



## **DEPARTMENT OF TRANSPORTATION**

### **Federal Motor Carrier Safety Administration**

#### **49 CFR Parts 393 and 399**

**[Docket No. FMCSA-2019-0211]**

**RIN 2126-AC31**

#### **Parts and Accessories Necessary for Safe Operation; Rear Impact Guards and Rear Impact Protection**

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of Proposed Rulemaking.

**SUMMARY:** FMCSA proposes to amend the Federal Motor Carrier Safety Regulations (FMCSRs) to include rear impact guards on the list of items that must be examined as part of the required annual inspection for each commercial motor vehicle (CMV). In addition, FMCSA proposes to amend the labeling requirements for rear impact guards, and to exclude road construction controlled (RCC) horizontal discharge trailers from the rear impact guard requirements, consistent with changes made by the National Highway Traffic Safety Administration (NHTSA) to the corresponding Federal Motor Vehicle Safety Standards (FMVSS). This notice of proposed rulemaking (NPRM) responds to rulemaking petitions, as well as a recommendation from the Government Accountability Office (GAO).

**DATES:** Comments on this notice must be received on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments identified by Docket Number FMCSA-2019-0211 using any of the following methods:

- Federal eRulemaking Portal: Go to <https://www.regulations.gov/docket?D=FMCSA-2019-0211>. Follow the online instructions for submitting comments.
- Mail: Dockets Operations, U.S. Department of Transportation, 1200 New Jersey Avenue, SE, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001.
- Hand Delivery or Courier: West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Dockets Operations.
- Fax: (202) 493-2251.

To avoid duplication, please use only one of these four methods. See the “Public Participation and Request for Comments” portion of the SUPPLEMENTARY INFORMATION section for instructions on submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Mr. Luke Loy, Vehicle and Roadside Operations, Office of Carrier, Driver, and Vehicle Safety, MC–PSV, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, (202) 366–0676, [luke.loy@dot.gov](mailto:luke.loy@dot.gov). If you have questions on viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

**SUPPLEMENTARY INFORMATION:**

**I. PUBLIC PARTICIPATION AND REQUEST FOR COMMENTS**

**A. Submitting Comments**

If you submit a comment, please include the docket number for this NPRM (FMCSA-2019-0211), indicate the specific section of this document to which comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only

one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to <https://www.regulations.gov/docket?D=FMCSA-2019-0211>, click on the “Comment Now!” button, and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, on paper no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period and may make changes based on your comments. FMCSA may issue a final rule at any time after the close of the comment period.

### **Confidential Business Information (CBI)**

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to the interim rule contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to the interim rule, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission that constitutes CBI as “PROPIN” to indicate it contains proprietary information. FMCSA will treat such marked submissions as confidential under the Freedom of Information Act, and they will not be placed in the public docket of the interim rule. Submissions containing CBI should be sent to Mr. Brian Dahlin, Chief,

Regulatory Analysis Division, Office of Policy, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington DC 20590-0001. Any comments FMCSA receives not specifically designated as CBI will be placed in the public docket for this rulemaking.

**B. Viewing Comments and Documents**

Supporting documents and any comments we receive on this docket may be viewed at <https://www.regulations.gov/docket?D=FMCSA-2019-0211>. If you do not have access to the internet, you may view the docket online by visiting the Dockets Operations in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE, Washington, DC 20590-0001, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Dockets Operations.

**C. Privacy Act**

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at [www.dot.gov/privacy](http://www.dot.gov/privacy).

**D. Advance Notice of Proposed Rulemaking**

Under the Fixing America's Surface Transportation Act, Public Law, 114-94 (FAST Act), FMCSA is required to publish an advance notice of proposed rulemaking (ANPRM) or conduct a negotiated rulemaking "if a proposed rule is likely to lead to the promulgation of a major rule." 49 U.S.C. 31136(g)(1). As this proposed rule is not likely to lead to the promulgation of a major rule, the Agency is not required to issue an ANPRM or to proceed with a negotiated rulemaking.

**II. EXECUTIVE SUMMARY**

## **A. Purpose and Summary of Major Provisions**

Section 393.86 of the FMCSRs, “Rear impact guards and rear end protection,” requires rear impact guards to be installed on most CMVs to reduce the incidence of passenger compartment intrusion during underride crashes in which a passenger vehicle strikes the rear of the CMV. Regulations requiring rear impact guards have been in the FMCSRs since 1952. The FMCSRs require that all CMVs be systematically inspected, repaired, and maintained to ensure that all required parts and accessories—including rear impact guards—are in safe and proper operating condition at all times (section 396.3(a)(1)). Operation of a CMV with a missing or noncompliant rear impact guard would be a violation of the FMCSRs, precluding the issuance of a Commercial Vehicle Safety Alliance (CVSA) inspection decal if the vehicle were to be inspected.

Among other things, the regulations require every CMV to be inspected at least once every 12 months. A motor carrier may not use a CMV unless each component identified in Appendix G of Subchapter B of Chapter III of title 49, Code of Federal Regulations, “Minimum Periodic Inspection Standards,” has passed the required annual inspection. While the FMCSRs have required rear impact guards for more than 65 years, they are not included on the list of components in Appendix G that must be inspected during the annual CMV inspection. This means that a vehicle can pass an annual inspection with a missing or damaged rear impact guard.

In response to petitions from the CVSA and Jerry and Marianne Karth (“the Karths”<sup>1</sup>); a recommendation included in GAO Report GAO-19-264, “Truck Underride Guards: Improved Data Collection, Inspections, and Research Needed;”<sup>2</sup> and

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<sup>1</sup> Copies of the petitions from CVSA and the Karths are available online at <https://www.regulations.gov/docket?D=FMCSA-2019-0211> and in Dockets Operations.

<sup>2</sup> A copy of the GAO Report is available online at <https://www.regulations.gov/docket?D=FMCSA-2019-0211> and in Dockets Operations.

Congressional correspondence,<sup>3</sup> this rulemaking proposes to amend the FMCSRs to include rear impact guards on the list of items that must be examined as part of the required annual inspection for each CMV.

In addition, NHTSA published two final rules on November 19, 2004, relating to rear impact guards. First, NHTSA amended the labeling requirement in FMVSS No. 223, “Rear impact guards,” to permit the rear impact guard certification label to be mounted on either the forward- or rearward-facing surface of the horizontal member of the guard, provided the label does not interfere with the retroreflective sheeting required by the FMVSS (69 FR 67660).<sup>4</sup> Prior to the amendment, the certification label was required to be mounted on the forward-facing surface of the horizontal member, 12 inches inboard of the right end of the guard. Second, NHTSA amended the applicability section of FMVSS No. 224, “Rear impact protection,” to exclude RCC horizontal discharge semitrailers from the requirements of the standard (69 FR 67663).<sup>5</sup> NHTSA concluded that installation of rear impact guards on RCC horizontal discharge trailers would interfere with the intended function of the trailers and was therefore impracticable due to the unique design and purpose of those vehicles. However, neither of NHTSA’s November 2004 amendments to the FMVSS has been incorporated into the corresponding rear impact requirements in section 393.86 of the FMCSRs. FMCSA is proposing to amend the FMCSRs to adopt the changes above to maintain consistency with FMVSS Nos. 223 and 224.

## **B. Costs and Benefits of Proposal**

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<sup>3</sup> A copy of the letter is available online at <https://www.regulations.gov/docket?D=FMCSA-2019-0211> and in Dockets Operations.

<sup>4</sup> You may view the NHTSA rule online at <https://www.federalregister.gov/documents/2004/11/19/04-25704/federal-motor-vehicle-safety-standards-rear-impact-guard-labels>.

<sup>5</sup> You may view the NHTSA rule online at <https://www.federalregister.gov/documents/2004/11/19/04-25703/federal-motor-vehicle-safety-standards-rear-impact-guards-final-rule>.

The Agency does not expect this rulemaking to result in incremental costs or benefits. Although rear impact guards are not currently among the items that must be examined during annual inspections, 49 CFR 393.86 requires that certain CMVs operated in interstate commerce be equipped with the devices and that they remain installed and in safe and proper operating conditions at all times. Therefore, for the purposes of assessing the potential economic impact of this rulemaking on motor carriers, the Agency assumes compliance as part of the baseline established by the existing FMCSRs in section 393.86. Neither the labeling requirements that would result from this proposed rule nor the exclusion of RCC horizontal discharge semitrailers from these requirements would result in incremental costs or benefits.

### **III. LEGAL BASIS FOR THE RULEMAKING**

This rulemaking is based on the authority of the Motor Carrier Act of 1935 (1935 Act) and the Motor Carrier Safety Act of 1984 (1984 Act).

The 1935 Act, as amended, provides that “[t]he Secretary of Transportation may prescribe requirements for—(1) qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier; and (2) qualifications and maximum hours of service of employees of, and standards of equipment of, a private motor carrier, when needed to promote safety of operation” (49 U.S.C. 31502(b)).

This NPRM would amend the FMCSRs to respond to petitions for rulemaking. The adoption and enforcement of such rules is specifically authorized by the 1935 Act. This proposed rulemaking rests squarely on that authority.

The 1984 Act provides concurrent authority to regulate drivers, motor carriers, and vehicle equipment. It requires the Secretary to “prescribe regulations on commercial motor vehicle safety.” The regulations shall prescribe minimum safety standards for CMVs. At a minimum, the regulations shall ensure that: (1) CMVs are maintained,

equipped, loaded, and operated safely; (2) the responsibilities imposed on operators of CMVs do not impair their ability to operate the vehicles safely; (3) the physical condition of operators of CMVs is adequate to enable them to operate vehicles safely; (4) the operation of CMVs does not have a deleterious effect on the physical condition of the operators; and (5) drivers are not coerced by motor carriers, shippers, receivers, or transportation intermediaries to operate a vehicle in violation of a regulation promulgated under 49 U.S.C. 31136 (which is the basis for much of the FMCSRs) or 49 U.S.C. chapters 51 or 313 (49 U.S.C. 31136(a)).

This proposed rule concerns parts and accessories necessary for the safe operation of CMVs, and the inspection, repair, and maintenance of CMVs. It is based on section 31136(a)(1) because it deals with CMV maintenance of rear impact guards. The NPRM does not address the driver-centered requirements of sections 31136(a)(2)-(4). As the amendments proposed by this rule are primarily technical changes that clarify existing requirements and improve enforcement consistency, FMCSA believes there will be stakeholder support for this initiative and that coercion to violate the proposed amendments, which is already prohibited by section 31136(a)(5), will not be an issue.

Before prescribing any such regulations, FMCSA must consider the “costs and benefits” of any proposal (49 U.S.C. 31136(c)(2)(A) and 31502(d)). As discussed in greater detail in the “Regulatory Analyses” section, FMCSA has determined that this proposed rule is not a significant regulatory action.

#### **IV. BACKGROUND**

##### **A. History of Rear Impact Guard Requirements**

The first Federal requirements concerning heavy vehicle rear underride protection were issued in 1952 by the Bureau of Motor Carriers of the Interstate Commerce Commission (ICC). The regulation required all heavy trucks, trailers, and semitrailers manufactured after December 31, 1952, to be equipped with a rear-end protection device

designed to help prevent underride. The rule required that the ground clearance of the underride guard be no more than 30 inches when the vehicle is empty. The rule also required that the underride guard be located no more than 24 inches forward of the rear of the vehicle, and that it extend laterally to within 18 inches of each side. The underride device was required to be “substantially constructed and firmly attached” (17 FR 4445, May 15, 1952). The ICC’s authority over motor carrier safety was transferred to DOT by Section 6(e)(6)(C) of the Department of Transportation Act (Pub. L. 89-670, 80 Stat. 931, 939-940, Oct. 15, 1966). The authority was delegated by the Secretary to the Federal Highway Administration (FHWA).

On January 24, 1996, NHTSA published a final rule creating FMVSS Nos. 223 and 224 (61 FR 2004). The requirements apply to most trailers and semitrailers with a gross vehicle weight rating of 10,000 pounds or more, manufactured on or after January 26, 1998.

FMVSS No. 223 specifies performance requirements that rear impact guards must meet before they can be installed on new trailers or semitrailers. It specifies strength and energy absorption requirements, as well as test procedures that manufacturers and NHTSA will use to determine compliance with the standard. The standard also requires the guard manufacturer to permanently label the impact guard to certify that it meets the requirements and to provide instructions on the proper installation of the guard.

FMVSS No. 224 requires that most new trailers and semitrailers with a GVWR of 10,000 pounds or more be equipped with a rear impact guard meeting the requirements of FMVSS No. 223. The guards must extend laterally to within 4 inches of the sides of the trailer, have a ground clearance of no more than 22 inches, and be placed as close as possible to, but not more than 12 inches from, the rear of the vehicle. To ensure that the guard will perform properly, the standard also requires it to be mounted on the trailer or

semitrailer in accordance with the installation instructions provided by the guard manufacturer.

On September 1, 1999, FHWA published a final rule amending the FMCSRs to require trailers and semitrailers manufactured on or after January 26, 1998, with a GVWR of 10,000 pounds or more, be equipped with rear impact guards that meet the requirements of FMVSS No. 223. The rear impact guards must be installed to ensure that the trailer or semitrailer meets the rear end protection requirements of FMVSS No. 224. This rule was intended to ensure that the rear impact protection requirements of the FMCSRs are consistent with the FMVSS (64 FR 47703).

As stated previously, NHTSA published two final rules on November 19, 2004, relating to rear impact guards. NHTSA amended the labeling requirement in FMVSS No. 223 to permit the rear impact guard certification label to be mounted on either the forward- or rearward-facing surface of the horizontal member of the guard (69 FR 67660), and amended the applicability section of FMVSS No. 224 to exclude RCC horizontal discharge semitrailers from the requirements of the standard (69 FR 67663). However, neither of NHTSA's November 2004 amendments to the FMVSS has been incorporated into the corresponding rear impact requirements in section 393.86 of the FMCSRs.

## **B. History of Appendix G Requirements**

Section 210 of the 1984 Act required the Secretary of Transportation to establish standards for the annual or more frequent (i.e., periodic) inspection of all CMVs engaged in interstate or foreign commerce (49 U.S.C. 31142(b)). In response, FHWA adopted new section 396.17 on December 7, 1988, which requires all CMVs to be inspected at least once every 12 months (53 FR 49380, as amended on Dec. 8, 1989 (54 FR 50722)). The rule was based largely on (1) the CVSA vehicle out-of-service criteria, and (2) the vehicle portion of the FHWA National Uniform Driver-Vehicle Inspection Procedure

(NUD-VIP). The latter was used as the standard for successful completion of the annual inspection, and the details of the required inspection were spelled out in Appendix G to the FMCSRs, also promulgated by the final rule. FHWA noted that utilization of the FHWA NUD-VIP would (1) provide the necessary inspection-related pass/fail criteria for the periodic inspection at a more stringent level than the vehicle out-of-service criteria, and (2) provide the proper level of Federal oversight in establishing and revising the criteria.

## **V. DISCUSSION OF PROPOSED RULEMAKING**

### **A. Rear Impact Guards in Appendix G**

Rear impact guards are not included on the list of items in Appendix G that must be examined during the annual inspection required by section 396.17. This means that a vehicle could pass the annual inspection with a missing or damaged rear impact guard. However, the operation of the vehicle with a missing or damaged rear impact guard would be a violation of the FMCSRs, and according to CVSA policy, a CVSA inspection decal would not be issued if the vehicle were inspected.

In its petition, CVSA requested that the Agency amend Appendix G to include specific language regarding the inspection of rear impact guards during annual inspections. The petition stated:

A vehicle's rear impact guard/rear end protection is inspected roadside as part of the North American Standard Inspection Program. However, the majority of commercial motor vehicles do not come into contact with an inspector on an annual basis...

According to data available through FMCSA's Analysis and Information Online webpage, in fiscal year 2017 inspectors document[ed] more than 2,300 violations related to rear impact guards and rear end protection, more than half of which are for components that are missing, damaged or improperly constructed. Including rear impact guards and rear end protection in the periodic inspection requirements in Appendix G will call additional attention to this critical safety component and help ensure that each vehicle is checked at least once a year, improving compliance and helping to prevent fatalities and injuries when rear-end collisions occur. Furthermore, including rear impact guards and rear end protection in the periodic annual inspection standards will harmonize U.S. regulations with those in Canada and Mexico, which include rear impact guards and rear end protection as part of their annual inspection programs.

The Karths' petition requested that FMCSA "Add underride guards to Appendix G and 396.17 (Periodic Inspection)," but did not provide any supporting information.<sup>6</sup>

In addition, several Senators asked GAO to review data on truck underride crashes and information on underride guards. Between January 2018 and March 2019, GAO conducted a performance audit that included a literature review and interviews with stakeholders familiar with underride crashes and guards.

GAO Report GAO-19-264, published in March 2019, examines (1) the data that DOT reports on underride crashes, and (2) the development and use of underride guard technologies in the United States. GAO analyzed DOT's underride crash data for 2008 through 2017; reviewed NHTSA's proposed regulations and research on new guard technologies (80 FR 78418, Dec. 16, 2015); and interviewed stakeholders including DOT officials, industry and safety groups, and State officials.

With respect to FMCSA, the GAO concluded that the lack of an annual inspection requirement for rear impact guards potentially affects the safety of the traveling public and FMCSA's ability to achieve its safety mission. GAO stated that "without explicitly including the inspection of the rear guard in Appendix G, there is no assurance that rear guards in operation will be inspected at least annually to ensure they perform as designed to prevent or mitigate an underride crash." In its "Recommendations for Executive Action," GAO stated:

The Administrator of the Federal Motor Carrier Safety Administration should revise Appendix G of the agency's regulations to require that rear guards are inspected during commercial vehicle annual inspections. (Recommendation 3)

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<sup>6</sup> The Karths' petition also requested that FMCSA change the definition of Out of Service Criteria to read as follows: "A vehicle(s) is placed out-of-service only when by reason of its mechanical condition or loading it is determined to be so imminently hazardous as to likely cause an accident or breakdown, or when such condition(s) would likely contribute to loss of control of the vehicle(s) by the driver, **or to allow death and/or injuries from truck underride (passenger compartment intrusion) upon collision.**" [Emphasis in original.] FMCSA notes that the North American Standard Out-of-Service Criteria are developed and maintained by CVSA, and are not part of the FMCSR. As such, any amendments to the Out-of-Service criteria are outside the scope of this rulemaking.

While the GAO review was being conducted, FMCSA received Congressional correspondence urging the Agency to “add ‘underride guards’ to the list of annual inspection items required [for] trucks and trailers under current periodic inspection regulations.” The Senators stated:

Requiring an annual inspection of rear underride guards, in addition to the current list of items already checked during annual inspections, would ensure trucks and trailers are complying with regulations already on the books. Therefore, we ask that FMCSA consider initiating a rulemaking to amend federal Minimum Periodic Inspection Standards to include a subsection on “underride guards.” Should you decide to move forward with this rulemaking, we respectfully request that an inserted subsection be identical to the already mandated minimum standards of rear impact guards and rear end protection.

FMCSA agrees that the failure of a motor carrier to properly maintain an important safety feature such as a rear impact guard should result in the vehicle failing the required annual inspection. Given that rear impact guards have been included in part 393 for more than 65 years, and that part 396 requires all parts and accessories specified in part 393—to include rear impact guards—to be in safe and proper operating condition at all times, FMCSA assumes that the majority of motor carriers currently inspect rear impact guards annually despite the absence of an explicit requirement to do so in Appendix G. According to FMCSA’s Motor Carrier Management Information System (MCMIS), out of approximately 5.8 million regulatory violations identified during inspections in 2017, only approximately 2,400—or about 0.041 percent—were rear impact guard violations.

For these reasons, and as discussed in the Regulatory Analyses section, the Agency believes that amending Appendix G to include a review of rear impact guards and maintain consistency with part 393, would result in only a de minimis economic impact. FMCSA proposes to amend Appendix G to require rear impact guards to be inspected as part of the annual inspection required under § 396.17.

## **B. Rear Impact Guard Labeling**

NHTSA amended the labeling requirement in FMVSS No. 223 on November 19, 2004, to permit the rear impact guard certification label to be mounted on either the forward- or rearward-facing surface of the horizontal member of the guard, if the label does not interfere with the retroreflective sheeting required by the FMVSS. Prior to the amendment, the certification label was required to be mounted on the forward-facing surface of the horizontal member, 12 inches inboard of the right end of the guard. NHTSA decided to allow rear impact guard manufacturers flexibility in determining where to place the label on the horizontal member of the guard so that they can minimize exposure to operational and environmental damage, while at the same time ensuring that it is readily accessible for visual inspection. FMCSA proposes to amend the labeling requirements in section 393.86(a)(6) to be consistent with the changes made by NHTSA in 2004.

**C. Applicability – RCC Horizontal Discharge Trailers**

Also on November 19, 2004, NHTSA amended the applicability section of FMVSS No. 224 to exclude RCC horizontal discharge trailers from its requirements. RCC horizontal discharge trailers are used to deliver asphalt to road construction sites and gradually to discharge asphalt mix into paving machines. Typically, the paving machine attaches to the rear axle of the RCC horizontal discharge trailer via hydraulic arms, and the edge of the trailer's conveyor belt extends over the paving machine opening. A rear impact guard required by the FMVSS would prevent the RCC horizontal discharge trailer from effectively connecting with a paving machine. NHTSA concluded that installation of rear impact guards on RCC horizontal discharge trailers would interfere with the intended function of the trailers and therefore exempted them from the standard.

FMCSA proposes to amend (1) § 393.5 to add a definition of *road construction controlled horizontal discharge trailer* consistent with the NHTSA definition in FMVSS

No. 224, and (2) § 393.86(a)(1) and § 393.86(b)(1) to make it clear that RCC horizontal discharge trailers are not required to have a rear impact guard installed, consistent with the amendments made by NHTSA in 2004.

Although neither of NHTSA's November 2004 amendments was incorporated into the rear impact requirements in § 393.86, FMCSA is not aware of any enforcement or compliance issues that have arisen with respect to these items in the ensuing 15 years. As such, FMCSA does not expect the proposed amendments to have any impact on motor carriers.

## **VI. International Impacts**

The FMCSRs, and any exceptions to the FMCSRs, apply only within the United States (and, in some cases, U.S. territories). Motor carriers and drivers are subject to the laws and regulations of the countries in which they operate, unless an international agreement states otherwise. Drivers and carriers should be aware of the regulatory differences among nations.

## **VII. SECTION-BY-SECTION ANALYSIS**

### **A. Part 393 – Parts and Accessories Necessary for Safe Operation**

Section 393.86(a)(1) (General requirements for trailers and semitrailers manufactured on or after January 26, 1998).

FMCSA proposes to amend this section by adding RCC horizontal discharge trailers to the list of vehicles that are not required to have a rear impact guard.

Section 393.86(a)(6) (Certification and labeling requirements for rear impact protection guards).

FMCSA proposes to amend this section to clarify that the label may be on the forward- or rear-facing surface of the horizontal member of the guard, provided it does not interfere with the retroreflective sheeting required by the FMVSS.

Section 393.86(b)(1) (Requirements for motor vehicles manufactured after December 31, 1952 (except trailers or semitrailers manufactured on or after January 26, 1998)).

FMCSA proposes to amend this section by adding RCC horizontal discharge trailers to the list of vehicles that are not required to have a rear impact guard.

**B. Appendix G to Subchapter B of Chapter III (Minimum Periodic Inspection Standards)**

FMCSA proposes to amend Appendix G by adding rear impact guards to the list of items required to be inspected pursuant to section 396.17.

**VIII. REGULATORY ANALYSES**

**A. Executive Order 12866 (Regulatory Planning and Review as Supplemented by Executive Order 13563 and DOT Regulations)**

The Office of Information and Regulatory Affairs determined that this proposed rule is not a significant regulatory action under section 3(f) of E.O. 12866 (58 FR 51735, Oct. 4, 1993), Regulatory Planning and Review, as supplemented by E.O. 13563 (76 FR 3821, Jan. 21, 2011), Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. This rule is also not significant within the meaning of DOT regulations (49 CFR 5.13(a)).

Accordingly, the Office of Management and Budget has not reviewed it under these Orders.

In response to rulemaking petitions and a recommendation from the GAO, FMCSA proposes to amend Appendix G to Subchapter B of Chapter III in title 49 CFR. This amendment would add rear impact guards to the list of items that must be examined as part of the required annual inspection for each CMV.

Section 393.86(a) currently requires most trailers and semitrailers manufactured on or after January 26, 1998, to be equipped with rear impact guards. This proposed rule

would not require installation or maintenance of rear impact guards beyond the current requirements in § 393.86.

The Agency does not expect this proposed rule to result in incremental costs or benefits beyond the baseline established in the FMCSRs. As required by 49 CFR 396.17, motor carriers currently complete annual inspections of all items identified in Appendix G. FMCSA assumes that motor carriers review rear impact guards in their annual inspection programs to remain in compliance with the current requirements in 49 CFR 396.3(a)(1), which states that rear impact guards must be installed and in safe and proper operating conditions at all times. Additionally, CMVs are subject to inspections conducted in accordance with the CVSA's North American Standard Inspection Program that may occur throughout the year, which include the examination of rear impact guards. According to MCMIS, most motor carriers comply with 49 CFR 396.3(a)(1). Specifically, out of approximately 5.8 million regulatory violations identified during inspections in 2017, only approximately 2,400—or about 0.041 percent—were rear impact guard violations.

FMCSA also proposes two minor changes to maintain consistency between the FMCSRs and NHTSA's FMVSS Nos. 223 and 224. As described above, these changes would provide consistent labeling requirements and would exclude RCC horizontal discharge semitrailers from the requirements of this standard. FMCSA does not expect these administrative changes to result in incremental impacts.

#### **B. Executive Order 13771 Reducing Regulation and Controlling Regulatory Costs**

This proposed rule is expected to be neither an Executive Order 13771 regulatory action nor an Executive Order 13771 deregulatory action because there would be no cost impacts resulting from the rule.<sup>7</sup>

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<sup>7</sup> Executive Office of the President, *Executive Order 13771 of January 30, 2017, Reducing Regulation and Controlling Regulatory Costs*, 82 FR 9339-9341, February 3, 2017.

### **C. Regulatory Flexibility Act (Small Entities)**

The Regulatory Flexibility Act of 1980 (RFA) (5 U.S.C. 601 et seq.) requires Federal agencies to consider the effects of their regulatory actions on small businesses and other small entities and to minimize any significant economic impact. The term “small entities” encompasses small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields and governmental jurisdictions with populations of less than 50,000.<sup>8</sup> Accordingly, DOT policy requires an analysis of the impact of all regulations on small entities and mandates that agencies strive to lessen any adverse effects on these businesses. Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

“Small entity” is defined in 5 U.S.C. 601(3) as having the same meaning as “small business concern” under Section 3 of the Small Business Act (SBA). This includes any small business concern that is independently owned and operated, and is not dominant in its field of operation. Section 601(4), likewise, includes within the definition of “small entities” not-for-profit enterprises that are independently owned and operated, and are not dominant in their fields of operation. In addition, Section 601(5) defines “small entities” as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000. The Small Business Administration develops the size standards used to classify entities as small, and establishes separate standards for each industry, as defined by the North American Industry Classification System (NAICS). The motor carriers that would be affected by this rule fall into many different industry codes with differing size standards. Because this

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<sup>8</sup> Regulatory Flexibility Act (5 U.S.C. 601 et seq.), see National Archives at <http://www.archives.gov/federal-register/laws/regulaotry-flexibility/601.html>.

rule would impact all motor carriers, including those considered to be small entities, FMCSA anticipates that this rule would impact a substantial number of small entities.

However, FMCSA has determined that this rule would not have a significant impact on the affected entities. This rule would require motor carriers to include rear impact guards on the list of items that must be examined as part of the required annual CMV inspection completed. FMCSA believes that motor carriers have been inspecting the rear impact guards on their CMVs to remain in compliance with requirements that have been in the FMCSRs since 1952. As such, FMCSA does not expect this proposed rule to have incremental impacts on the affected entities. The Agency also does not expect the two minor changes proposed to maintain consistency between the FMCSRs and NHTSA's FMVSS Nos. 223 and 224 to result in incremental impacts. The Agency expects the impacts of this proposed rule would be de minimis, and therefore, does not expect the proposed rule to have a significant economic impact on a substantial number of small entities.

Consequently, I certify that the proposed action will not have a significant economic impact on a substantial number of small entities. FMCSA invites comment from members of the public who believe there will be a significant impact either on small businesses or on governmental jurisdictions with a population of less than 50,000.

#### **D. Assistance for Small Entities**

In accordance with section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, FMCSA wants to assist small entities in understanding this proposed rule so that they can better evaluate its effects on themselves and participate in the rulemaking initiative. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult the person listed under FOR FURTHER INFORMATION CONTACT.

Small businesses may send comments on the actions of Federal employees who enforce or otherwise determine compliance with Federal regulations to the Small Business Administration's Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of FMCSA, call 1-888-REG-FAIR (1-888-734-3247). DOT has a policy regarding the rights of small entities to regulatory enforcement fairness and an explicit policy against retaliation for exercising these rights.

#### **E. Unfunded Mandates Reform Act of 1995**

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$165 million (which is the value equivalent of \$100,000,000 in 1995, adjusted for inflation to 2018 levels) or more in any one year. Though this proposed rule would not result in such an expenditure, the Agency does discuss the effects of this rule elsewhere in this preamble.

#### **F. Paperwork Reduction Act**

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

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

A rule has implications for federalism under Section 1(a) of Executive Order 13132 if it has "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." FMCSA determined that this proposal would not have substantial direct costs on or for States, nor would it limit the policymaking

discretion of States. Nothing in this document preempts any State law or regulation. Therefore, this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Impact Statement.

#### **H. Executive Order 12988 (Civil Justice Reform)**

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

#### **I. Executive Order 13045 (Protection of Children)**

Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), requires agencies issuing “economically significant” rules, if the regulation also concerns an environmental health or safety risk that an agency has reason to believe may disproportionately affect children, to include an evaluation of the regulation’s environmental health and safety effects on children. The Agency determined this proposed rule is not economically significant. Therefore, no analysis of the impacts on children is required. In any event, the Agency does not anticipate that this regulatory action could in any respect present an environmental or safety risk that could disproportionately affect children.

#### **J. Executive Order. 12630 (Taking of Private Property)**

FMCSA reviewed this proposed rule in accordance with Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and has determined it will not result in the effect a taking of private property or otherwise have taking implications.

#### **K. Privacy**

Section 522 of title I of division H of the Consolidated Appropriations Act, 2005, enacted December 8, 2004 (Pub. L. 108-447, 118 Stat. 2809, 3268, 5 U.S.C. 552a note), requires the Agency to conduct a privacy impact assessment (PIA) of a regulation that

will affect the privacy of individuals. The Agency completed a Privacy Threshold Assessment (PTA) to assist in analyzing the new rulemaking to determine if it creates privacy risk for individuals that could require other entities to collect, use, store or share personally identifiable information (PII), or deploy technologies as a result of this rulemaking implementation. The PTA is also used to identify programs and systems that are privacy sensitive and help determine whether additional privacy compliance, such a PIA or System of Records Notice (SORN), is required for a particular rulemaking or system. Based on the preliminary adjudication of the PTA by the FMCSA Privacy Officer, this rule does not require the collection of PII and the Agency is not required to conduct a PIA. The PTA has been submitted to FMCSA's Privacy Officer for review and preliminary adjudication and to DOT's Privacy Officer for review and final adjudication. The DOT Privacy Office has determined that this rulemaking does not create privacy risk.

**L. Executive Order 12372 (Intergovernmental Review)**

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

**M. Executive Order 13211 (Energy Supply, Distribution, or Use)**

FMCSA has analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. The Agency has determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy

action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

**N. Executive Order 13175 (Indian Tribal Governments)**

This rule does not have Tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

**O. National Technology Transfer and Advancement Act (Technical Standards)**

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) are standards that are developed or adopted by voluntary consensus standards bodies. This rule does not use technical standards. Therefore, FMCSA did not consider the use of voluntary consensus standards.

**P. National Environmental Policy Act of 1969**

FMCSA analyzed this NPRM for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and determined this action is categorically excluded from further analysis and documentation in an environmental assessment or environmental impact statement under FMCSA Order 5610.1 (69 FR 9680, March 1, 2004), Appendix 2, paragraph (aa). The Categorical Exclusion (CE) in paragraph (aa) covers regulations requiring motor carriers, their officers, drivers, agents, representatives, and employees directly in control of CMVs to inspect, repair, and provide maintenance

for every CMV used on a public road. The proposed requirements in this rule are covered by this CE and the NPRM does not have any effect on the quality of the environment. The CE determination is available for inspection or copying in the regulations.gov website listed under ADDRESSES.

**Q. Executive Order 13783 (Promoting Energy Independence and Economic Growth)**

Executive Order 13783 directs executive departments and agencies to review existing regulations that potentially burden the development or use of domestically produced energy resources, and to appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources. In accordance with Executive Order 13783, DOT prepared and submitted a report to the Director of OMB that provides specific recommendations that, to the extent permitted by law, could alleviate or eliminate aspects of agency action that burden domestic energy production. This proposed rule has not been identified by DOT under Executive Order 13783 as potentially alleviating unnecessary burdens on domestic energy production.

**List of Subjects**

*49 CFR Part 393*

Highway safety, Motor carriers, Motor vehicle safety, Reporting and recordkeeping requirements.

*49 CFR Part 399*

Motor carriers, Motor vehicle safety, Occupational safety and health.

In consideration of the foregoing, FMCSA proposes to amend 49 CFR Parts 393 and 399 as follows:

**PART 393—PARTS AND ACCESSORIES NECESSARY FOR SAFE OPERATION**

1. The authority citation for part 393 continues to read as follows:

**Authority:** 49 U.S.C. 31136, 31151, and 31502; sec. 1041(b) of Pub. L. 102-240, 105 Stat. 1914, 1993 (1991); sec. 5301 and 5524 of Pub. L. 114-94, 129 Stat. 1312, 1543, 1560; and 49 CFR 1.87.

2. Amend § 393.5 by adding a definition for *Road construction controlled horizontal discharge trailer* in alphabetical order to read as follows:

**§ 393.5 Definitions**

\* \* \* \* \*

*Road construction controlled horizontal discharge trailer* means a trailer or semitrailer that is equipped with a mechanical drive and a conveyor to deliver asphalt and other road building materials, in a controlled horizontal manner, into a lay down machine or paving equipment for road construction and paving operations.

\* \* \* \* \*

3. In § 393.86 revise paragraphs (a)(1), (6) and (b)(1) to read as follows:

**§ 393.86 Rear impact guards and rear end protection**

(a)(1) *General requirements for trailers and semitrailers manufactured on or after January 26, 1998.* Each trailer and semitrailer with a gross vehicle weight rating of 4,536 kg (10,000 pounds) or more, and manufactured on or after January 26, 1998, must be equipped with a rear impact guard that meets the requirements of Federal Motor Vehicle Safety Standard No. 223 (49 CFR 571.223) in effect at the time the vehicle was manufactured. When the rear impact guard is installed on the trailer or semitrailer, the vehicle must, at a minimum, meet the requirements of FMVSS No. 224 (49 CFR 571.224) in effect at the time the vehicle was manufactured. The requirements of paragraph (a) of this section do not apply to pole trailers (as defined in § 390.5 of this chapter); pulpwood trailers, low chassis vehicles, special purpose vehicles, wheels back

vehicles (as defined in § 393.5), road construction controlled horizontal discharge trailers; and trailers towed in driveaway-towaway operations (as defined in § 390.5).

\* \* \* \* \*

(6) Certification and labeling requirements for rear impact protection guards.

Each rear impact guard used to satisfy the requirements of paragraph (a)(1) of this section must be permanently marked or labeled as required by FMVSS No. 223 (49 CFR 571.223, S5.3). The label shall be placed on the forward or rearward facing surface of the horizontal member of the guard, provided that the label does not interfere with the retroreflective sheeting required by S5.7.1.4.1(c) of FMVSS No. 108 (49 CFR 571.108), and is readily accessible for visual inspection. The certification label must contain the following information:

\* \* \* \* \*

(b)(1) *Requirements for motor vehicles manufactured after December 31, 1952 (except trailers or semitrailers manufactured on or after January 26, 1998).* Each motor vehicle manufactured after December 31, 1952, (except truck tractors, pole trailers, pulpwood trailers, road construction controlled horizontal discharge trailers, or vehicles in driveaway-towaway operations) in which the vertical distance between the rear bottom edge of the body (or the chassis assembly if the chassis is the rearmost part of the vehicle) and the ground is greater than 76.2 cm (30 inches) when the motor vehicle is empty, shall be equipped with a rear impact guard(s). The rear impact guard(s) must be installed and maintained in such a manner that:

\* \* \* \* \*

**PART 399— EMPLOYEE SAFETY AND HEALTH STANDARDS**

4. The authority citation for part 399 continues to read as follows:

**Authority:** 49 U.S.C. 31502 and 49 CFR 1.87.

5. Amend Appendix G to Subchapter B of Chapter III by adding Section 15 as follows:

**Appendix G to Subchapter B of Chapter III – Minimum Periodic Inspection Standards**

\* \* \* \* \*

15. Rear Impact Guard

a. Trailers and semitrailers with a GVWR of 4,536 kg (10,000 lbs) or more, manufactured on or after January 26, 1998 (see exceptions in § 393.86(a)(1)).

1. Missing guard.

2. Guard is not securely attached to trailer.

3. Guard does not extend to within 100 mm (4 inches) of each side extremity of the vehicle, and not beyond.

4. Guard is more than 560 mm (22 inches) above the ground.

5. Guard is more than 305 mm (12 inches) forward of the rear extremity of the vehicle.

6. Guard does not have a cross sectional vertical height of at least 100 mm (4 inches) across its entire width.

b. Commercial motor vehicles manufactured after December 31, 1952 (except trailers and semitrailers manufactured on or after January 26, 1998) (see exceptions in § 393.86(b)(1) and § 393.86(b)(3)).

1. Missing guard.

2. Guard is not securely attached to trailer by bolts, welding, or other comparable means.
3. Guard is more than 762 mm (30 inches) above the ground.
4. Guard does not extend to within 457 mm (18 inches) of each side extremity of the vehicle.
5. Guard is more than 610 mm (24 inches) forward of the rear extremity of the vehicle.

Issued under authority delegated in 49 CFR 1.87.

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James W. Deck,  
Deputy Administrator.

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