

Further, Tesla believes that the lack of ESC systems on the Roadster will not unduly compromise safety based on the intended use of the Roadster. The Roadster is a low, two-seat sport coupe. Tesla believes that, while the Roadster is capable of handling slippery roads due to ice and snow, most owners either do not use their Roadsters during winter months or sharply limit their use.

Tesla also contends that the failure to obtain the exemption would result in substantial economic hardship. Tesla states that it has incurred cumulative net losses of \$464 million since inception and nearly \$50 million in the first three months of 2011. Tesla states that the loss of the ability to sell the Roadster in the United States could adversely impact its compliance with financial covenants with the U.S. Department of Energy, potentially depriving it of a source of capital. Further, because the Roadster is the only vehicle Tesla offers for sale in the United States, Tesla contends that the cancellation of the program would result in a significant loss of market for Tesla.

Tesla states that it spent between \$2 million and \$3 million developing an ESC system for the Model S. Tesla does not have a precise cost to equip the Roadster with an ESC system, but applying the per vehicle cost of its Model S to the Roadster, it would cost as much as \$30,000 per vehicle to equip ESC systems onto Roadsters planned to be sold under the exemption.

Tesla notes that its chassis is based upon the Lotus Elise, which is equipped with ABS, but not an ESC system. Because Lotus is ending production of the Elise for the United States market by August 2011, Lotus will not invest in redesigns or additions to existing vehicle systems, including changes to comply with the ESC system requirements. Tesla states that, given the small number of Roadsters planned for production during the exemption period and the short time frame available to Tesla, it is technologically and economically infeasible to develop an ESC system for the Roadster.

Tesla contends that it has exerted good faith efforts to achieve compliance with FMVSS No. 126. Tesla has developed an ESC system for the upcoming Model S, which is scheduled to be introduced in the United States in 2012. Tesla also states that it has included a number of features not mandated by the FMVSSs, including the TCS system discussed earlier. Tesla notes that it had intended on ending Roadster production prior to September 1, 2011 and, thus, would not have been required to equip its vehicles with ESC

systems. Thus, Tesla did not focus development activities on meeting the requirements of FMVSS No. 126. However, due to a shift in production priorities at Lotus, Tesla was informed that an additional quantity of Roadster gliders could be produced in 2011.

Tesla also believes that the exemption is in the public interest. Tesla states that, without the exemption, it may be required to lay off a significant number of employees. Further, Tesla notes that denying this petition would result in fewer electric vehicles for sale in the United States. Finally, Tesla believes that continuing to sell a long range, highway-capable, battery-powered electric vehicle in the United States will lead to more electric vehicles entering the fleet.

#### IV. Completeness and Comment Period

Upon receiving a petition, NHTSA conducts an initial review of the petition with respect to whether the petition is complete and whether the petitioner appears to be eligible to apply for the requested petition. The agency has tentatively concluded that the petition from Tesla is complete and that Tesla is eligible for a temporary exemption. The agency has not made any judgment on the merits of the application, and is placing a non-confidential copy of the petition in the docket.

We are providing a 30-day comment period. After considering public comments and other available information, we will publish a notice of final action on the application in the **Federal Register**.

Issued on: August 2, 2011.

**Christopher J. Bonanti,**

*Associate Administrator for Rulemaking.*

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## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

[Docket No. NHTSA-2008-0181, Notice 2]

#### Pagani Automobili SpA; Denial of Application for Temporary Exemption From Advanced Air Bag Requirements of FMVSS No. 208

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

**ACTION:** Notice of denial of petition for temporary exemption from certain provisions of Federal Motor Vehicle Safety Standard (FMVSS) No. 208, *Occupant Crash Protection*.

**SUMMARY:** This notice denies the petition of Pagani Automobili SpA (Pagani)<sup>1</sup> for exemption from certain advanced air bag requirements of FMVSS No. 208, for the Huayra model.<sup>2</sup> The basis for the application is that the petitioner avers compliance would cause substantial economic hardship and that it has tried in good faith to comply with the standard.<sup>3</sup> The agency has determined that Pagani has failed to demonstrate that compliance would cause substantial economic hardship. Furthermore, the agency is unable to find that an exemption would be consistent with the public interest or the objectives of the Safety Act. This action follows our publication in the **Federal Register** of a document announcing receipt of Pagani's petition and soliciting public comments.

**FOR FURTHER INFORMATION CONTACT:** William H. Shakely, Office of the Chief Counsel, NCC-112, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., West Building 4th Floor, Room W41-326, Washington, DC 20590. Telephone: (202) 366-2992; Fax: (202) 366-3820.

#### SUPPLEMENTARY INFORMATION:

##### I. Advanced Air Bag Requirements and Small Volume Manufacturers

In general, frontal air bags for drivers and right front passengers have large net benefits. NHTSA estimates that they saved 30,232 lives from 1987 through the end of 2009.<sup>4</sup> Air bags reduce overall fatality risk in purely frontal crashes by 29 percent. They reduce overall fatality risk by 12 percent for drivers of passenger cars, and by 14 percent for right front passengers of passenger cars.<sup>5</sup>

In 2000, NHTSA published a final rule that upgraded the requirements for air bags in passenger cars and light trucks, requiring what are commonly known as "advanced air bags."<sup>6</sup> The upgrade was designed to meet the twin goals of improving protection for occupants of all sizes, belted and

<sup>1</sup> Pagani was formerly known by Modena Design, the name reflected in the notice of receipt of the petition.

<sup>2</sup> In the original petition, this model was referred to as the C9 model. In subsequent submissions, the company indicated that the model is now known as the Huayra.

<sup>3</sup> To view the application, go to <http://www.regulations.gov> and enter the docket number set forth in the heading of this document.

<sup>4</sup> Traffic Safety Facts—2009 Data—Occupant Protection, NHTSA Report No. DOT HS 811 390, Washington, DC, 2010.

<sup>5</sup> Kahane, C.J., Lives Saved by the Federal Motor Vehicle Safety Standards and Other Vehicle Safety Technologies, 1960–2002, NHTSA Technical Report No. DOT HS 809 833, Washington, 2004, pp. 108–115.

<sup>6</sup> See 65 FR 30680 (May 12, 2000).

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 agency estimated that the upgraded requirements had the potential to reduce fatalities and nonfatal injuries from crashes, as well as protect more than 95 percent of the at-risk population (out-of-position infants, children, and small-statured adults) from the risks presented by air bag deployment.

The issuance of the advanced air bag requirements was a culmination of a comprehensive plan that the agency announced in 1996 to address the adverse effects of some air bag designs. 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 the end of the phase-in period, i.e., September 1, 2006.

In recent years, NHTSA has addressed a number of petitions for exemption from the advanced air bag requirements of FMVSS No. 208. The majority of these requests have come from small manufacturers, each of which has petitioned on the basis that compliance would cause it substantial economic hardship and that it has tried in good faith to comply with the standard. In recognition of the more limited resources and capabilities of small motor vehicle manufacturers, authority to grant exemptions based on substantial economic hardship and good faith efforts was added to the Vehicle Safety Act in 1972 to enable the agency to give those manufacturers additional time to comply with the Federal safety standards.

NHTSA has granted a number of these petitions, usually in situations in which the manufacturer is supplying standard air bags in lieu of advanced air bags.<sup>7</sup> In addressing these petitions, NHTSA recognized that small manufacturers faced particular difficulties in acquiring or developing advanced air bag systems. Specifically, the agency noted that major air bag suppliers initially concentrated their efforts on working with large volume manufacturers and small volume manufacturers had limited access to advanced air bag technology.

Notwithstanding those previous grants of exemption, NHTSA has considered two key issues—

(1) Whether it is in the public interest to continue to grant such petitions, particularly in the same manner as in the past, given the number of years these requirements have now been in effect and the benefits of advanced air bags, and

(2) to the extent such petitions are granted, what plans and countermeasures to protect child and infant occupants, short of compliance with the advanced air bag requirements, should be expected.<sup>8</sup>

While the exemption authority was created to address the problems of small manufacturers and the agency wishes to be appropriately attentive to those problems, it was not anticipated by the agency that use of this authority would result in small manufacturers being given much more than relatively short term exemptions from recently implemented safety standards, especially those addressing particularly significant safety problems.

Over time, the number of petitions for exemption from the advanced air bag requirements has decreased, and several small manufacturers that previously received exemptions now produce vehicles that comply with the advanced air bag requirements. The majority of current petitions before the agency are petitions for limited extension of previously granted exemptions.

Given the passage of time since the advanced air bag requirements were established and implemented, and in light of the benefits of advanced air bags, NHTSA has determined that it is not in the public interest to continue to grant exemptions from these requirements in the same circumstances and under the same terms as in the past.

<sup>8</sup> The agency requested comments on these issues in recent notices of receipt. *See, e.g.*, Notice of Receipt of Application of Spyker Automobielen, B.V., 76 FR 19179 (Apr. 6, 2011); Notice of Receipt of Applications of Koenigsegg AB and Morgan Motor Company Limited, 76 FR 20082 (Apr. 11, 2011). Advocates for Highway and Auto Safety (Advocates) concurred with NHTSA's concerns regarding the continuation of such exemptions and the agency's conclusions regarding the availability of advanced air bag technology. Docket Nos. NHTSA–2011–0030–0006, NHTSA–2011–0006–0004. Vision Motor Cars, Inc. (VMCI), agreed with NHTSA's concerns about advanced air bag exemptions but recommended that a distinction be made between initial exemptions and extensions, with extensions receiving more scrutiny. Docket No. NHTSA–2011–0030–0003. Koenigsegg Automotive AB (Koenigsegg) commented that a change to NHTSA policy regarding advanced air bag exemptions would be justified if there were evidence of a safety problem with the existing policy, but that, in the absence of such evidence, such exemptions should be considered in accordance with past policy. Docket No. NHTSA–2011–0006–0005.

The costs of compliance with the advanced air bag requirements of FMVSS No. 208 are costs that all entrants to the U.S. automobile marketplace should expect to bear. Furthermore, NHTSA understands that, in contrast to the initial years after the advanced air bag requirements went into effect, low volume manufacturers now have access to advanced air bag technology.<sup>9</sup> Accordingly, NHTSA concludes that the expense of advanced air bag technology is not now sufficient, in and of itself, to justify the grant of a petition for a hardship exemption from the advanced air bag requirements.

## II. Statutory Basis for Requested Part 555 Exemption

The National Traffic and Motor Vehicle Safety Act (Safety Act), codified as 49 U.S.C. Chapter 301, provides the Secretary of Transportation authority to exempt, on a temporary basis and under specified circumstances, motor vehicles from a motor vehicle safety standard or bumper standard. This authority is set forth at 49 U.S.C. 30113. The Secretary has delegated the authority for implementing this section to NHTSA.

The Act authorizes the Secretary to grant a temporary exemption to a manufacturer of not more than 10,000 motor vehicles annually, on such terms as the Secretary deems appropriate, if the Secretary finds that the exemption would be consistent with the public interest and also finds that compliance with the standard would cause substantial economic hardship to the manufacturer and that the manufacturer has tried to comply with the standard in good faith.

NHTSA established Part 555, *Temporary Exemption from Motor Vehicle Safety and Bumper Standards*, to implement the statutory provisions concerning temporary exemptions. Under Part 555, a petitioner must provide specified information in submitting a petition for exemption. These requirements are specified in 49 CFR 555.5, and include a number of

<sup>9</sup> The recent petitions for exemption support NHTSA's belief that advanced air bag technology has become more accessible to small volume manufacturers in recent years. In addition to the fact that several manufacturers who received exemptions in the past have been able to produce fully-compliant vehicles, many of the manufacturers who have petitions pending before the agency have been developing advanced air bag systems in-house or are working with suppliers to develop such systems. *See, e.g.*, Notice of Receipt of Application of Spyker Automobielen, B.V., 76 FR 19179 (Apr. 6, 2011) (manufacturer is working with a supplier to develop advanced air bag system); Notice of Receipt of Petition of Lotus Cars Ltd., 76 FR 33406 (June 8, 2011) (manufacturer has another model that fully complies with the advanced air bag requirements).

<sup>7</sup> *See, e.g.*, Grant of petition of Panoz, 72 FR 28759 (May 22, 2007); Grant of petition of Koenigsegg Automotive AB, 72 FR 17608 (April 9, 2007).

items. Foremost among them are that the petitioner must set forth the basis of the application under § 555.6, and the reasons why the exemption would be in the public interest and consistent with the objectives of 49 U.S.C. Chapter 301.

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 state that a manufacturer has substantial responsibility as manufacturer of a vehicle simply because it owns or controls a second manufacturer that assembled that vehicle. However, the agency considers the statutory definition of “manufacturer” (49 U.S.C. 30102) 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.

### III. Pagani's Petition

**Background**—Pagani, an Italian corporation, was formed in 1991 and has been producing a small number of luxury sports cars since 1999. Pagani currently produces one vehicle, the C8 Zonda, which is not sold in the United States, but the company has been developing a new vehicle, the Huayra, a two-seat sports car, which it plans on selling in the United States and for which it seeks an exemption. The Huayra Pagani submitted its original petition in 2007 and a notice of receipt was published on November 25, 2008. Pagani subsequently requested that the agency delay a decision on its petition because of changes in the company's production plans. In 2008, 2010, and 2011, the company submitted supplementary information regarding its financial situation and its compliance efforts. This information is included in the summary below and the submissions have been posted to the docket.

**Requested Exemption**—Pagani originally requested a three-year exemption from paragraph S14 of FMVSS No. 208, *Occupant Crash*

*Protection*, which establishes the advanced air bag requirements. In supplemental submissions, the company stated that it plans on beginning the production of the Huayra at the end of 2011 and clarified its plans with respect to S14 of FMVSS No. 208, stating that it will certify its vehicles to comply with the 30 mph belted 50th percentile male barrier impact test (S14.5.1(a)). Pagani has also since stated that it plans to certify to the unbelted 50th percentile male barrier impact test in force prior to September 1, 2006 (S5.1.2(a)) (with the unbelted sled test in S13 being an acceptable option for that requirement). Finally, Pagani indicated that it has accelerated its compliance testing and would only need a two-year exemption.

**Eligibility**—Pagani asserted that it produces, on average, no more than 25 vehicles per year. The company estimated that if the requested exemption were granted, it would sell 35 to 45 vehicles per year, 6 to 12 vehicles of which would be sold in the United States. The original petition stated that Pagani contracts out some aspects of vehicle development, but asserted that these are arms-length transactions.

**Economic Hardship**—The agency notes that the material submitted by Pagani consists of its original 2007 petition, as well as updated financial information the company provided in 2008, 2010, and 2011. In determining the existence of substantial economic hardship, we rely primarily on the most recent financial information. The original petition was based on estimated compliance costs at the time and financial projections for 2009 through 2011. Given the passage of time and the updated financial information, these projections are no longer relevant. The most recent financial records provide updated estimated compliance costs for the advanced air bag program as well as financial projections for 2011 through 2014, one set in the event an exemption is granted and one set in the event the exemption is denied. The most recent records, as well as Pagani's accompanying descriptions, reflect the company's current financial condition and the company's estimates of the projected effect of a grant or denial of the exemption petition. These records, and the relevant factual information from past submissions, are summarized below.

Pagani submitted financial records from 2004 to 2010 showing net incomes ranging from €13,327 to €832,000, with a total net income of approximately €1,947,846. The company also submitted projections estimating that if

the petition for exemption is denied and no vehicles are sold in the United States, the company would make an estimated €5,398,000 in net income during the period of 2011 through 2014, compared to €8,613,000 in net income during the same period if an exemption were granted. The company asserted that the difference in gross revenue between granting and denying the exemption is approximately €34,000,000, and the financial records indicate a difference in projected net income of approximately €3,215,000.

Although Pagani has realized profits in recent years, the company asserted that immediate compliance with the advanced air bag requirements will cause substantial economic hardship. Specifically, Pagani stated that the company only operates on the cash on hand without lines of credit or debt financing, and its small profit margin is necessary to guard it from market fluctuations.

Pagani stated that without an exemption, it will not be able to fund the advanced air bag program, which is estimated as costing €4,000,000, from its non-U.S. sales and will not be able to enter the U.S. market until at least 2015.

Finally, Pagani stated that its production capacity is currently limited to approximately 25 units per year worldwide. The company indicated that its plan is to expand its production capacity to 50 to 60 units per year worldwide by building a new factory. However, the company stated that the new factory represents a significant investment for the company and could not be justified without the revenue from U.S. sales. Accordingly, construction of this new facility cannot begin unless an exemption is granted.

**Compliance Efforts**—Pagani asserted that small volume manufacturers have delayed access to “off-the-shelf” systems and must wait for technology to “trickle down” from larger manufacturers and suppliers. The company further noted that because small volume manufacturers build so few vehicles, the costs of developing custom advanced air bag systems, as compared to potential profits, discourages some air bag suppliers from working with these manufacturers. In a supplemental submission, the company stated that 65 percent of its costs have been focused on developing a U.S. version of the Huayra.

Pagani indicated that it has partnered with Applus+ IDIADA, a Spanish engineering services company that has previously provided advanced air bag development solutions and testing for small volume manufacturers, and Bosch Engineering GmbH to develop its

advanced air bag systems. Pagani estimated that the cost of developing an advanced air bag system is €4,000,000. The project began in 2009 and was initially scheduled to be completed at the beginning of 2014, at which time Pagani would begin production of fully-compliant Huayra vehicles. As discussed above, Pagani indicated that it has accelerated its testing schedule and is requesting a two year, rather than, three year, exemption from the advanced air bag requirements.

According to Pagani, the vehicles produced during the exemption period will be equipped with a standard air bag system for both the driver and passenger seating positions and will comply with the pre-S14 provisions of FMVSS No. 208. Additionally, Pagani stated that it will certify its vehicles to comply with the belted 50th percentile male barrier impact test (S14.5.1(a)) and to the unbelted 50th percentile male barrier impact test in force prior to September 1, 2006 (S5.1.2(a)) (with the unbelted sled test in S13 being an acceptable option for that requirement).

**Public Interest**—Pagani stated that the Huayra comes equipped with numerous features that enhance safety, and that the granting of this exemption would be consistent with the public interest and the objectives of the Safety Act (*see* 49 U.S.C. chapter 301). The petitioner asserted that the vehicles incorporate design features that have significant safety benefits. These include the use of carbon-fiber technology, which provides great strength at a low weight. The fuel tank is incorporated into the carbon chassis for maximum protection, and the chassis also incorporates the monocoque protective “cell” design. Enhanced by a metal roll cage and alloy front and rear chassis subframes, the vehicle provides a significant safety benefit in the event of a crash or rollover. The monocoque design can stay rigid during repeated impacts, providing an additional source of protection in the event of a potentially penetrating impact. Pagani indicated that these features serve, in part, to increase the crashworthiness of the vehicle. Additionally, the company indicated that all exempted cars will have standard air bags which comply with the pre-S14 provisions of FMVSS No. 208.

Pagani stated that the risk to the public will be minimal given that only 6 to 12 vehicles will be sold per year in the United States, each vehicle is only expected to be driven approximately 2,500 miles annually, and children will

rarely ride in the vehicle.<sup>10</sup> Finally, Pagani argued that if an exemption is not granted, U.S. consumer choice would be adversely affected.

#### IV. Notice of Receipt

On November 25, 2008, we published in the **Federal Register** (73 FR 71725) a notice of receipt of Pagani’s petition for temporary exemption, and provided an opportunity for public comment. We received one comment, which was from Pagani, containing additional information regarding the company’s financial situation and compliance efforts as well as a request to delay a decision on the petition because of changes to the Huayra’s production schedule.

#### V. Agency Analysis and Decision

In this section, we provide our analysis and decision regarding Pagani’s temporary exemption request concerning advanced air bag requirements of FMVSS No. 208. As discussed below, we are denying Pagani’s petition because Pagani has failed to demonstrate that compliance would cause substantial economic hardship and because we are unable to conclude that an exemption would be in the public interest and consistent with the objectives of the Safety Act.

**Eligibility**—As discussed above, a manufacturer is eligible to apply for an economic 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). Pagani asserted that it produces, on average, no more than 25 vehicles per year. The company estimated that if the requested exemption were granted, it would sell 35 to 45 vehicles per year, 6 to 12 vehicles of which would be sold in the United States. The original petition stated that Pagani contracts out some aspects of vehicle development, but asserted that these are arms-length transactions.

Accordingly, we have determined that Pagani is eligible to apply for an economic hardship exemption.

**Substantial Economic Hardship**—Pagani asserted that the difference between granting and denying the exemption is an approximately €34,000,000 reduction in gross revenue from 2011 to 2014. Additionally, the financial records show a reduction in projected net income of approximately €3,215,000 from 2011 to 2014. Pagani

<sup>10</sup> In the original petition, the company also indicated that the vehicle would be equipped with an on-off air bag switch. In a supplemental submission to the agency, the company indicated that no on-off switch would be installed.

stated that without an exemption, it will not be able to fund the advanced air bag program, which is estimated as costing approximately €4,000,000, from its non-U.S. sales. The company further stated that, in the event of a denial, the company will not be able to enter the U.S. market until at least 2015. Additionally, denial would postpone construction of a new factory needed to increase the company’s production capacity.<sup>11</sup>

The touchstone that NHTSA uses in determining the existence of substantial economic hardship is an applicant’s financial health, as indicated by its income statements. NHTSA has tended to consider a continuing and a cumulative net loss position as strong evidence of hardship.<sup>12</sup> The theory behind NHTSA’s rationale is that, if a company with a continuing net loss is required to divert its limited resources to resolve a compliance problem on an immediate basis, it may be unable to use those resources to solve other problems that may affect its viability. In this case, Pagani has made profits in recent years, and based on its projections, would continue to do so even if its petition is denied and the company is limited to selling vehicles outside of the United States.

As noted by Pagani in its petition, the existence of recent net income does not necessarily preclude a finding of substantial economic hardship. In situations where a petitioner’s financial records show recent net income, the agency balances the net income against the costs of compliance and the effect of a denial on the company. In past petitions, we have noted that even where a small enterprise manages a net

<sup>11</sup> In its original petition, Pagani also asserted that, without an exemption, it would be unable to fund the €13,000,000 in investment costs it would have to make in the Huayra from 2009 to 2011. In a July 9, 2010 e-mail to the agency, Pagani briefly noted that investment in the Huayra had risen to €20,000,000 and that this would be funded by its net income from 2008 through 2010 as well as U.S. sales from 2011 to 2013 under an exemption. However, no further discussion of these investment costs was made in the company’s most recent financial records or its February 22, 2011, description of its financial situation and the effect of a denial of the exemption on the company. In any event, the company did not explain in its original petition, or in any of its subsequent submissions, why all of the investment costs for the Huayra have to be recouped immediately during the exemption period, particularly in light of the long model life of the vehicle. See Denial of petition of Ferrari S.p.A., 55 FR 3785 (Feb. 5, 1990) (the agency found unpersuasive the manufacturer’s bare assertion that an exemption was necessary to recoup its investment without further explanation as to why this recovery had to begin immediately).

<sup>12</sup> See Grant of petition of Bugatti Automobili, S.p.A., 59 FR 11649, 11650 (Mar. 11, 1994).

profit, the agency may find that hardship exists.<sup>13</sup>

In this case, Pagani earned profits of approximately €1,947,846 from 2004 to 2010. This amount is less than the €4,000,000 it will cost to complete the advanced air bag program. Accordingly, immediate compliance would result in net losses. However, considering the effect of a denial on the company, we believe that the fact that immediate compliance would cause Pagani to suffer short-term losses is insufficient to demonstrate substantial economic hardship.

Examining Pagani's petition and supplemental submissions, it appears that the hardship from denying the petition consists of decreased anticipated profits and the inability to enter the U.S. market until it fields a fully compliant vehicle. With an exemption, Pagani projects earning €8,613,000 in net income from 2011 to 2014. Without an exemption, Pagani projects earning €5,398,000 in net income during the same period. Based on these projections, Pagani would continue to earn increasing net income each year without an exemption. Additionally, the amount of net income projected over the next several years if the petition is denied would appear to cover the costs of the €4,000,000 advanced air bag program.

In contrast to most of the manufacturers that have been granted exemptions, Pagani has historically made profits and projects increasing profits even in the event that an exemption is denied.<sup>14</sup> Additionally, unlike several profitable manufacturers that have been granted exemptions in the past, Pagani currently only sells vehicles outside of the U.S., and the company expects to maintain and exceed its current sales levels in the event that an exemption is denied.<sup>15</sup>

Accordingly, the agency concludes that a measure of economic hardship may result from the denial, but it cannot be characterized as "substantial" given Pagani's current financial condition, its financial projections, and the continuing demand for its vehicles outside of the United States.

**Public Interest**—We have also examined whether an exemption in this case would be consistent with the public interest and the objectives of the Safety Act, as is required by the Act and the implementing regulations (49 CFR 555.5(b)(7)). Pagani has requested an exemption from all of the advanced air bag requirements except for the 30 mph belted 50th percentile male barrier impact test, compliance with which the agency has conditioned previous advanced air bag exemptions. Pagani stated that (1) the Huayra has several features that increase the crashworthiness of the vehicle, (2) a limited number of vehicles will be sold in the U.S. and each vehicle is expected to be driven approximately 2,500 miles annually, (3) the vehicle is expected to rarely carry children, and (4) a denial of the exemption would adversely affect consumer choice.

Although the agency supports additional crashworthiness features designed to increase the safety of occupants in the vehicle, we note that most of the requirements from which Pagani seeks exemption were implemented to minimize the risks posed by air bags to infants, children, and small-statured adults, especially in low-speed crashes. In the 2000 final rule, the agency estimated that these requirements had the potential to protect more than 95 percent of the at-risk population (out-of-position infants, children, and small-statured adults) from the risks presented by air bag deployment. The Huayra's crashworthiness features do not mitigate these risks, and although Pagani asserted that children will rarely ride in the Huayra, the company has not proposed any measures or warnings to reduce the chance that a child or small-statured adult would ride in the vehicle nor has the company described any vehicle features designed to mitigate the safety risks of standard air bags to

vehicle occupants.<sup>16</sup> Accordingly, the agency is unable to find that an exemption would be consistent with the public interest and the objectives of the Safety Act.

**Decision**—Based on the foregoing, the agency is unable to make a finding of substantial economic hardship or that an exemption would be consistent with the public interest and the objectives of the Safety Act. Accordingly, Pagani's petition for temporary exemption is denied.

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

Issued on: July 29 2011.

**David L. Strickland,**  
*Administrator.*

[FR Doc. 2011-19934 Filed 8-4-11; 8:45 am]

**BILLING CODE 4910-59-P**

## DEPARTMENT OF TRANSPORTATION

### Surface Transportation Board

[Docket No. FD 35538]

### CSX Transportation, Inc.—Trackage Rights Exemption—Norfolk Southern Railway Company

Pursuant to a written trackage rights agreement, Norfolk Southern Railway Company (NSR) has agreed to grant approximately 3,290 feet of overhead trackage rights to CSX Transportation, Inc. (CSXT),<sup>1</sup> between the point of switch at Track Station 55 + 65 and the point of switch at Track Station 30 + 70, and the portion of NSR's track parallel to CSXT's track between the point of switch at Track Station 30 + 55 and Track Station 22 + 75, in Hamilton County, Tenn.

The transaction is scheduled to be consummated on or after August 21, 2011, the effective date of the exemption (30 days after the exemption was filed).

CSXT states that it and NSR both own tracks between Craven's Yard and the riverfront in the vicinity of 19th Street in Chattanooga, Tenn. According to CSXT, NSR's single spur track crosses CSXT's single spur track at Chestnut Street, just north of Craven's Yard under provisions of an agreement dated January 30, 1907, as supplemented (the Lewis Street Crossing Agreement). To

<sup>13</sup> See, e.g., Grant of petition of Panther Motor Car Co. Ltd., 54 FR 12731 (Mar. 28, 1989).

<sup>14</sup> Compare Denial of petition of Ferrari S.p.A., 55 FR 3785 (Feb. 5, 1990) (manufacturer had a history of earning profits and would continue to do so if the petition were denied), with Grant of petition of Koenigsegg Automotive AB, 72 FR 17608 (Apr. 9, 2007) (manufacturer had recently experienced losses and would experience further losses if its petition were denied); Grant of petition of YES! Sportscars, 71 FR 68888 (manufacturer had continuing and cumulative net loss position and would experience further losses if the petition were denied); Grant of petition of Morgan Motor Company Limited, 71 FR 52851 (manufacturer had continuing and cumulative net loss position and would experience further losses if the petition were denied); Grant of petition of Spyker Automobielen B.V., 70 FR 39007 (July 6, 2005) (manufacturer had continuing and cumulative net loss position and would experience further losses if the petition were denied).

<sup>15</sup> See, e.g., Grant of petition of Ferrari S.p.A and Ferrari North America, Inc., 71 FR 29389 (May 22,

2006) (denial of the petition would reduce the manufacturer's U.S. sales by 85 percent); Grant of petition of Panther Motor Car Co. Ltd., 54 FR 12731 (Mar. 28, 1989) (denial of petition would result in temporary suspension of manufacturer's sales in the U.S. market); Grant of petition of Aston Martin Lagonda Limited, 52 FR 26760 (July 16, 1987) (denial of petition would delay further sales of vehicles in the U.S., which represented over one-third of the manufacturer's total sales).

<sup>16</sup> In the original petition, the company indicated that the vehicle would be equipped with an on-off air bag switch. In a supplemental submission to the agency, the company indicated that no on-off switch would be installed.

<sup>1</sup> A redacted, executed trackage rights agreement between CSXT and NSR was filed with the notice of exemption. The unredacted version was concurrently filed under seal along with a motion for protective order, which will be addressed in a separate decision.