

(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.”<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup> In general, NHTSA does not

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

<sup>2</sup> 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).

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

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.<sup>4</sup>

NHTSA has evaluated the merits of the inconsequential noncompliance petition and supplemental materials submitted by BMW and has determined that this particular noncompliance is inconsequential to motor vehicle safety. Specifically, the Agency considered the following when making its decision:

In pertinent part, S5.2.5 requires that each footrest for a passenger other than an operator fold rearward and upward when not in use. NHTSA has issued several interpretations of section S5.2.5. In a letter dated February 16, 1982, to American Honda Motor Co., Inc., with respect to a proposed footboard design, the then Chief Counsel commented that “[w]e consider that the purpose of S5.2.5 is to prevent accidents caused by rigid footrests contacting the ground in a banking turn.”<sup>5</sup> Various other NHTSA letters provided the same interpretation of the footrest requirement in S5.2.5.<sup>6</sup>

BMW conducted a measurement analysis for the K1600 GTL Motorcycle including lean angle to determine the distance between the passenger footrest and the ground when other motorcycle components contact the ground during a banked turn. The analysis indicated that the first component that would

contact the ground would be the rider’s footrest at 39 degrees lean angle, followed by other components such as the engine spoiler that would contact the ground at 43 degrees. Next, components including the center stand would contact the ground at 46 degrees. The BMW analysis demonstrated that, as the motorcycle lean angle increases, all of these components contact the ground well before the passenger footrest would make contact with the ground.

Additionally, BMW conducted a measurement analysis for the K1600 B Motorcycle including lean angle to determine the distance between the passenger footrest and the ground when other motorcycle components contact the ground during a banked turn. The analysis indicated that the first component that would contact the ground would be the rider’s footrest at 39 degrees, followed by other components such as the engine spoiler that would contact the ground at 42 degrees. Next, components including the engine spoiler would contact the ground at 43.5 degrees. According to BMW’s analysis, as the motorcycle lean angle increases, all of these components contact the ground before the passenger footrest would make contact with the ground.

Furthermore, BMW conducted a measurement analysis for the K1600 Grand America Motorcycle including lean angle to determine the distance between the passenger footrest and the ground when other motorcycle components contact the ground during a banked turn. The analysis indicated that the first component that would contact the ground would be the rider’s floorboard at a lean angle of 34.5 degrees, followed by other components such as the rider footrest that would contact the ground at 39 degrees. Next, components including the silencer would contact the ground at 42 degrees. As motorcycle lean angle increases, all of these components contact the ground well before the passenger footrest would make contact with the ground.

BMW also conducted real-world test rides with a K 1600 GTL and with a K 1600 Grand America. On-board videos were taken to provide a close-up view of certain components prior to, and at, contact with the ground. The videos confirmed the findings from the measurement analysis.

NHTSA considers the purpose of S5.2.5 is to prevent accidents caused by rigid passenger footrests contacting the ground when a motorcycle is leaned over in a turn. BMW’s measurement analysis and real-world testing clearly demonstrate there is no possibility for

the passenger footrests to contact the ground while the motorcycle is under control in a banked turn because numerous other components would contact the ground first, preventing either passenger footrest from ever contacting the ground. Therefore, this noncompliance is inconsequential to motor vehicle safety.

## VII. NHTSA’s Decision

In consideration of the foregoing, NHTSA finds that BMW has met its burden of persuasion that the subject FMVSS No. 123 noncompliance in the affected motorcycles is inconsequential to motor vehicle safety. Accordingly, BMW’s petition is hereby granted, and BMW is consequently exempted from the obligation of providing notification of, and a free remedy for, that noncompliance under 49 U.S.C. 30118 and 30120.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, this decision only applies to the subject motorcycles that BMW no longer controlled at the time it determined that the noncompliance existed. However, the granting of this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant motorcycles under their control after BMW notified them that the subject noncompliance existed.

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

**Otto G. Matheke III,**

*Director, Office of Vehicle Safety Compliance.*

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## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

[Docket No. NHTSA–2020–0064; 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).

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).

<sup>4</sup> 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”).

<sup>5</sup> <https://www.nhtsa.gov/interpretations/aiaam3524>.

<sup>6</sup> An earlier interpretation from 1973 also to American Honda stated that S5.2.5 regulates “only the direction in which footrests shall retract, so that if they are inadvertently left down when not in use they will fold rearward and upward should they hit an obstacle while the motorcycle is travelling forward.” That interpretation suggests that contact of the footrests with obstacles other than the ground or roadway may be a consideration. However, all other agency interpretations of S5.2.5 focus on footrest contact with the ground/roadway. See <https://www.nhtsa.gov/interpretations/nht73-622>.