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Docket: To read background documents or comments received, go to <http://www.regulations.gov> at any time or to the Docket Management Facility in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Laverne Brunache (202) 267-3133 or Tyneka Thomas (202) 267-7626, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on March 20, 2009.

Pamela Hamilton-Powell,
Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA-2009-0083.

Petitioner: CitationShares Management, LLC.

Section of 14 CFR Affected: 14 CFR 91.23, 91.1001.

Description of Relief Sought: CitationShares Management, LLC (CM), a fractional program manager and certificated air carrier, has petitioned the Federal Aviation Administration to provide an exemption from the

following regulations pertaining to part 91 subpart K fractional ownership operations:

(1) CM requests an exemption from § 91.1001 to the extent necessary to clarify that “fractional owner or owner,” and “fractional ownership interest,” as defined in § 91.1001(b)(3) and (b)(4), of subpart K, are not limited to FAA registered owners but may include a beneficial owner or beneficial ownership interest arising under a single Delaware statutory trust structure outlined in the CM Fractional Program Trust Structure;

(2) CM requests an exemption from § 91.1001 to the extent necessary to clarify that “dry lease exchange,” as defined in § 91.1001(b)(2) of subpart K, may include the arrangement for exchange of aircraft arising under the CM Fractional Program Trust Structure; and

(3) CM requests an exemption from § 91.23 to the extent necessary to confirm that the arrangements among and between the fractional owners and CM, in its capacity as a part 135 certificate holder, does not require further compliance with that section.

The purpose of the exemption would be to permit CM to implement a Fractional Program Trust Structure for ownership, registration, and operation of fractional ownership program aircraft. A key feature of the proposed structure is that participating fractional owners would no longer hold legal title to a fractional share of a program aircraft. Instead, a Delaware statutory trust would hold legal title to the entire aircraft, and fractional ownership program participants would be beneficial owners of a series in the trust. CM would act as the fractional ownership program manager, would administer the statutory trust, and would continue operating program aircraft as a part 135 certificate holder. The CM Fractional Program Trust Structure would continue to follow the operational control provisions as set forth in §§ 91.1009-91.1013 of subpart K.

Additionally, CM seeks an exemption from § 91.1001 pertaining to dry-lease aircraft exchanges. Under the CM Fractional Program Trust Structure, there would not be a dry-lease aircraft exchange arrangement among all of the fractional owners. Instead, CM would hold a lease to the program aircraft entered into a statutory trust, and fractional owners would have access to all of the program aircraft, without crew, on an as needed basis through a sublease directly from CM.

Finally, CM requests an exemption from § 91.23, the truth-in-leasing

requirements in leases and conditional sales contracts, to confirm that those requirements would not be applicable to the dry-lease exchange component of the CM Fractional Program Trust Structure because CM is a part 135 certificate holder.

[FR Doc. E9-6563 Filed 3-24-09; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA-2008-0107, Notice 2]

Spyker Automobielen B.V.; Grant of Application for Limited Extension of Temporary Exemption From Certain Requirements of FMVSS No. 208

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

ACTION: Grant of petition for limited extension of a Temporary Exemption from certain provisions of Federal Motor Vehicle Safety Standard (FMVSS) No. 208, *Occupant Crash Protection*.

SUMMARY: This notice grants the Spyker Automobielen B.V. (“Spyker”) application for a limited extension of a previously received temporary exemption from certain requirements of Federal Motor Vehicle Safety Standard (FMVSS) No. 208, *Occupant Crash Protection*, for the Spyker C vehicle line. In accordance with 49 CFR Part 555, the basis for the grant is that compliance would cause substantial economic hardship to a low-volume manufacturer that has tried in good faith to comply with the standard, and the exemption would have a negligible impact on motor vehicle safety. The exemption is effective through December 15, 2010.

In accordance with the requirements of 49 U.S.C. 30113(b)(2), we published a notice of receipt of the application and asked for public comments.¹

DATES: The exemption from the applicable Federal motor vehicle safety standards is effective from March 25, 2009 through December 15, 2010.

FOR FURTHER INFORMATION CONTACT: Sarah Alves, Office of the Chief Counsel, NCC-112, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590. Phone: 202-366-2992; Fax: 202-366-3820; e-Mail: sarah.alves@dot.gov.

SUPPLEMENTARY INFORMATION:

I. Advanced Air Bag Requirements and Small

¹ To view the application or public comments, please go to: <http://www.regulations.gov> (Docket No. NHTSA-2007-0107).

- Volume Manufacturers
- II. Overview and Statutory Background of Petition for Economic Hardship Exemption
- III. Petition of Spyker
- IV. **Federal Register** Notice of May 27, 2008
- V. NHTSA Analysis of Petition
- VI. Agency Decision

I. Advanced Air Bag Requirements and Small Volume Manufacturers

In 2000, NHTSA upgraded the requirements for air bags in passenger cars and light trucks, requiring what are commonly known as “advanced air bags.”² The upgrade was designed to meet the goals of improving protection for occupants of all sizes, belted and unbelted, in moderate-to-high-speed crashes, and of minimizing the risks posed by air bags to infants, children, and other occupants, especially in low-speed crashes.

The advanced air bag requirements were a culmination of a comprehensive plan that the agency announced in 1996 to address the adverse effects of air bags. This plan also included an extensive consumer education program to encourage the placement of children in rear seats. The new requirements were phased in beginning with the 2004 model year.

Small volume manufacturers were not subject to the advanced air bag requirements until September 1, 2006, but their efforts to bring their respective vehicles into compliance with these requirements began several years earlier. However, because the new requirements were challenging, major air bag suppliers concentrated their efforts on working with large volume manufacturers, and thus, until recently, small volume manufacturers had limited access to advanced air bag technology. Because of the nature of the requirements for protecting out-of-position occupants, “off-the-shelf” systems could not be readily adopted. Further complicating matters, because small volume manufacturers build so few vehicles, the costs of developing custom air bag systems compared to potential benefits discouraged some air bag suppliers from working with small volume manufacturers.

The agency has carefully tracked occupant fatalities resulting from air bag deployment. Our data indicate that the agency’s efforts in the area of consumer education and manufacturers’ providing depowered air bags were successful in reducing air bag fatalities even before advanced air bag requirements were implemented. As always, we are concerned about the potential safety

implication of any temporary exemptions granted by this agency.

In a petition submitted on August 17, 2007,³ Spyker Automobielen B.V. (“Spyker”) requested a limited extension of the temporary exemption that it previously received,⁴ i.e., a three-year hardship exemption from the “basic” air bag requirements and advanced air bag provisions of FMVSS No. 208, *Occupant Crash Protection*, as well as from 49 CFR Part 581, *Bumper Standard*. The requested exemption would apply to the Spyker C vehicle line and would apply to certain advanced air bag requirements, specifically the requirements in S19, S21, S23, and S25 (the child and 5th percentile adult female driver out-of-position portions of the advanced air bag provisions of FMVSS No. 208). Spyker requested an extension for exemption from these requirements through December 15, 2010.

II. Overview and Statutory Background of Petition for Economic Hardship Exemption

In accordance with 49 U.S.C. 30113 and the procedures in 49 CFR Part 555, Spyker has petitioned the agency for a limited extension of a temporary exemption from certain requirements of FMVSS No. 208. The basis for the application was that compliance would cause substantial economic hardship to a manufacturer that has tried in good faith to comply with the standard. A manufacturer is eligible to apply for a hardship exemption if its total motor vehicle production in its most recent year of production did not exceed 10,000 vehicles, as determined by the NHTSA Administrator (49 U.S.C. 30113).

In determining whether a manufacturer of a vehicle meets that criterion, NHTSA considers whether a second vehicle manufacturer also might be deemed the manufacturer of that vehicle. The statutory provisions governing motor vehicle safety (49 U.S.C. Chapter 301) do not include any provision indicating that a manufacturer might have substantial responsibility as manufacturer of a vehicle simply because it owns or controls a second manufacturer that assembled that vehicle. However, the agency considers

³ The petition is available at <http://www.regulations.gov>, Docket No. NHTSA–2007–0107.

⁴ The original petition of Spyker is available at <http://www.regulations.gov>, Docket No. NHTSA–2005–20455. The notice granting that petition, Spyker Automobielen B.V.; Grant of Application for a Temporary Exemption From Federal Motor Vehicle Safety Standards Nos. 201 and 208; and Part 581 Bumper Standard, was published at 70 FR 39007, July 6, 2005.

the statutory definition of “manufacturer” (49 U.S.C. 30102(a)(5)) to be sufficiently broad to include sponsors, depending on the circumstances. Thus, NHTSA has stated that a manufacturer may be deemed to be a sponsor and thus a manufacturer of a vehicle assembled by a second manufacturer if the first manufacturer had a substantial role in the development and manufacturing process of that vehicle.

Finally, while 49 U.S.C. 30113(b) states that exemptions from a Safety Act standard are to be granted on a “temporary basis,” the statute also expressly provides for renewal of an exemption on reapplication.⁵ Manufacturers are nevertheless cautioned that the agency’s decision to grant an initial petition in no way predetermines that the agency will repeatedly grant renewal petitions, thereby imparting semi-permanent exemption from a safety standard. Exempted manufacturers seeking renewal must bear in mind that the agency is directed to consider financial hardship as but one factor, along with the manufacturer’s on-going good faith efforts to comply with the regulation, the public interest, consistency with the Safety Act, generally, as well as other such matters provided in the statute.

III. Petition of Spyker

Background. NHTSA notes that a manufacturer is eligible to apply for a hardship exemption if its total motor vehicle production in its most recent year of production does not exceed 10,000, as determined by the NHTSA Administrator (49 U.S.C. 30113(d)). In its petition, Spyker stated that it manufactured 94 automobiles in 2006 and estimated a total production of 106 automobiles in 2007. Spyker stated that 60 automobiles were imported into the U.S. in 2006, and Spyker projected that U.S. imports would total 70 Spyker automobiles in 2007. Subsequently, Spyker advised NHTSA that it manufactured 22 automobiles in 2007 and 43 in 2008. Seven Spyker automobiles were imported into the U.S. in 2007 and 6 were imported in 2008.

Spyker is a wholly owned subsidiary of Spyker Cars NV, a publicly traded Dutch company. Spyker stated that it is unaware of any other automobile manufacturer having an ownership interest in Spyker.⁶ Moreover, Spyker stated that Spyker Cars NV has no ownership interest in any other vehicle

⁵ 49 U.S.C. 30113(b)(1).

⁶ Only parties with an interest of more than 5% are known and need to register with the Dutch authority for financial markets.

² See 65 FR 30680 (May 12, 2000).

manufacturer, and is not under any common control with another automobile manufacturer.

In July 2005, NHTSA granted Spyker a three-year hardship exemption from the "basic" air bag requirements and advanced air bag provisions of FMVSS No. 208 (S4.1.5.3; S14), and Part 581, expiring on June 15, 2008 (70 FR 39007; July 6, 2005). In this same grant, NHTSA also exempted Spyker from S7 of FMVSS No. 108, *Lamps, Reflective Devices, and Associated Equipment*, for the first 10 Spyker C8 vehicles imported into the United States.

Requested exemption. Spyker is requesting a limited extension of that temporary exemption. Spyker is requesting an exemption from the child and 5th percentile adult female driver out-of-position portions of the advanced air bag provisions of FMVSS No. 208 (S19, S21, S23, and S25).⁷ Spyker's previous exemption extended until June 15, 2008,⁸ and Spyker requested a two-and-a-half year extension that would exempt Spyker's C8 vehicle line from the listed advanced air bag requirements through December 15, 2010. Spyker submitted a supplement to their petition on April 7, 2008, which is posted in this docket, and which included updated financial information from 2007. See Docket No. NHTSA-2008-0107-0003.

Economic hardship. Spyker stated that its previously established financial hardship⁹ continues, in part due to the start-up nature of the company. Specifically, Spyker's financial information submission showed a net operating loss of 13,000,000 Euros (\$16,900,000) from 2004 to 2006.¹⁰ Spyker originally projected a further loss in 2007 of 6,500,000 Euros (\$8,450,000). Moreover, based on 2008-2010 projections, Spyker estimated that if the limited extension is denied, Spyker will bear a loss of over 2,000,000 Euros (\$2,600,000) during that time. Spyker also stated that the loss of sales in the U.S. that would result if the limited extension is denied could not be made up in the rest of the world because the U.S. is the largest and most important market for the vehicle. Spyker argued that such consequences demonstrate "substantial economic

hardship" within the meaning of 49 U.S.C. 30113(b)(3)(B)(i).

On April 7, 2008, Spyker submitted to NHTSA a supplement to their petition because Spyker had recently updated its accounts for 2007.¹¹ Spyker stated in its supplement to its petition that 2007 losses now total 16,000,000 Euros (\$20,800,000), and stated that this higher number was due to their parent company having sold its interest in its Formula 1 ("F1") racing team, and extraordinary financing and consulting costs. This new financial statement information is in further support of the substantial economic hardship criterion.

Good faith efforts to comply. Spyker stated that when it filed for the original exemption, the C vehicle line had no air bag system at all, and that the windshield design does not permit a top-mounted air bag on the passenger side, thereby precluding the use of a low risk deployment system. Spyker indicated that it has spent over 3,500,000 Euros bringing the C vehicle line into compliance with all of the high-speed belted and unbelted crash test requirements of the Advanced Air Bag rule by developing an "interim" driver air bag system for the C vehicle line. However, it stated that it has not been able to bring the vehicle into compliance with the child out-of-position requirements (S19, S21, and S23), and the 5th percentile adult female out-of-position requirements for the driver seat (S25). Despite efforts to involve numerous potential suppliers, Spyker has not identified any that are willing to work with the company to develop an automatic suppression system for compliance with S19, S21, and S23. Spyker has budgeted an additional 3,500,000 Euros for 2008-2010 to develop, test and build a fully-compliant advanced air bag system for the new C line vehicle. Spyker also indicated that by the time its new D vehicle line is launched, Spyker will have spent 5,500,000 Euros developing for this new line an advanced air bag system fully compliant with FMVSS No. 208.

Spyker further indicated that it plans to re-engineer the C vehicle line for model year 2011, at which time the D line advanced air bag system will be incorporated into the new C line, making the redesigned C line fully compliant with all advanced air bag requirements. Spyker stated that it will use the extension period, if granted, to develop, test, tool and implement the redesigned model.

¹¹ See Supplement to Petition of Spyker Cars for Limited Extension of Temporary Exemption (April 7, 2008), Docket No. NHTSA-2008-0107-0003.

Spyker argues that an exemption would be in the public interest. The petitioner put forth several arguments in favor of a finding that the requested exemption is consistent with the public interest and would not have a significant adverse impact on safety. Specifically:

1. Spyker stated that the exempted vehicles will comply with all FMVSSs other than the provisions that are the subject of this extension request.

2. The petitioner stated that an exemption will benefit U.S. employment and U.S. companies because Spyker vehicles are distributed by a U.S. company, Spyker of North America, and are sold and serviced in the U.S. through a network of 17 dealers. Spyker argued that denial of an extension will negatively impact these companies.

3. Spyker argued that if the exemption is not granted, U.S. consumer choice would be harmed and that the agency has long maintained that the National Traffic and Motor Vehicle Safety Act seeks, if possible, to avoid limiting consumer choice.

4. The petitioner argued that given its exotic design and high-performance nature, the C vehicle line is not expected to be used extensively, nor is it expected to carry children with any frequency.

5. Spyker stated that as of the submission date of its application for extension, approximately 60 exempted C line Spykers have been imported into the U.S. and there have been no reports of any air bag-related injuries.

6. Spyker stated that an important safety feature on the C line offers enhanced occupant protection. The petitioner stated that occupants are positioned in a protective "cell" because the main chassis structure is built around them.

IV. Federal Register Notice of May 27, 2008

In the **Federal Register** of May 27, 2008 (73 FR 30443), we published a notice announcing receipt of an application from Spyker for a limited extension of a previously received temporary exemption from the advanced air bag requirements of FMVSS No. 208 for the Spyker C vehicle line. We invited public comment on Spyker's application. We received one comment in response to this publication from Spyker in support of its petition. See Docket No. NHTSA-2008-0107-0004. The comment was brief and provided an update on Spyker's air bag development work, confirming that the driver air bag was incorporated into Spyker vehicle production as of the start

⁷ The previous exemption covered these provisions by including S14.

⁸ We note that under 49 CFR 555.8(e), "if an application for renewal of temporary exemption that meets the requirements of § 555.5 has been filed not later than 60 days before the termination date of an exemption, the exemption does not terminate until the Administrator grants or denies the application for renewal."

⁹ See 70 FR 39007 (July 6, 2005).

¹⁰ All dollar values are based on an exchange rate of 1 Euro = \$1.30.

of the second quarter of 2008. It stated that the passenger air bag development has been proceeding with testing and would be incorporated into all vehicle production prior to the expiration of the current exemption.

V. NHTSA Analysis of Petition

The following discussion provides our decision regarding Spyker's temporary exemption request pertaining to the advanced air bag requirement of FMVSS No. 208.

In July 2005 Spyker was granted a temporary exemption from the bumper standard and from the "basic" air bag requirements. Despite significant expenditures of capital and labor in pursuit of compliance,¹² Spyker was unable to bring its Spyker C vehicle line into compliance with all of the advanced air bag requirements (although, we note, it was able to comply with sections S14.5, S15, and S17 of Standard No. 208, as well as 49 CFR Part 581, *Bumper Standard*).

Spyker stated that the U.S. sales losses that would occur as the result of an exemption extension denial could not be made up in the rest of the world because the U.S. is by far the largest market for Spyker vehicles, representing approximately 70 percent of Spyker sales. At the time of the petition, Spyker estimated that the difference between granting and denying the extension would amount to 35,000,000 Euros (\$45,500,000). Spyker stated that such consequences demonstrate "substantial economic hardship" within the meaning of 49 U.S.C. 30113(b)(3)(B)(i).

Spyker has requested that additional specific details regarding its finances and financial forecasts be afforded confidential treatment under 49 CFR 512.4, asserting a claim for confidential information. NHTSA has granted the request and determined that this information is to be afforded confidential treatment.

While it complies with a significant portion of the requirements of FMVSS No. 208, the petitioner has not been able to achieve full compliance despite considerable effort put forth to that end. When Spyker applied for and was granted its original exemption, the C8 vehicle line had no air bag system at all because the original vehicle was designed in 2000 without the U.S. market and air bags in mind. Spyker indicated that it has spent over 3,500,000 Euros bringing the C vehicle line into compliance with all of the high-speed belted and unbelted crash test requirements of the advanced air

bag requirements by developing an "interim" driver air bag system for the C vehicle line. However, it stated that it has not been able to bring the vehicle into compliance with the child out-of-position requirements (S19, S21, and S23), and the 5th percentile adult female out-of-position requirements for the driver seat (S25). Despite recent efforts to involve numerous potential suppliers, Spyker has not identified any that are willing to work with the company to develop an automatic suppression system for compliance with S19, S21, and S23. Spyker has budgeted an additional 3,500,000 Euros for 2008–2010 to develop, test and build a fully-compliant advanced air bag system for the new C line vehicle. Spyker also indicated that by the time its new D vehicle line is launched, Spyker will have spent 5,500,000 Euros developing for this new line an advanced air bag system fully compliant with FMVSS No. 208. Additionally, Spyker stated in its petition that it plans to re-engineer the C line for MY 2011 (including new tooling), at which time the D line advanced air bag system will be incorporated into the C line, making the redesigned C line fully compliant with FMVSS No. 208. Spyker explains that it would use the exemption extension period to develop, test, tool, and implement the redesigned model.

Given the above discussion, we conclude that Spyker has demonstrated good faith effort to bring its vehicles into compliance with the relevant advanced air bag requirements of FMVSS No. 208 and has also demonstrated the requisite financial hardship.

We believe there are public interest considerations served by granting this petition. These include the general consideration of affording consumers a wider variety of motor vehicle choices and the economic benefits of affording continued employment to the Spyker's U.S. work force and distribution network. Moreover, we believe this exemption will have a minimal impact on safety given the limited number of vehicles, the relatively low-use nature of the vehicle, and the rare use of the vehicle by young children.

After considering all of the relevant information, including Spyker's commitment to meet the advanced air bag requirements for the redesigned vehicle, we believe Spyker has presented a persuasive case for extending, in a limited way, the current exemption until December 15, 2010. The agency notes that the vehicle subject to this petition must comply with the other portions of FMVSS No.

208 and all other applicable Federal motor vehicle safety standards.

VI. Agency Decision

In consideration of the foregoing, we conclude that compliance with the advanced air bag requirements of FMVSS No. 208, *Occupant Crash Protection*, would cause substantial economic hardship to a small-volume manufacturer that has tried in good faith to comply with the standard. We further conclude that granting of an exemption would be in the public interest and consistent with the objectives of traffic safety.

We note that, as explained below, prospective purchasers will be notified that the vehicle is exempted from the specified advanced air bag requirements of FMVSS No. 208. Under 49 CFR § 555.9(b), a manufacturer of an exempted passenger car must affix securely to the windshield or side window of each exempted vehicle a label containing a statement that the vehicle conforms to all applicable Federal motor vehicle safety standards in effect on the date of manufacture "except for Standards Nos. [listing the standards by number and title for which an exemption has been granted] exempted pursuant to NHTSA Exemption No. _____." This label notifies prospective purchasers about the exemption and its subject. Under 49 CFR 555.9(c), this information must also be included on the vehicle's certification label.

We note that the text of 49 CFR 555.9 does not expressly indicate how the required statement on the two labels should read in situations where an exemption covers part but not all of a Federal motor vehicle safety standard. Specifically in the case of FMVSS No. 208, we believe that a statement that the vehicle has been exempted from FMVSS No. 208 generally, without an indication that the exemption is limited to the specified advanced air bag provisions, could be misleading. A consumer might incorrectly believe that the vehicle has been exempted from all of FMVSS No. 208's requirements. Moreover, we believe that the addition of a reference to such provisions by number without an indication of its subject matter would be of little use to consumers, since they would not know the subject of those specific provisions. For these reasons, we believe the two labels should read in relevant part, "except for S19, S21, S23, and S25 (Advanced Air Bag Requirements) of Standard No. 208, *Occupant Crash Protection*, exempted pursuant to * * *." We note that the phrase "Advanced Air Bag

¹² The precise figures are provided in the confidential version of the petition.

Requirements” is an abbreviated form of the title of S14 of FMVSS No. 208.

In accordance with 49 U.S.C. 30113(b)(3)(B)(i), Spyker is granted NHTSA Temporary Exemption No. EX 08-03, from S19, S21, S23 and S25 of FMVSS No. 208. The exemption shall remain in effect until December 15, 2010.

(49 U.S.C. 30113; delegations of authority at 49 CFR 1.50. and 501.8)

Issued on: March 19, 2009.

Ronald L. Medford,

Acting Deputy Administrator.

[FR Doc. E9-6576 Filed 3-24-09; 8:45 am]

BILLING CODE 4910-59-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Ex Parte No. 290 (Sub-No. 4)]

Railroad Cost Recovery Procedures— Productivity Adjustment

AGENCY: Surface Transportation Board.

ACTION: Adoption of a railroad cost recovery procedures productivity adjustment.

SUMMARY: In a decision served on February 5, 2009, we proposed to adopt 1.012 (1.2% per year) as the measure of average change in railroad productivity for the 2003–2007 (5-year) averaging period. This value represented no change from the current measure of 1.2% that was developed for the 2002–2006 period. The decision stated that comments may be filed addressing any

perceived data and computational errors in our calculation. It also stated that, if there were no further action taken by the Board, the proposed productivity adjustment would become effective on March 1, 2009.¹

On February 23, 2009, the Board received comments from the Association of American Railroads (AAR). AAR noted that they could not check the computation of the productivity value without access to certain input data. To ensure that release of this data would not violate our confidentiality practices, we conducted additional analysis of the data AAR referenced. In that review, we found inconsistencies in our application of the program processes used to compute our most recent estimate of productivity change. Therefore, we reopened this proceeding based on material error under 49 U.S.C. 722(c) to correct these inconsistencies and issued a modified annual productivity decision on March 20, 2009. We find that the increase in productivity in 2007 should have been reported as 1.018 instead of 1.004. As a result, the 5-year geometric mean of the annual change in productivity is 1.015 (or 1.5% per year), not 1.012 (or 1.2% per year), as originally reported.

¹ Since 1989, the cost recovery procedures have required that the quarterly rail cost adjustment factor (RCAF) be adjusted for long-run changes in railroad productivity. The ICC Termination Act of 1995 continues this requirement (49 U.S.C. 10708, as revised). The long-run measure of productivity is computed using a 5-year moving geometric mean. See *Productivity Adjustment-Implementation*, 9 I.C.C.2d 1072 (1993).

In its comments, AAR also requested that we eliminate reference to the arithmetic mean over the previous five years, as that mean is not required by regulation. We had originally reported the 2003–2007 productivity growth using both an arithmetic and geometric mean. The AAR is correct to note that the arithmetic mean is not used in any required applications and can be a source of confusion. Therefore, we will no longer publish the arithmetic mean in future Ex Parte No. 290 (Sub-No. 4) decisions.

DATES: *Effective Date:* The productivity adjustment is effective March 20, 2009.

FOR FURTHER INFORMATION CONTACT: Pedro Ramirez, (202) 245-0333. [Federal Information Relay Service (FIRS) for the hearing impaired: 1-800-877-8339.]

SUPPLEMENTARY INFORMATION: Additional information is contained in the Board’s decision, which is available on our Web site <http://www.stb.dot.gov>.

This action will not significantly affect either the quality of the human environment or energy conservation.

Pursuant to 5 U.S.C. 605(b), we conclude that our action will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

Decided: March 20, 2009.

By the Board, Chairman Mulvey, and Vice Chairman Nottingham.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. E9-6622 Filed 3-24-09; 8:45 am]

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