appropriate distance away from the air bag.

For these reasons, NHTSA is denying the petition.

the driver's seat. Further, at least one alterer also conducted a crash test with a dummy in a wheelchair. The vehicle met the requirements of Standard 208.

IV. NPRM Proposing an Exemption From the Make Inoperative Prohibition

NHTSA recognizes that while businesses that either manufacture LTVs to be operated by persons with disabilities or alter those vehicles for that purpose before their first retail sale no longer need accommodation with respect to the dynamic test and automatic restraint requirements, manufacturers and alterers that modify vehicles for people with disabilities after the first retail sale of those vehicles do still need accommodation. Further, the agency is aware that many of the modifications made after the first retail sale compromise a vehicle's compliance not only with Standard 208, but with other Standards, such as Standard 207, Seating Systems, and Standard 204, Steering Control Rearward Displacement, as well.

Accordingly, in a separate but related notice (63 FR 51547; September 28, 1998), NHTSA has proposed an exemption from the make inoperative prohibition that would enable repair businesses and dealers to modify motor vehicles after the first retail sale to accommodate a person with a disability without violating the prohibition and making themselves liable for civil penalties. The exemption would permit modifications affecting safety features installed pursuant to some, but not all Standards. Among the included Standards is Standard 208. The agency believes a regulation exempting vehicles from the make inoperative prohibition would more effectively and directly address the needs of those who modify vehicles for people with disabilities than re-establishing and expanding the exclusion from Standard 208. The agency notes that the proposed rule would directly benefit the NMEDA members that modify vehicles after their first retail sale.

V. Petitioner's Concerns Over Adverse Interaction of Air Bags and Adaptive Steering Devices

As noted above, NMEDA raised a number of concerns with respect to air bags. NMEDA expressed concern over the risk air bags pose to individuals who use adaptive equipment to drive. NHTSA is aware that vehicle manufacturers have instructed modifiers not to place adaptive driving equipment, such as steering control devices, in the air bag deployment zone. The agency's own research indicates, however, that steering control devices,

including tripins, do not interact significantly with the deployment of the air bag.¹¹ Spanner bars, however, pose a danger as they interfere with the proper deployment of the air bag and may be projected toward the occupant by the force of the deploying air bag.

NMEDA stated that the deactivation or removal of an air bag should be allowed in a number of circumstances. NMEDA stated that due to their particular disabilities, some drivers have no choice but to sit dangerously close to an air bag. The petitioner also explained that some of the modifications that are needed to allow a person with a disability to drive, such as the installation of horizontal steering, can only be performed by removing the driver's air bag.

Any person with a disability who believes that he or she is at risk of injury from an air bag because of their physical or medical condition may request an on-off switch by filling out an agency request form and submitting the form to the agency. If the agency approves the request, the agency will send the owner a letter authorizing the installation of a switch. (See Final Rule on Manual Cut-off Switches for Air Bags, 62 FR 62406; Nov. 21, 1997) Further, if a switch is not available from the vehicle manufacturer for the person's vehicle or if the modification requires removal or deactivation of the air bag, the person may submit a written request to the agency to have his or her air bag deactivated. In those cases where an air bag must be deactivated or removed to accommodate a person's disability, the agency will issue a letter authorizing the deactivation.

In accordance with 49 CFR part 552, this completes the agency's review of the petition. The agency has concluded that there is no reasonable possibility that the amendment requested by the petitioner would be issued at the conclusion of a rulemaking proceeding. After considering all relevant factors, the agency has decided to deny the petition.

Authority: 49 U.S.C. 30162; delegation of authority at 49 CFR 1.50 and 501.8.

Issued: December 7, 1998.

L. Robert Shelton,

Associate Administrator for Safety Performance Standards.

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¹¹ See footnote 9 above.