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Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety
Chief Safety Officer.

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA-2020-0091; Notice 2]

Mercedes-Benz USA, LLC, Denial of Petition for Decision of Inconsequential Noncompliance

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

ACTION: Denial of petition.

SUMMARY: Mercedes-Benz AG (“MBAG”) and Mercedes-Benz USA, LLC, (“MBUSA”) (collectively, “Mercedes-Benz”) have determined that certain model year (MY) 2019–2021 Mercedes-Benz motor vehicles do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 135, *Light Vehicle Brake Systems*. Mercedes-Benz filed a noncompliance report dated August 14, 2020. Mercedes-Benz subsequently petitioned NHTSA on September 4, 2020, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This notice announces denial of Mercedes-Benz’s petition.

FOR FURTHER INFORMATION CONTACT: Vince Williams, General Engineer, Office of Vehicle Safety Compliance, the National Highway Traffic Safety Administration (NHTSA), telephone (202) 366-2319, facsimile (202) 366-3018.

SUPPLEMENTARY INFORMATION:

I. Overview: Mercedes-Benz has determined that certain MY 2019–2021 Mercedes-Benz A-Class, CLA-Class, GLA-Class, and GLB-Class motor vehicles do not fully comply with the requirements of paragraph S5.1.2 of FMVSS No. 135, *Light Vehicle Brake Systems* (49 CFR 571.135). Mercedes-Benz filed a noncompliance report dated August 14, 2020, pursuant to 49 CFR part 573, *Defect and*

Noncompliance Responsibility and Reports. Mercedes-Benz subsequently petitioned NHTSA on September 4, 2020, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance*.

This notice of receipt of Mercedes-Benz’s petition was published with a 30-day public comment period, on December 11, 2020, in the **Federal Register** (85 FR 80225). One comment was received. To view the petition and all supporting documents, log onto the Federal Docket Management System (FDMS) website at <https://www.regulations.gov/>, and then follow the online search instructions to locate docket number “NHTSA-2020-0091.”

II. Vehicles Involved: Approximately 56,223 of the following MY 2019–2021 Mercedes-Benz A-Class, CLA-Class, GLA-Class, and GLB-Class motor vehicles, manufactured between October 8, 2018, and July 27, 2020, are potentially involved:

- 2020 Mercedes-Benz A35 AMG
- 2020 Mercedes-Benz CLA45 AMG
- 2021 Mercedes-Benz GLA250
- 2019–2020 Mercedes-Benz A220
- 2020–2021 Mercedes-Benz CLA250
- 2020 Mercedes-Benz CLA35 AMG
- 2021 Mercedes-Benz GLA45 AMG
- 2021 Mercedes-Benz GLA35 AMG
- 2020 Mercedes-Benz GLB250

III. Noncompliance: Mercedes-Benz explains that the noncompliance is that the subject vehicles are not equipped with an acoustic or optical device that warns the driver when the rear brake lining requires replacement, and therefore, does not meet the requirements specified in paragraph S5.1.2 of FMVSS No. 135. Specifically, the subject vehicles are equipped with a service brake system that does not indicate the wear condition of the rear service brakes.

IV. Rule Requirements: Paragraph S5.1.2 of FMVSS No. 135 includes the requirements relevant to this petition. The wear condition of all service brakes shall be indicated by either acoustic or optical devices warning the driver at his or her driving position when lining replacement is necessary or by way of visually checking the degree of brake lining wear, from the outside or underside of the vehicle, utilizing only the tools or equipment normally supplied with the vehicle. The removal of wheels is permitted for this purpose.

V. Summary of Mercedes-Benz’s Petition: The following views and

arguments presented in this section are the views and arguments provided by Mercedes-Benz. They do not reflect the views of NHTSA. Mercedes-Benz describes the subject noncompliance and states its belief that the noncompliance is inconsequential as it relates to motor vehicle safety.

Mercedes-Benz submits that although the subject vehicles are equipped with a service brake system that does not indicate the wear condition of the rear service brakes, the front service brakes use an electrical brake pad sensor to monitor the wear status of the front brake pads. Mercedes-Benz explains that once the front service brakes reach a thickness of 1/8 inch or 3 mm, “a warning lamp will automatically display in the instrument cluster and will remain permanently illuminated until the vehicle is serviced.” Mercedes-Benz states a message will also appear in the instrument cluster stating: “Check brake pads. See Owner’s Manual.” Mercedes-Benz states that while the driver is able to manually extinguish the indicator and message, both the indicator and message will display at each ignition cycle until the brake linings are replaced. Mercedes-Benz states that the front brake lining will not become critical until 6,000 miles after the warning indicator and message first appears.

Mercedes-Benz further explains that “the brake force distribution is in a range of 71.9%–75.5% (front)/28.1%–24.5% (rear)” causing the lining on the front service brakes to wear faster than the lining on the rear service brakes. Therefore, Mercedes-Benz explains, when the driver goes to get the front brakes serviced, “the standard work instructions direct the technician to also inspect and evaluate the status of all other sets of brake pads” and the driver will be advised if the rear brake linings are “not sufficient to make it to the next service interval.” Accordingly, Mercedes-Benz argues the “vehicle’s rear brakes will be inspected by a trained professional technician a number of times before they ever need to be replaced.”

Additionally, Mercedes-Benz states that in the event that the subject vehicle is “taken to an independent repair facility that did not follow Mercedes-Benz’s comprehensive brake pad inspection protocols, there is not an increased safety risk.” According to Mercedes-Benz, if the rear brake lining becomes fully worn, the subject vehicle “would continue to meet the braking distance requirements of FMVSS [No.] 135” due to the brake force distribution described above and the performance of the rear brakes. Furthermore, Mercedes-

Benz argues that if a driver of the subject vehicle had completely worn rear braking linings, “the driver will hear the unmistakable sound of metal being pressed against the brake discs.”

Mercedes-Benz states that it is not aware of any reports or complaints about the issue from the field and it has corrected the condition in production.

Mercedes-Benz concluded by reiterating the subject noncompliance is inconsequential as it relates to motor vehicle safety, and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

Mercedes-Benz’s complete petition and all supporting documents are available by logging onto the Federal Docket Management System (FDMS) website at: <https://www.regulations.gov> and by following the online search instructions to locate the docket number as listed in the title of this notice.

VI. Public Comment: NHTSA received one comment from the public. This comment was submitted by Ricquitta Johnson. The comment only states the docket number for the notice of receipt and does not provide any feedback or address the purpose of this petition.

VII. NHTSA’s Analysis: The burden of establishing the inconsequentiality of a failure to comply with a *performance requirement* in an FMVSS—as opposed to a *labeling requirement with no performance implications*—is more substantial and difficult to meet. Accordingly, the Agency has not found many such noncompliances inconsequential.¹

In determining inconsequentiality of a noncompliance, NHTSA focuses on the safety risk to individuals who experience the type of event against which a recall would otherwise protect.² In general, NHTSA does not consider the absence of complaints or injuries when determining if a noncompliance is inconsequential to

safety. The absence of complaints does not mean vehicle occupants have not experienced a safety issue, nor does it mean that there will not be safety issues in the future.³

NHTSA has evaluated the merits of Mercedes-Benz’s petition and determined that Mercedes-Benz has not met its burden of persuasion that the subject noncompliance is inconsequential to motor vehicle safety.

Paragraph S5.1.2 of FMVSS No. 135 requires all vehicles to have an acoustic or optical warning device on all wheels, or a means of visually checking the degree of brake lining wear from the outside or underside of the vehicle by utilizing only the tools or equipment normally supplied with the vehicle. The removal of wheels is also permitted for this purpose. According to the petition’s description of the system at issue, the front wheels on the subject vehicles meet the brake requirement in that they are equipped with electrical brake pad sensors that monitor the front brake pads and provide an optical warning to the driver once the brake pads reach a certain OEM determined thickness. However, the rear wheels are neither equipped with an optical or audible sensor to alert the driver once the rear brake pads are below the OEM recommended thickness nor are the vehicles supplied with a visual means of checking the degree of brake lining wear from the outside or underside of the vehicle. Specifically, the vehicle is lacking an inspection gauge with the necessary instructions to check the wear of the brake pads on the rear axle from the outside or underside of the vehicle.

In its petition, Mercedes-Benz states that the front brakes provide 72–75% of the braking force. Due to this unequal brake force distribution, the front brake pads will wear out faster than the rear brake pads. Mercedes-Benz contends that anytime the front brake pads are serviced at a Mercedes-Benz workshop or an independent work facility, the standard work instructions are to inspect both the front and rear brake pads to determine if the rear brake pads also need to be replaced. Mercedes-Benz also states that if the rear brake pads are not serviced at the time when the front pads are inspected and the rear brake pads wear out, even completely, before the next scheduled brake inspection, the

front brakes and brake distribution will always be adequate to meet the stopping requirements of FMVSS No. 135.

Mercedes-Benz claims that in the case where the rear brake pads are completely worn out, the driver will hear an unmistakable sound of metal being pressed against the brake discs which will alert them that the pads are worn out.

NHTSA finds that the repair scenario described by Mercedes-Benz does not account for all drivers of Mercedes-Benz vehicles. Some drivers may not follow brake service or maintenance schedules. Without receiving a warning that the brake pads need to be replaced, these drivers could continue to operate the vehicle for an extended period once the rear brake pads reach the OEM determined minimum thickness. In addition, the “do it yourself (DIY)” customers who may not have the technical expertise of a Mercedes-Benz technician, could potentially miss checking the condition of the rear brake pads during brake servicing and, without a warning, continue to operate the vehicle for an extended period once the rear brake pads reach the OEM determined minimum thickness.

Although Mercedes-Benz claims that the brake force distribution described above and the performance of the front brakes are enough to meet the stopping requirements of the regulation in the event the rear brake lining is completely worn, Mercedes-Benz provided no data to support this assertion. Additionally, with regard to Mercedes-Benz’ claim that the driver would hear the unmistakable sound of metal on the rear disc once the rear pads completely wear out, no data was provided to support this contention and further, the purpose of the standard is to notify the driver prior to reaching such an extreme brake pad wear state that most of the brake power on that wheel is lost. Mercedes-Benz has not met its burden of persuasion and for the reasons described herein NHTSA does not find that the subject noncompliance is inconsequential to motor vehicle safety.

VIII. NHTSA’s Decision: In consideration of the foregoing, NHTSA has decided that Mercedes-Benz has not met its burden of persuasion that the subject FMVSS No. 135 noncompliance is inconsequential to motor vehicle safety. Accordingly, Mercedes-Benz’s petition is hereby denied, and Mercedes-Benz is consequently obligated to provide notification and a free remedy for that noncompliance under 49 U.S.C. 30118 and 30120.

¹ Cf. *Gen. Motors Corporation; Ruling on Petition for Determination of Inconsequential Noncompliance*, 69 FR 19897, 19899 (Apr. 14, 2004) (citing prior cases where noncompliance was expected to be imperceptible, or nearly so, to vehicle occupants or approaching drivers).

² See *Gen. Motors, LLC; Grant of Petition for Decision of Inconsequential Noncompliance*, 78 FR 35355 (June 12, 2013) (finding noncompliance had no effect on occupant safety because it had no effect on the proper operation of the occupant classification system and the correct deployment of an air bag); *Osram Sylvania Prods. Inc.; Grant of Petition for Decision of Inconsequential Noncompliance*, 78 FR 46000 (July 30, 2013) (finding occupant using noncompliant light source would not be exposed to significantly greater risk than occupant using similar compliant light source).

³ See *Morgan 3 Wheeler Limited; Denial of Petition for Decision of Inconsequential Noncompliance*, 81 FR 21663, 21666 (Apr. 12, 2016); see also *United States v. Gen. Motors Corp.*, 565 F.2d 754, 759 (D.C. Cir. 1977) (finding defect poses an unreasonable risk when it “results in hazards as potentially dangerous as sudden engine fire, and where there is no dispute that at least some such hazards, in this case fires, can definitely be expected to occur in the future”).

(Authority: 49 U.S.C. 30118, 30120; delegations of authority at 49 CFR 1.95 and 501.8)

Cem Hatipoglu,

Acting Associate Administrator for Enforcement.

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2021–0037; Notice 2]

BMW of North America, LLC, Grant of Petition for Decision of Inconsequential Noncompliance

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

ACTION: Grant of petition.

SUMMARY: BMW of North America, LLC, a subsidiary of BMW AG, Munich, Germany, (collectively “BMW”), has determined that certain Model Year (MY) 2018–2021 BMW K 1600 motorcycles do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 123, *Motorcycle Controls and Displays*. BMW filed an original noncompliance report dated March 18, 2021, and, subsequently, BMW petitioned NHTSA on April 9, 2021, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This notice announces the grant of BMW’s petition.

FOR FURTHER INFORMATION CONTACT: Frederick Smith, General Engineer, NHTSA, Office of Vehicle Safety Compliance, (202) 366–7487.

SUPPLEMENTARY INFORMATION:

I. Overview

BMW has determined that certain MY 2018–2021 BMW K 1600 motorcycles do not fully comply with the requirements of paragraph S5.2.5 of FMVSS No. 123, *Motorcycle Controls and Displays* (49 CFR 571.123). BMW filed a noncompliance report dated March 18, 2021, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports*. BMW subsequently petitioned NHTSA on April 9, 2021, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance*.

Notice of receipt of BMW’s petition was published with a 30-day public comment period, on June 17, 2022, in the **Federal Register** (87 FR 36579). No comments were received. To view the petition and all supporting documents log onto the Federal Docket Management System (FDMS) website at <https://www.regulations.gov/>. Then follow the online search instructions to locate docket number “NHTSA–2021–0037.”

II. Motorcycles Involved

Approximately 4,966 MY 2018–2021 BMW K 1600 GTL, B, and Grand America motorcycles manufactured between April 13, 2017, and February 23, 2021, are potentially involved.

III. Noncompliance

BMW explains that the subject motorcycles are equipped with passenger footrests that fold upward and slightly forward, but not rearward, when not in use, and therefore do not fully comply with the requirements specified in paragraph S5.2.5 of FMVSS No. 123.

IV. Rule Requirements

Paragraph S5.2.5 of FMVSS No. 123 includes the requirements relevant to this petition. Footrests shall be provided for each designated seating position. Each footrest for a passenger other than an operator shall fold rearward and upward when not in use.

V. Summary of BMW’s Petition

The following views and arguments presented in this section, “V. Summary of BMW’s Petition,” are the views and arguments provided by BMW and do not reflect the views of the Agency. BMW describes the subject noncompliance and contends that the noncompliance is inconsequential as it relates to motor vehicle safety.

BMW says that that while “there are slight differences in the geometry and mounting locations” between each model of the affected motorcycles, the passenger footrest “is attached to the mounting bracket and the bracket is bolted to the motorcycle frame.” BMW notes that “the mounting locations for the rider footrest are identical, but for the K 1600 GTL, the mounting location for the passenger footrest is higher.”

BMW states that despite there being “no possibility for ground contact to occur with the passenger footrest” while in a banked turn, BMW conducted an analysis “to determine the distance between the passenger footrest and the ground when other motorcycle

components contact the ground.”¹ BMW also conducted test rides with the affected K 1600 GTL and K 1600 Grand America model motorcycles.

For the analysis, BMW examined the “various components that could contact the ground during a banked turn” and “the lean angles at which a specific component will contact the ground.” BMW explains that the “lean angle is the angle that is subtended by the intersection of a plane passing through the longitudinal axis of the motorcycle when it is upright (vertical), and a plane passing through the longitudinal axis of the motorcycle when the motorcycle is at a specific angle (*i.e.*, the lean angle) from upright (vertical).”

As a result of the analysis, BMW found that it is not possible for the passenger footrest on the subject vehicles to contact the ground while in a banked turn. Furthermore, BMW says that “if the lean angle is increased, there are a number of motorcycle components that would contact the ground and, at those points, the passenger footrest is still approximately several inches from the ground.”

BMW says that it has not received any complaints from vehicle owners and is not aware of any accidents or injuries that have occurred because of this issue. Additionally, BMW says that vehicle production has been corrected.

BMW concludes that the subject noncompliance is inconsequential as it relates to motor vehicle safety and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

VI. NHTSA’s Analysis

The burden of establishing the inconsequentiality of a failure to comply with a *performance requirement* is substantial and difficult to meet. Accordingly, the Agency has not found many such noncompliances inconsequential.²

In determining inconsequentiality of a noncompliance, NHTSA focuses on the safety risk to individuals who experience the type of event against which a recall would otherwise protect.³ In general, NHTSA does not

¹ Details of BMW’s analysis can be found in its petition at <https://www.regulations.gov/document/NHTSA-2021-0037-0001>.

² Cf. *Gen. Motors Corporation; Ruling on Petition for Determination of Inconsequential Noncompliance*, 69 FR 19897, 19899 (Apr. 14, 2004) (citing prior cases where noncompliance was expected to be imperceptible, or nearly so, to vehicle occupants or approaching drivers).

³ See *Gen. Motors, LLC; Grant of Petition for Decision of Inconsequential Noncompliance*, 78 FR