

and are factually distinguishable from the specific facts of petitioner's case, the reports do not provide support for the investigation requested by the petitioner.

The remaining 168 reports (~40%) are similar to those investigated during PE04-021 and to the situation that petitioner experienced. These reports typically describe incidents where a vehicle equipped with ETC is being maneuvered at slow speed in a close quarter situation, such as pulling into or out of a parking space, at which point the operator alleges that the vehicle accelerates without driver input and crashes.<sup>11,16</sup> The crashes are generally low speed crashes, with minor or no injuries. In the aftermath, operators are unsure of whether the brakes were applied or not, sometimes stating that there was insufficient time to use the brake pedal. The common thread in these reports is that the vehicle accelerated, a crash occurred, and the operator believes an uncommanded acceleration caused it.

Prompted by consumer complaints and DP04-04, PE04-021 investigated the ETC system on MY 2002 and 2003 subject vehicles and involved many of the same VOQ reports identified by the petitioner. ODI opened the investigation to determine if the system could be the cause of complaints alleging the engine speed increased, or failed to decrease, when the accelerator pedal was not depressed. During the course of the investigation, ODI reviewed VOQ and manufacturer reports, inspected two complaint vehicles, reviewed relevant Toyota technical documentation, analyzed Toyota's responses to an information request letter, conducted a limited control pedal assessment and attended a Toyota technical presentation that included the assessment of two demonstration vehicles. The investigation closed in July, 2004, without the identification of a defect trend, and with the agency noting that it would take further action if warranted.

With regard to the 168 reports recently identified by the petitioner, ODI has now interviewed<sup>12</sup> 110 of these 168 complainants (65%) including 23 of the 29 (~80%) MY 2004 to 2005 complainants. Here again, these interviews revealed that most vehicles were subsequently inspected by dealership, manufacturer and/or independent technical personnel and no malfunction or failure explaining these incidents was identified. Many vehicles involved in these incidents have been

placed back in service and have accumulated significant service experience without any recurrence.<sup>17</sup> For these 168 reports, the complaint rate of 8.8/100k vehicles is comparable to rates for similar vehicles and the complaint trend is declining.<sup>18</sup> None of this evidence suggests that a vehicle-based cause may exist. Therefore, the reports have ambiguous significance and do not constitute a basis on which any further investigative action can be initiated.<sup>19</sup>

In view of the foregoing, it is unlikely that NHTSA would issue an order for the notification and remedy of a safety-related defect as alleged by the petitioner at the conclusion of the requested investigation. Therefore, in view of the need to allocate and prioritize NHTSA's limited resources to best accomplish the agency's safety mission, the petition is denied. This action does not constitute a finding by NHTSA that a safety-related defect does not exist. The agency will take further action if warranted by future circumstances.

**Authority:** 49 U.S.C. 30162(d); delegations of authority at CFR 1.50 and 501.8.

Issued on: December 23, 2005.

**Daniel C. Smith,**

*Associate Administrator for Enforcement.*

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## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

[Docket No. NHTSA-2005-20288, Notice 2]

#### Cross Lander USA; Grant of Application for a Temporary Exemption From Federal Motor Vehicle Safety Standard No. 208

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), DOT.

**ACTION:** Grant of Application for a Temporary Exemption from S4.2 and S14 of Federal Motor Vehicle Safety Standard No. 208.

**SUMMARY:** This notice grants the Cross Lander USA ("Cross Lander") application for a temporary exemption from the requirements of S4.2 and S14 of Federal Motor Vehicle Safety Standard (FMVSS) No. 208, *Occupant crash protection*. The exemption applies

<sup>17</sup> This observation does not support the existence of a vehicle-based causal explanation.

<sup>18</sup> This is partially due to the effects of publicity surrounding PE04-021.

<sup>19</sup> For this reason, these reports will not be reflected in the close resume.

to the Cross Lander 244X vehicle line. In accordance with 49 CFR part 555, the basis for the grant is that compliance would cause substantial economic hardship to a manufacturer that has tried in good faith to comply with the standard.

**DATES:** The exemption from S4.2 and S14 of FMVSS No. 208, *Occupant crash protection*, is effective from December 1, 2005 until May 1, 2008.

**FOR FURTHER INFORMATION CONTACT:** George Feygin in the Office of Chief Counsel, NCC-112, (Phone: 202-366-2992; Fax 202-366-3820; E-Mail: [George.Feygin@nhtsa.dot.gov](mailto:George.Feygin@nhtsa.dot.gov)).

### I. Background

Cross Lander, a Nevada corporation, owns a Romanian vehicle manufacturer ARO, S.A., which manufactures multipurpose passenger vehicles built for extreme off road conditions.<sup>1</sup> According to the petitioner, this vehicle was formerly used by Romanian military. Cross Lander intends to import and distribute this vehicle, named the Cross Lander 244X ("244X"), in the United States. A detailed description of the 244X is set forth in their petition (Docket No. NHTSA-2005-20288-1). For additional information on the 244X, please go to <http://www.crosslander4x4.com/>.

In preparing the 244X for sale in the United States, Cross Lander anticipated that the Gross Vehicle Weight Rating (GVWR) of the 244X would exceed 5,500 pounds, which would exclude the vehicles from the air bag requirements specified in S4.2 and S14 of FMVSS No. 208. However, because of an unexpected change in the choice of engine used in the 244X, the GVWR of the 244X is less than 5,500 pounds, and it is thus subject to the requirements in S4.2 and S14. Because a heavier vehicle would not have been subject to the applicable air bag requirements, the petitioner was not prepared to equip the 244X with a suitable air bag system. According to the petitioner, the cost of making the 244X compliant with FMVSS No. 208 on short notice is beyond the company's current capabilities. Thus, Cross Lander requests a three-year exemption in order to develop a compliant automatic restraint system.

As described below, the petitioner seeks a temporary exemption because despite its good faith efforts, it cannot bring the 244X into compliance with the applicable air bag requirements without

<sup>1</sup> To view the petition and other supporting documents, please go to: <http://dms.dot.gov/search/searchFormSimple.cfm> (Docket No. NHTSA-2005-20288).

<sup>16</sup> ODI notes that driver error is one plausible explanation for many of these incidents.

incurring substantial economic hardship.

## II. Why Compliance Would Cause Substantial Economic Hardship and How Cross Lander Has Tried in Good Faith To Comply With FMVSS No. 208 and the Bumper Standard

Because the "advanced" air bag requirements specified in S14 of FMVSS No. 208 become effective September 1, 2006, Cross Lander intends to concentrate all its efforts on developing an "advanced" air bag system. Cross Lander chose Siemens as its air bag supplier. According to the petitioner, equipping the 244X with advanced air bags will require significant time and resources necessary to redesign the vehicle interior and for laboratory testing and sensor calibration. The

estimated cost of developing an advanced air bag system is \$2 to \$3 million.<sup>2</sup> Further, the project would take approximately 24 months and cannot begin until Cross Lander is assured of an immediate source of revenue. That is, because Cross Lander has no current vehicles for sale in the United States, the petitioner states that it is impossible to finance this project without a source of revenue. The petitioner contends that a three-year exemption from the current, as well as the "advanced" air bag requirements would allow it to successfully develop a suitable air bag system.

The petition and supplements filed by the petitioner indicate that Cross Lander has invested over \$3 million into the company. According to the petitioners,

the total investment will reach \$34,000,000 by the time the 244X will be offered for sale in the U.S. The petitioner states that an immediate exemption is crucial to the survival of Cross Lander because it must begin selling 244X immediately in order to generate a cash flow that can support the company's continued existence.

The petitioner's financial statements indicate a net loss of \$673,079 for the fiscal year ending 12/31/2002, and a net loss of \$523,676 for the fiscal year ending 12/31/2003. The petitioner stated that its 2004 net loss is \$5,069,185.00. The petitioner provided the following summary of the financial consequences of failure to obtain a temporary exemption from the requirements of FMVSS No. 208:

2005	2006	2007
<b>Assuming Grant of Petition</b>		
Net loss of \$108,000	Net profit of \$14,000,000	Net profit of \$30,000,000
<b>Assuming Denial of Petition</b>		
Net loss of \$8,500,000	Net loss of \$8,000,000	Net loss of \$8,500,000

## III. Comments Regarding the Cross Lander Petition.

The National Highway Traffic Safety Administration (NHTSA) published a notice of receipt of the application on February 9, 2005, and afforded an opportunity for comment.<sup>3</sup> The agency received two comments from Public Citizen.<sup>4</sup> A short description of the comments follows.

Public Citizen argues that the petitioner has not sufficiently demonstrated financial hardship, and that a grant of exemption would not be in the public interest. First, Public Citizen argues that the financial burdens associated with complying with the air bag requirements are not covered by the "substantial economic hardship" statutory provision. Second, Public Citizen argues that because a financial

hardship exemption could affect a large number of vehicles, a grant of the petition would not be in the public interest. Third, Public Citizen argued that the petitioner downplayed the safety benefits associated with air bags. Fourth, Public Citizen expressed concerns that the 244X vehicles would be used primarily for common transportation by the vast majority of buyers, and not off-road, as indicated by the petitioner.

## IV. The Agency's Findings

Cross Lander is not significantly different from small volume manufacturers who have received temporary exemptions in the past on hardship grounds. Although Cross Lander has negotiated with an air bag manufacturer for the design and testing of an air bag system for its vehicle, they

contend that completion of the air bag development is not economically viable without additional revenue generated through immediate sales of the 244X in the United States. In evaluating the petitioner's current situation, the agency finds that to require immediate compliance with FMVSS No. 208 would cause the petitioner substantial economic hardship, and could even result in the company going out of business. The agency concludes that the petitioner's application for a temporary exemption demonstrates the requisite financial hardship.

The term of this exemption will be limited to less than three years and the agency anticipates that the 244X will be sold in limited quantities. In total, we anticipate that Cross Lander will not sell

<sup>2</sup> See Siemens Report, Attachment 2 (Docket No. NHTSA-2005-20288-3).

<sup>3</sup> See 70 FR 6924.

<sup>4</sup> See Docket Nos. NHTSA-2005-20288-7, NHTSA-2005-20288-9.

more than 9,000 vehicles.<sup>5</sup> We anticipate that with the help of revenues derived from U.S. sales, Cross Lander will be able to introduce a fully compliant vehicle by the time this exemption expires. The agency notes that, according to the petitioner, the 244X complies with all other applicable Federal motor vehicle safety standards.

We note that under 49 CFR 555.9(b) and (c), the petitioner will be required to indicate on the vehicle certification label, and on a separate label affixed to the windshield or the side window, that the 244X does not comply with FMVSS No. 208. In addition to the required labeling, the petitioner agreed to affix additional labeling to each vehicle. This supplemental labeling would read as follows:

*Notice*

THIS VEHICLE DOES NOT CONTAIN AN AIR BAG AND WAS EXEMPTED FROM FEDERAL MOTOR VEHICLE SAFETY STANDARD 208 REGARDING OCCUPANT PROTECTION WITH AIR BAGS. IT WAS EXEMPTED PURSUANT TO NHTSA EXEMPTION NO \* \* \*

**WARNING !!**

TO AVOID SERIOUS INJURIES IN ALL TYPES OF CRASHES, ALWAYS WEAR YOUR SAFETY BELTS

The supplemental labeling will take the place of air bag warning labels required by FMVSS 208, and will be affixed to the sun visor.<sup>6</sup>

Contrary to Public Citizen's comments, we believe that the petitioner has demonstrated financial hardship. As a part of its application, the petitioner submitted detailed financial information. While most of this information has been granted confidential treatment and is not being published in this notice, the agency examined all the information submitted to the agency and concluded that the petitioner has experienced financial hardship as evidenced by net losses in all of the past 3 years. We further note that an exemption from the air bag requirements is consistent with the agency's previous financial hardship exemptions granted to Lotus, Saleen, and Spyker.<sup>7</sup> Finally, we note that the information submitted by the petitioner indicates that sales of their vehicles are unlikely to exceed 9,000 vehicles for the duration of the exemption.

Public Citizen made a variety of arguments against granting this

exemption. However, we believe that our decision is consistent with Congressional intent to allow the Secretary to temporarily exempt small volume manufacturers from a given standard when compliance with that standard would cause substantial economic hardship.

In consideration of the foregoing, it is hereby found that compliance with the requirements of Paragraphs S4.2 and S14 of Federal Motor Vehicle Safety Standard (FMVSS) No. 208, *Occupant crash protection* would cause substantial economic hardship to a manufacturer that has tried in good faith to comply with the standard. It is further found that the granting of an exemption would be in the public interest.

In accordance with 49 U.S.C. 30113(b)(3)(B)(i), Cross Lander is granted NHTSA Temporary Exemption No. EX 05-3, from Paragraphs S4.2 and S14 of Federal Motor Vehicle Safety Standard (FMVSS) No. 208, *Occupant crash protection*. The exemption shall remain in effect until May 1, 2008.

**Authority:** 49 U.S.C. 30113; delegation of authority at 49 CFR 1.50 and 501.8.

Issued on: December 23, 2005.

**Gregory Walter,**

*Senior Associate Administrator for Policy and Operations.*

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**DEPARTMENT OF TRANSPORTATION**

**Surface Transportation Board**

**[STB Docket No. AB-290 (Sub-No. 237X)]**

**Norfolk Southern Railway Company—  
Abandonment Exemption—in  
Baltimore County, MD**

On December 14, 2005, Norfolk Southern Railway Company (NSR) filed with the Surface Transportation Board a petition under 49 U.S.C. 10502 for exemption from the provisions of 49 U.S.C. 10903-05 to abandon its freight operating rights and rail freight service over 12.8 miles of a line of railroad between milepost UU-1.0 at Baltimore, MD, and milepost UU-12.8 at Cockeysville, MD.<sup>1</sup> The line traverses

<sup>1</sup> Pursuant to the Conrail Transaction Agreement approved by the Board in 3 S.T.B. 196 (1998), certain Consolidated Rail Corporation (Conrail) assets, including Conrail's interest in the line, were allocated to Pennsylvania Lines, LLC (PRR). PRR's assets, in turn, were leased to and operated by NSR under the terms of an allocated assets operating agreement between PRR and NSR. NSR acquired the right to operate over the line from Conrail through merger of NSR with Conrail's former subsidiary, PRR, on August 27, 2004. See *CSX Corporation and*

U.S. Postal Service Zip Codes 21030, 21065, and 21201 and includes the stations of Lutherville, Timonium, Texas, and Cockeysville. NSR states that it will continue to provide rail service to the station of Baltimore.

In addition to an exemption from 49 U.S.C. 10903, NSR seeks exemption from 49 U.S.C. 10904 [offer of financial assistance (OFA) procedures] and 49 U.S.C. 10905 [public use conditions]. In support, NSR states that the right-of-way is owned by the Maryland Department of Transportation (MDOT),<sup>2</sup> and MDOT, through MTA, will continue to use the line for the public purpose of providing light rail commuter passenger service. These requests will be addressed in the final decision.

The line does not contain Federally granted rights-of-way. Any documentation in NSR's possession will be made available promptly to those requesting it.

The interest of railroad employees will be protected by the conditions set forth in *Oregon Short Line R. Co.—Abandonment—Goshen*, 360 I.C.C. 91 (1979).

By issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by April 3, 2006.

Any OFA under 49 CFR 1152.27(b)(2) will be due no later than 10 days after service of a decision granting the petition for exemption, unless the Board grants the requested exemption from the OFA process. Each offer must be accompanied by a \$1,200 filing fee. See 49 CFR 1002.2(f)(25).

All interested persons should be aware that, following abandonment of rail service and salvage of the line, the line may be suitable for other public use, including interim trail use. Unless the Board grants the requested exemption from the public use provisions, any request for a public use condition under 49 CFR 1152.28 or for trail use/rail banking<sup>3</sup> under 49 CFR 1152.29 will be due no later than

*CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company—Control and Operating Leases/Agreements—Conrail Inc. and Consolidated Rail Corporation*, STB Finance Docket No. 33388 (Sub-No. 94), Decision No. 2 (STB served Nov. 7, 2003).

<sup>2</sup> MDOT describes itself as the umbrella organization for the Maryland Transit Administration (MTA) and other Maryland governmental transportation agencies. MDOT and MTA are government agencies sponsoring or operating commuter mass transit service and have not held, do not hold, and do not intend to hold themselves out to provide rail freight service over the line.

<sup>3</sup> NSR indicates that, because of the continuing use of the line for light rail commuter passenger operations by MTA, NSR will not consent to a trail use negotiation condition.

<sup>5</sup> See NHTSA-2005-20288-11.

<sup>6</sup> See Docket No. NHTSA-2005-20288-3, pages 9 and 11.

<sup>7</sup> We also note that Spyker, like Cross Lander, was a start-up manufacturer without prior U.S. presence.