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Docket Management Facility
U.S. Department of Transportation
400 7th Street, S.W.
Washington, DC 20590

**Comments on Cross Lander USA, Inc.
Petition for Temporary Exemption from FMVSS 208**

Introduction

Binețe. Public Citizen takes this opportunity to submit comments regarding Cross Lander USA, Inc.'s (Cross Lander) petition for temporary exemption from the Federal Motor Vehicle Safety Standard (FMVSS) 208 airbag requirements. Statutorily, two conditions must be met in this case before the National Highway Traffic Safety Administration (NHTSA) may choose to grant the exemption: one, the exemption must be consistent with the public interest, and two, compliance with the standard must cause Cross Lander substantial economic hardship.

Cross Lander's petition for exemption comes up short on both conditions. The requested exemption, which would put thousands of lives at risk, is far from being consistent with the public interest, and the financial burdens for Cross Lander of compliance with the FMVSS airbag requirements are not covered by the "substantial economic hardship" statutory provision.

For both of these reasons, NHTSA is not statutorily enabled to grant Cross Lander's petition. NHTSA should uphold the basic level of safety that the FMVSS airbag requirements provide the public, and deny Cross Lander's dangerous petition. Thousands of lives should not be jeopardized for a corporate handout.

Cross Lander's Requested Exemption Is Inconsistent with Public Interest

Downplayed Dangers Very Real

To enable NHTSA to grant Cross Lander's requested exemption, the exemption must be consistent with the public interest.¹ In its petitions, Cross Lander downplays the dangers of the requested exemption and claims dubious benefits to argue the requested exemption's merits. However, far from being in the public interest, Cross Lander's requested exemption would place the lives of potentially 19,000 or more drivers and passengers at increased risk in crashes. This is unacceptable, especially given that the requested exemption offers only *de minimus* benefits to the public.

Cross Lander argues in its August 10, 2004 petition for temporary exemption for the Cross Lander 244X that "due to its structure and its utilitarian design, the risk of occupant injury which would be reduced by an air bag is minimal." This is not true.

¹ 49 U.S.C. § 30113(b)(3)(a).

Airbags offer significant safety benefits for both belted and unbelted occupants. In fact, NHTSA found that airbags reduce the likelihood of death in head-on crashes by 21 percent for belted occupants and 34 percent for unbelted occupants.² Denying occupants this critical safety feature increases the likelihood of death, even in vehicles that are otherwise relatively crashworthy.

Cross Lander's requested exemption would leave unbelted occupants completely unrestrained in crashes and deny belted occupants the significant additional safety benefits of airbags – a morbid throwback to the decades before the FMVSS airbag requirements marked by high fatality rates and highway carnage. Additionally, because even belted occupants are at a higher risk of death in vehicles without airbags, Cross Lander's promise to place stickers in vehicles without airbags would have only a limited effect in reducing the increased dangers posed to occupants due to the vehicle's lack of airbags.

Also, the requested exemption raises concerns about the vehicle's stiffness. It is critical in crash tests for unrestrained occupants for the vehicle to absorb crash forces. This provides manufacturers with a strong incentive to reduce vehicle stiffness. However, because the 244X will not be subject to unbelted crash test requirements, it may exhibit a stiff body and harsh crash pulse, endangering occupants of the 244X and making the vehicle aggressive in crashes.

Despite Cross Lander's claims that the "utilitarian design" of the 244X would limit its road use, it is likely that the 244X, like all other SUVs, will be primarily used for common transportation by the vast majority of buyers. As evidenced by the predominance of SUV commercials touting the off-road capabilities of SUVs, manufacturers have used the appeal of off-road capabilities – even to customers who will rarely, if ever, put them to use – to sell SUVs, and with incredible success.

The 244X offers the same appeal of rugged off-road capabilities that fueled the SUV sales explosion. These capabilities, which Cross Lander claims will limit the vehicle's practical transportation use, likely will entice, rather than deter, many buyers. Moreover, many SUV owners have proven willing to accept the impractical aspects of the vehicles, such as bad gas mileage and difficult handling, suggesting that customers will also overlook the impractical aspects of the 244X.

In fact, the marketing of the 244X already capitalizes on the demonstrated wide appeal of SUVs. One dealership planning to sell the 244X advertises on its Web site that "The Cross Lander 244X 4x4 Brings True Sport Recreation Performance On and Off the Highway."³ Clearly, this dealer expects to sell the 244X to a wider consumer population than that which would use the 244X purely for off-road purposes. Additionally, with

² National Highway Traffic Safety Administration, *Third Report to Congress: Effectiveness of Occupant Protection Systems and Their Use*, December 1996.

³ <http://www.noboundaries4x4.com/>

dealerships actively marketing the 244X as providing on-road performance, customers are more likely to purchase the vehicle for common transportation.

Especially alarming about Cross Lander's requested exemption is the number of vehicles without airbags it would put on the roads, and subsequently, the number of lives that would be jeopardized. Cross Lander's original petition requesting exemption from the FMVSS airbag standards for two years would have put up to 6,000 of these dangerous vehicles on the roads. However, Cross Lander later submitted a second petition asking for a one-year extension of the original requested exemption. The second petition did not include a revised estimate of the number of vehicles that would be sold during the requested extended exemption period. But using sales expectations from the earlier petition, Cross Lander could sell approximately 9,500 vehicles during the requested three-year exemption. This does not, however, factor in increased production as the company's earnings from vehicle sales allow it to expand, and Cross Lander's sales may very well be significantly more than this already very high number.

Cross Lander cites several past instances in which NHTSA has granted exemptions to manufacturers under what Cross Lander argues are similar circumstances. However, the number of vehicles Cross Lander is expected to sell without airbags is far more than the number of vehicles sold during the granted exemptions that Cross Lander cites in its petition. For instance, Cross Lander cites exemptions that NHTSA granted to Shelby American, Laforza, and Bugatti. But in these cases, the manufacturer expected to sell only 500,⁴ 400,⁵ and 50⁶ vehicles, respectively. Cross Lander's expected 9,500 vehicles sold to market under the requested exemption is nearly 20 times the number of vehicles that were expected to be sold in even the most lenient of NHTSA's granted exemptions. Given that both driver and front passenger in the 244X would be exposed to increased likelihood of death in crashes, Cross Lander's exemption would jeopardize potentially 19,000 or more lives.

Dubious Benefits

In addition to downplaying the dangers of the requested exemption, Cross Lander offers misleading claims about the benefits it would offer the public. Cross Lander argues in the January 25, 2005 petition to NHTSA that "if there is no Cross Lander available in the US, consumer choice will be negatively affected as there is no other serious off-road SUV in the price range of the 244X." It is true that currently there is no other off-road SUV in the price range of the 244X, but other manufacturers likely will soon fill this gap in the market.

In fact, *The Business Journal of Phoenix* ran an article last year on Cross Lander citing the imminent cultivation by major manufacturers of the market niche that Cross Lander claims the 244X would exclusively occupy. In the article, Larry Edsall, a freelance writer specializing in the automotive industry, testified to this, saying:

⁴ 64 FR 6738.

⁵ 63 FR 49152.

⁶ Federal Register, March 11, 1994.

“Obviously there's a market there. Ford introduced its new Bronco concept at the Detroit show and it will be priced in the teens. Jeep has a similar concept also.”⁷ So while the market niche that the 244X would fall into is currently empty, models meeting all safety standards can be expected to soon fill it, offering consumers choices without compromising safety.

Cross Lander also claims that the requested exemption would benefit U.S. employment and companies. However, the 244X SUV offers no net benefits to the public, but rather would enter a zero-sum competition with other manufacturers in the already bloated vehicle sales market. The economic benefits that Cross Lander claims will result from production and sales of the 244X will come only with equal economic detriment. For instance, 244X sales will detract from the sales of other manufacturers, most likely American manufacturers producing vehicles comparable to the 244X. And any additional dealership jobs resulting from 244X sales will be produced only through jobs lost at other dealerships.

With other vehicles to soon offer consumers a product similar to the 244X and no net economic benefits resulting from 244X sales, all that the requested exemption has to offer the public is 19,000 jeopardized lives. The requested exemption is therefore inconsistent with the public interest.

Cross Lander Does Not Qualify for Protection Under “Substantial Economic Hardship” Provision

Cross Lander’s requested exemption also fails to meet the other statutory condition that delimits NHTSA’s authority to grant this exemption: Cross Lander does not face substantial exemption hardship under 49 U.S.C. 30113(b)(3)(B)(i), as interpreted according to the intent of Congress.

As NHTSA stated in a 1994 response to a petition for temporary exemption, “the phrase ‘substantial economic hardship’ is undefined, and there is scant legislative history to provide an interpretation of these words.” To gain insight into the meaning of this vague phrase, NHTSA’s response noted a statement made by Representative Springer regarding the purpose of the provision. While the legislation was on the House floor, Representative Springer cited the need to allow a small U.S. manufacturer to “continue production of its automobiles while it tooled to adapt the new safety equipment, which it purchases from big automobile manufacturers, to its own automobiles.”⁸ This statement indicates that the “substantial economic hardship” provision was intended to provide protection to manufacturers under specific extenuating circumstances.

Small manufacturers often have limited research and development resources in comparison to larger manufacturers. This may place small manufacturers behind the curve in integrating new safety technologies into their vehicles, as they may need to wait

⁷ Adam Kress, “Rugged Romanian 4WD Vehicle Set for Valley Debut,” *The Business Journal of Phoenix*, February 6, 2004.

⁸ Federal Register, March 11, 1994.

for safety technologies to trickle down from larger manufacturers. Representative Springer's statement reveals that Congress intended for the "substantial economic hardship" provision to allow small manufacturers a small amount of extra time in cases where their limited research and development resources constrain their ability to integrate safety features into vehicles in a timely manner, and compliance would mean that the manufacturer would have to cease production.

In its 1994 response, however, NHTSA illegitimately expanded Representative Springer's statement to allow far more lenient exemptions under the "substantial economic hardship" provision than Congress originally intended. NHTSA claimed that the Representative's statement is "directly related to the effect of a denial upon a small manufacturer's present income."⁹ This may be true, but this related issue is only one of the several prerequisite conditions in a specific scenario of extenuating circumstances in which manufacturers may warrant protection. Congress did not consider, for instance, the fact that a manufacturer purchases safety features from a large manufacturer as providing reason alone to grant an exemption from a safety standard. And similarly, Congress did not consider the effect of a denial of a petition for exemption on a manufacturer's present income alone as warranting exemption.

A careful interpretation of Representative Springer's statement reveals that Cross Lander's requested exemption does not meet the conditions to qualify under the "substantial economic hardship" provision according to Congress's original intent. Compliance with the airbag requirements would not force Cross Lander to cease production of vehicles for sale in the U.S., as Cross Lander is not currently producing vehicles for sale in the U.S. Representative Springer explicitly stated that the purpose of the provision was to allow manufacturers to *continue* production of vehicles. Cross Lander's request to *begin* production of vehicles, thus, does not qualify for exemption.

Congress did not intend to allow start-up manufacturers to shirk the responsibility of meeting federal safety standards. Federal safety standards establish a minimum level of safety, critical to public safety, which manufacturers must meet in producing vehicles. The costs associated with complying with these standards are simply those of bringing a car to market in the U.S., and cannot be shirked just as other costs inherent in bringing a vehicle to market, such as the cost of materials and the cost of production, cannot be avoided. Certainly all of these costs place economic demands on a manufacturer, but it is the manufacturer's responsibility to acquire funds that will enable payment of these start-up costs.

NHTSA has time and time again violated the original intent of Congress and used the "substantial economic hardship" provision to grant dangerous exemptions relieving manufacturers of a portion of the basic costs of bringing vehicles to market. NHTSA's duty is to ensure safe vehicles for the public, not cushion manufacturers by allowing them to provide the public with vehicles that unnecessarily jeopardize lives. NHTSA must stop granting these outrageous exemptions that are out-of-line with Congress's original intent for the "substantial economic hardship" provisions.

⁹ *Ibid.*

Conclusion

Cross Lander's request is not in the public interest, and thus fails to meet the first statutory condition necessary to enable NHTSA to grant the petition. Also, as NHTSA has recognized, the vague phrase "substantial economic hardship" provides few clues as to under what circumstances a manufacturer in fact faces hardship under this statute. However, an examination of Representative Springer's statement illuminating Congressional intent in providing protection against "substantial economic hardship" reveals that the legislative provision was intended to protect manufacturers under specific extenuating circumstances. Cross Lander's petition does not meet the conditions cited by Representative Springer under which a manufacturer may qualify for an exemption from a federal safety standard.

For NHTSA to grant the petition, both statutory conditions must be met, yet Cross Lander meets neither. NHTSA should not grant Cross Lander's petition for exemption from the FMVSS airbag requirements.

Sincerely,

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