September 14, 2021

Pete Buttigieg, Secretary
U.S. Department of Transportation
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Washington, DC 20590-0001

Robin Hutcheson, Deputy Assistant Secretary for Safety Policy
1200 New Jersey Avenue SE
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Steven Cliff, NHTSA Acting Administrator
1200 New Jersey Avenue SE
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Stephen Ridella, Director
NHTSA Office of Defects Investigation
1200 New Jersey Avenue SE
Washington, DC 20590-0001

Dear Secretary Buttigieg:

In accordance with 49 U.S.C. 30162 and 49 C.F.R § 552.1, we hereby petition the National Highway Traffic Safety Administration (NHTSA) to promptly initiate a safety defect investigation into van-type or box semitrailers[1] when being operated as intended because of a known safety hazard and defect from collisions with passenger vehicles and other vulnerable road users (pedestrians, bicyclists, or motorcyclists) resulting in death and significant injuries due to a lack of side underride guards. This investigation will clearly demonstrate that NHTSA should issue a recall order pursuant to 49 U.S.C. §§ 30118(b), 30119, and 30120 for all van-type and box semitrailers that lack side underride guards.

An "underride" collision occurs when a semitrailer collides with a passenger vehicle causing the passenger vehicle to slide under the body of a semitrailer, often crushing the vehicle and passengers within, or dragging the vehicle causing it to burn with passengers inside. Due to the height difference between passenger vehicles and semitrailers (in addition to single unit trucks; see NHTSA 2013), a collision bypasses the car's safety features because the point of impact is the passenger compartment, not the front bumper of the car (Kiefer as cited by Zasky 2018a). The bottom edge of a semitrailer is between forty-two and forty-five inches high, which is about eye height for passengers of a motor vehicle. Side underride guards work by engaging safety accessories like airbags, crash avoidance sensors, and other features of cars as well as preventing vehicles from going under the truck and encountering the semitrailer body or rear wheels, increasing the chance of survival with these types of collisions, many of which would be minor collisions if not for the "underride" (Airflow 2020; Zasky 2018, 2018a). Without engaging a car's safety features which would otherwise absorb the force of the collision, the passenger compartment can be crushed when it contacts the semitrailer, resulting in death or severe injuries

[1]The most common trailer type is the standard dry van or box trailer, which is a fully enclosed trailer that can haul most types of mixed freight (Environmental Protection Agency (EPA) 2016). Together, the standard box vans and reefers are the likely types of trailers for side underride guards and make up greater than 70 percent (7.7 of 11 million) of the registered semi-trailers (EPA 2016).

OST-S10-211005-047

for the occupants. This story map, *Unguarded & Unsafe: Death By Underride*, provides a comprehensive overview of the side underride issue, literature, and data.

The National Highway Traffic Safety Administration is directed by Congress to protect the safety of the driving public against unreasonable risk of death or injury that may occur because of the design, construction, or performance of a motor vehicle or motor vehicle equipment and, is charged with reducing deaths, injuries, and economic losses resulting from motor vehicle crashes (49 U.S.C. § 30102). The concerns raised in this petition are best exemplified by a New Mexico jury verdict finding that Utility Trailer Manufacturing Company was negligent because their newly-manufactured semitrailer lacked side underride guards (Sievers 2020). This case represents 1 tragic death; however, there are similarly at least 500 deaths and 5,000 serious injuries annually from collisions with semitrailers lacking side underride guards (Bloch and Schmutzler 1998, Bodapati 2004, Braver et al. 1997, Brumbelow 2012, GAO 2019, Mattos and Friedman 2021, NTSB 2014, Padmanaban 2013, Sievers 2020), indicating that semitrailers without side underride guards contain a *defect that presents an unreasonable risk* to the public from "…a "significant number of failures" in "normal operation" that is "reasonably foreseeable" (*United States* v. *General Motors Corporation* ("*Wheels*"), 518 F.2d 420 (D.C. Cir. 1975)). As NHTSA recognizes, a "significant number of failures" is merely a "non-de minimus" quantity; it need not be a "substantial percentage of the total" (*Wheels*, 518 F.2d at 438). In fact, hundreds of deaths and thousands of injuries occurring annually from vehicles colliding with semitrailers that lack side underride guards demonstrates a defect because there is no dispute that this hazard "…can definitely be expected to occur in the future" (*United States* v. *Gen. Motors Corp.*, 565 F.2d 754, 758 (D.C. Cir. 1977)).

Similarly, where a defect "is systematic and prevalent in a particular class [of motor vehicles or equipment], . . . this is prima facie an unreasonable risk" (*United States* v. *General Motors Corp.*, 561 F.2d 923, 928–29 (D.C. Cir. 1977) ("*Pitman Arms*"). In the context of the National Traffic and Motor Vehicle Safety Act of 1966, (Safety Act), "motor vehicle safety" refers to an "unreasonable risk of accidents" and an "unreasonable risk of death or injury in an accident" (49 U.S.C. § 30102(a)(8)). Thus, while defect analysis has generally entailed a retrospective look at how many failures have occurred (see, e.g., *Wheels*), the safety-relatedness question is forward-looking, and concerns hazards that may arise in the future from, for example, side underride collisions resulting in death and serious injury to the traveling public (e.g., see *United States* v. *Gen. Motors Corp.*, 565 F.2d at 758).

Although currently there is no applicable Federal Motor Vehicle Safety Standard (FMVSS) for side underride guards on semitrailers (or single unit trucks), NHTSA has the authority to recall vehicles or equipment that pose an "unreasonable risk" to safety even when there is no FMVSS. Under the Safety Act, a safety "defect" includes "any defect in performance, construction, a component, or material of a motor vehicle or motor vehicle equipment" 49 U.S.C. § 30102(a)(2). Importantly, this includes a defect in design of a safety part missing from the vehicle (i.e., lacking side underride guards; see *Wheels*, 518 F.2d at 436; see for example Safety Research and Strategies 2021).

Congress intended the Safety Act to represent a "commonsense" approach to safety and Courts have followed that approach in determining what constitutes a "defect" (*Wheels*, 518 F.2d at

436). For this reason, a defect determination for semitrailers lacking side underride guards does not require an engineering explanation or root cause, but instead "may be based exclusively on the performance record of the component" (*Wheels*, 518 F.2d at 432). The substantial amount of research and data on the number of deaths and serious injuries from collisions with semitrailers without side underride guards is clear; failure to include a side underride guard amounts to a defect in the semitrailer's design, construction, and performance.

I also note the following facts to consider:

1. For over 50 years, NHTSA has been remiss in failing to correct this extreme safety hazard posed to the traveling public. In 1969, the DOT, published in the *Federal Register* that the proposed standard for rear underride protection would be amended after technical studies to extend the requirement for underride protection to the sides of large vehicles large trucks and trailers (34 FR 5383). Fifty-three years later, NHTSA has taken no action to mitigate this known defect, while the risk and number of deaths due to side underride guard omission have increased proportionately with the number of semitrailers on the road. Side underride guard crash tests have demonstrated that the guards can prevent a passenger vehicle from becoming trapped underneath the semitrailer and prevent intrusion into the vehicle's compartment by stopping the car from underriding the semitrailer (Zasky 2018, 2018a; see also GAO 2019). A side underride guard helps avoid windshield-first crashes and improves the chances that a car's air bags, and other lifesaving built-in occupant protection systems can function as intended, earning endorsement of side underride guards by Consumer Reports (2019).

2. Without a government recall in the United States, truck and trailer manufacturers and operators will not voluntarily stop the known unreasonable risk to public safety by designing and implementing safer trucks and trailers with effective side underride prevention guards (Bloch and Schmutzler 1998; GAO 2019). Crash tests and side underride guard international standards demonstrate that side underride guard technology is available, has been well-studied, and would be an easy and inexpensive solution to the known hazard of side underride collisions to the traveling public. For example, starting in 2010, the AngelWing has been installed on a small number of semitrailers that have already logged over 1 million miles delivering loads with no issues of road clearance, structural deficiencies (e.g., stress cracks on welds), or loading/unloading at docks (P. Ponder pers. comm.).

3. Importantly, Wabash holds three patents (issued in 2012, 2020, and 2021) and Vanguard holds one patent (issued in 2019) for side underride guards. These are two of the eight major semitrailer manufacturers, indicating the industry has already designed and tested a solution to this known defect. Moreover, semitrailer manufacturers have known of this defect for years and have not reported it to NHTSA, even though manufacturers have a continuing obligation to proactively identify and mitigate such safety risks (*Wheels*, 518 F.2d 420, 427 (D.C. Cir. 1975). Similarly, under the Transportation Recall Enhancement, Accountability, and Documentation Act (2000), manufacturers were supposedly required to report information to NHTSA related to defects, especially in cases of injury or death related to their semitrailers (also referred to as Early Warning Reports; e.g., see Safety Research Strategy (2021) detailing NHTSA fines to vehicle manufacturers for untimely

recalls and failing to submit Early Warning Reports). However, early warning reporting has been abysmal compared to known occurrences of underride collisions (Karth 2018). As referenced below, all the Wabash and Vanguard patents clearly acknowledge the known defect and unreasonable risk posed by the geometric mismatch of semitrailers and passenger vehicles. Wabash (2021) also indicated that its side underride system may provide dual aerodynamic efficiency and protection to road users without operational limitations such as "costly installation, access to the underside of the trailer, or adding considerable weight".

a. From Wabash (2012 and 2020): "Truck trailers typically have a higher elevation than passenger vehicles. This presents a risk that a passenger vehicle will underride the trailer in an accident, potentially resulting in damage to the underriding vehicle and injury to occupants therein. Accordingly, some trailers may include a side protection device, or underride guard, to reduce the risk of such passenger vehicles underriding the trailer. The side protection device is intended to reduce the extent to which a "passenger vehicle" (as defined in 49 C.F.R. Part 571S) can intrude under the side of a trailer, diminishing passenger compartment intrusion."

b. From Wabash (2020 and 2021): "The above-described side underride system…may reduce the risk of passenger vehicle underride in the event of a side impact collision, as well as reduce the risk of pedestrians, bicyclists, or motorcyclists from falling or sliding under the trailer, for example, between the landing gear and rear wheel assembly."

c. From Vanguard (2019): "Truck trailers typically have a higher elevation than passenger vehicles. This presents a risk that a passenger vehicle will underride the trailer in an accident, potentially resulting in damage to the underriding vehicle and injury to occupants therein. Accordingly, the United States Federal Motor Vehicle Safety Standards require the installation of underride guards or bumpers on certain trailers. The underride guards must comply with certain deflection and energy absorption requirements. Underride guards are common on the rear of trailers; however, underride guards between the landing gear and wheel assembly of the trailer are less common. A device positioned between the landing gear and wheel assembly of the trailer can function to prevent an impacting vehicle from underriding the trailer. Additionally, such a device can have features to reduce the aerodynamic drag on the trailer."

4. In addition to industry-designed side underride guards, Perry Ponder of Tallahassee, Florida and Aaron Kiefer of Cary, North Carolina have designed different underride guards that have been successfully crash tested. The Insurance Institute for Highway Safety (IIHS) crash testing of Mr. Ponder's AngelWing design, which uses steel and, more recently, aluminum, showed that side guards could stop a car from going underneath a trailer in crashes up to 40 mph (IHHS 2017; Zasky 2018; GAO 2019). Mr. Kiefer's Safetyskirt design, which uses a lightweight but strong fabric, has also been crash tested and can stop underride (Zasky 2018a, Safetyskirt 2020). In March 2019,

additional crash tests were conducted in Washington DC for Mr. Ponder's AngelWing and Mr. Kiefer's Safetyskirt. They were also both successful, demonstrating that side underride guards can prevent intrusion into the vehicle's passenger compartment by stopping the car from underriding the semitrailer. As such, underride guards have been proven to help stop a car from continuing under a semitrailer in the event of a collision (Zasky 2018, 2018a).

For the reasons discussed above, we urge NHTSA to grant this Petition for a Defect Investigation into van-type or box semitrailers due to a lack of side underride guards. Deaths and serious injuries continue to occur every day across our Country. Pursuant to 49 U.S.C. § 30162(d), we formally request NHTSA respond to this petition within 120 days. The DOT can no longer feign ignorance to the danger of underride collisions. NHTSA must conduct an analysis, in which they will certainly find that this known defect poses an unreasonable risk to motor vehicle safety and is therefore a "safety defect," and subsequently order manufacturers to conduct a recall to mitigate the dangers of death and serious injury from semitrailers lacking side underride guards (49 U.S.C. § 30118(b)). Please fix this defect now.

Sincerely,
Eric Hein

Marianne and Jerry Karth

Lois Durso

Cc:
Representative Earl Blumenauer
Representative David Price
Representative Cohen
Representative DeSaulnier
Representative DeFazio
Senator Ron Wyden
Senator Jeff Merkley
Senator Richard Burr
Senator Gillibrand
Senator Heinrich
Senator Luján

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THE VICE PRESIDENT

WASHINGTON

August 7, 2013

Jerry Karth
[redacted]
Rocky Mount, NC [redacted]

Dear Jerry:

You have my heartfelt condolences for the loss of your two daughters. I know from my personal experience that there are no words I can say to ease your pain, but please know that I will keep you in my thoughts and prayers.

I regret that, since I am no longer a Senator, I do not have the ability to sponsor legislation in the United States Congress. However, I sincerely appreciate you taking the time to inform me about this issue.

Again, I am truly sorry for your loss. I will keep you in my thoughts and prayers.

Sincerely,

Joseph R. Biden, Jr.

**MEMORANDUM FOR THE SECRETARY OF TRANSPORTATION**

SUBJECT: Establishing an ***Advisory Committee On Underride Protection (ACOUP)***

On average, 40,000 people die each year in crashes on our roads. According to *Advocates for Highway & Auto Safety*, 362,532 Americans are "missing" i.e., lost their lives due to vehicle violence over the last 10 years. Using NHTSA figures of estimated injuries, nearly 1.5 million additional people suffered serious injuries during that time. Using DOT values of $9 million in comprehensive costs per fatality, these losses would be valued by DOT to be about $3 trillion.

A subset of these traffic fatalities and injuries can be attributed to a truck crash in which the passenger vehicle – because of a geometric mismatch between the bottom of large trucks and the lower bumper of passenger vehicles – upon collision easily slides under the large truck leading to Passenger Compartment Intrusion (PCI) and catastrophic and often fatal injuries. In fact, engineers have developed solutions to prevent underride but these have for the most part *not* been adopted by the trucking industry *nor* mandated by the federal government.

Our families cannot continue to sustain these unacceptable and preventable losses and injuries. Therefore, as President of the United States, I am directing the Secretary of Transportation to take the necessary steps to address this traffic safety and public health issue. To these ends, it is hereby ordered as follows:

Section 1. **Establishment of the *Advisory Committee On Underride Protection (ACOUP)*.**

There is established an ***Advisory Committee On Underride Protection (ACOUP)***. The Committee shall be chaired by a designee of the Secretary of Transportation.

Section 2. **Authority**. The Committee is established as a discretionary committee under the authority of the U.S. Department of Transportation (DOT), established in accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C. App. 2. The formation and use of ACOUP are determined to be in the public interest.

Section 3. **Mission and Function of the Committee**. The Committee shall work with the Department of Transportation to develop a coordinated Federal response to the underride issue.

Section 4. **Objectives and Scope of Activities.** The Office of The Secretary, or his or her designee, shall present ACOUP with tasks on matters relating to underride protection. The Committee will provide advice and recommendations to the Secretary of Transportation (the Secretary) through the Administrator of the Federal Motor Carrier Safety Administration (FMCSA) and the Administrator of the National Highway Traffic Safety Administration (NHTSA) about needs, objectives, plans, approaches, content, and accomplishments of the motor carrier safety programs carried out by the Department specifically related to underride protection.

Section 5. **Description of Duties.** The Committee is advisory only. Duties include the following:

a. Gathering information as necessary to discuss underride issues presented by the Designated Federal Officer (DFO);

b. Deliberating on issues relevant to underride injuries and deaths; and

c. Providing written consensus advice on underride rulemaking to the Secretary.

Section 6. **Agency/Official to Whom the Committee Reports.** The Committee shall report to the Secretary of Transportation. The Administrators are the sponsors and evaluate the recommendations produced by the Committee.

Section 7. **Support.** The Office of The Secretary's Office of Policy will provide necessary funding, logistics, and administrative support for the committee.

Section 8. **Estimated Annual Operating Costs and Staff Years.** The annual operating costs associated with the Committee's functions are estimated to be $250,000 including all direct and indirect expenses. The cost estimate includes 1.3 full-time equivalent positions that are required to support the Committee. Videoconferencing, when possible, will reduce these expenses.

Section 9. **Designated Federal Officer (DFO) and Sponsor.**

a. The DFO for the Committee is OST's Associate Administrator for Safety Policy or his or her designee.

b. The DFO, in conjunction with the Committee Chair, will approve or call all Committee and subcommittee meetings, prepare and approve all meeting agendas, attend all Committee and subcommittee meetings, adjourn any meetings when he or she determines adjournment to be in the public interest, and chair meetings when directed to do so by the Secretary.

Section 10. **Estimated Number and Frequency of Meetings.** Committee meetings will be held at least twice a year. As necessary, the DFO may call subcommittee meetings.

Section 11. **Duration.** Continuing.

Section 12. **Termination.** The committee will terminate 2 years from the charter filing date unless the charter is renewed in accordance with FACA.

Section 13. **Membership and Designation.**

a. The committee shall comprise no more than 25 members appointed by the Secretary for up to 2-year terms.

b. Members serve at the pleasure of the Secretary. The Secretary may extend appointments and may appoint replacements for members who have resigned outside a stated term, as necessary.

c. The Secretary may reappoint members.

d. Membership of the Committee. In addition to the Chair, the Committee shall consist of at least two from each of the following categories:

(i) Truck and trailer manufacturers;

(ii) Motor carriers, including independent owner-operators

(iii) Law enforcement;

(iv) Motor vehicle engineers;

(v) Motor vehicle crash investigators;

(vi) Truck safety organizations;

(vii) The insurance industry

(viiii) Emergency medical service providers;

(ix) Families of underride crash victims; and

(x) Labor organizations.

e. To ensure the recommendations of the Committee have considered the needs of diverse groups served by the Department, membership shall include, to the extent practicable, individuals and/or organizations to represent minorities, women, and persons with disabilities.

f. Members may continue to serve until their replacements have been appointed.

g. The Secretary, shall designate a chairman and vice chairman from among members of the committee. They will serve 2-year nonrenewable terms. The vice chairman will succeed the chairman at the end of the term.

Section 14. **Subcommittees.** The Chair will also establish Ad-Hoc Subcommittees which shall not work independently of the chartered ACOUP and shall report their recommendations and advice to the full ACOUP for deliberation and discussion. Subcommittees must not provide advice or work products directly to NHTSA, FMCSA or DOT. Members of the Committee may serve on the Subcommittees if appropriate. At least two subcommittees will be established, including:

a. an Ad-Hoc Underride Engineering Subcommittee to advise this Committee on matters related to the technical aspects of the rulemaking. The Subcommittee should include at least 12 individuals with expertise in areas related to underride crashes, including—but not limited to—engineers, crash investigators, injury prevention specialists, and at least one member will be someone who has been directly affected by an underride crash.

b. An Ad-Hoc Underride Cost Benefit Analysis Subcommittee to advise this Committee on matters related to the counting of underride deaths and injuries, as well as all factors which should be included in an underride rulemaking regulatory analysis for consideration as both costs and benefits. The Subcommittee should include at least 12 individuals with expertise in areas related to underride crashes, including—but not limited to—economics, public health administration, trucking industry, engineers, crash investigators, injury prevention specialists, and at least one member will be someone who has been directly affected by an underride crash

Section 15. **Action Plan.**

(a) Within 30 days of the date of this memorandum, the Committee members shall be appointed and hold their first meeting. The Committee will develop and submit proposals and recommendations to the Secretary of Transportation for underride rulemaking as prescribed in the ***STOP Underrides Act***. This will include specific strategies for moving toward the reduction

of truck underride crash deaths and serious injuries.

(b) Within 60 days of the date of this memorandum, the Subcommittee members shall be appointed and hold their first meeting. The Subcommittees will develop and submit proposals and recommendations to the Committee.

(b) Within 1 year of the date of this memorandum, and then on an annual basis, the Committee shall provide a report to the President, the Senate Commerce Committee, the House Transportation & Infrastructure Committee on implementation efforts with respect to this memorandum.

Section 16. **General Provisions.**

(a) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(b) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an agency or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) The heads of agencies and offices shall assist and provide information to the Task Force, consistent with applicable law, as may be necessary to carry out the functions of the Task Force. Each agency and office shall bear its own expenses of participating in the Task Force.

(d) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations, which will be specifically sought after to support the effective and timely implementation of the goals of this Task Force.

(e) The Secretary of Transportation is authorized and directed to publish this memorandum in the Federal Register.

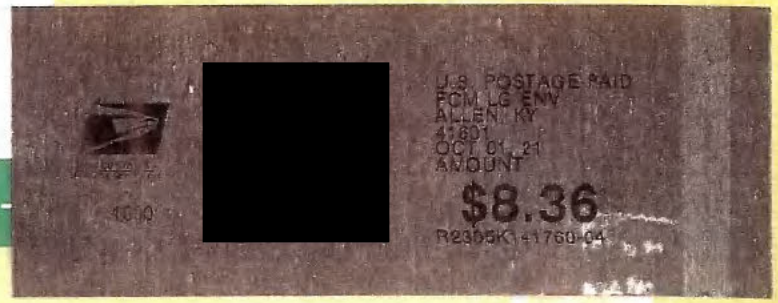
Respectfully submitted,

Marianne Karth, November 14, 2020

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Barry H. Davis & Betty T. Davis
[redacted]
Banner, KY [redacted]

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**Department of Transportation**

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The Honorable Pete Buttigieg
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OST-S10-211005-047