

Docket Number NHTSA-2005-20288  
Docket Management Facility  
U.S. Department of Transportation  
400 7<sup>th</sup> Street, S.W.  
Washington, DC 20590

**Response to Cross Lander USA, Inc.**

Binețe. Public Citizen respectfully offers the following response to Cross Lander's comments submitted April 28, 2005.

<b>Cross Lander Comment</b>	<b>Public Citizen Response</b>
<p>1. "Regarding PC's comment, it is clear that PC wants NHTSA to write into part 555 a prohibition against air bag exemptions" (1).</p>	<p>Public Citizen never suggested that the National Highway Traffic Safety Administration (NHTSA) should prohibit airbag exemptions. However, airbags provide occupants critical protection in crashes. In fact, the life-saving benefits of this safety technology are so great that Congress has mandated that new passenger cars and light trucks must have driver and passenger frontal airbags. Cross Lander's requested exemption would potentially place 14,200 people at higher risk of death in crashes.</p> <p>The value to the public provided by both pre-advanced and advanced air bags in the Federal Motor Vehicle Safety Standards (FMVSSs) is so fundamental that any exemption to this standard would be extremely difficult to prove as consistent with the public interest. Public Citizen is not asking NHTSA to categorically prohibit all airbag exemptions. Rather, Public Citizen is asking NHTSA to deny exemptions that are inconsistent with the clear public interest, which happens in this instance to be encapsulated by the requirements of FMVSS 208, a standard which provides critical safety protections.</p>

<p>2. “If the 244X weighed about 12% more – approximately an additional 600 pounds – something not at all infeasible, it would be exempt from the air bag requirements – indeed from the crash testing requirements of Standard 208 – by virtue of FMVSS 208 S4.2.3” (2).</p>	<p>This out-of-place, thinly veiled threat is very disturbing. Clearly Cross Lander does not value the safety of the public if it is willing to increase the weight of the 244X, which would subject everyone else on the road to increased risk of injury and death in crashes with the 244X, in order to evade a federal safety standard. This demonstrates why NHTSA must close the regulatory loophole allowing the heaviest and most dangerous vehicles to avoid the FMVSS airbag requirements.</p>
<p>3. “PC also takes issue with the <u>quantity</u> of vehicles Cross Lander expects to sell under the requested exemption. Cross Lander forecasts selling approximately 7100 vehicles during the requested <u>three-year</u> exemption (approximately 2367 vehicles per year). This number, as well as Cross Lander’s annual world-wide production, is well within the 10,000 unit per year eligibility requirement for exemption requests based on economic hardship. To place <u>additional</u> sales or import restrictions on economic hardship exemptions is simply not permitted by the statute – whether via the ‘public interest’ argument or not” (2).</p>	<p>Cross Lander’s eligibility for an exemption in accordance with the “substantial economic hardship” provision does not release it from its duty to show that the requested exemption is consistent with the public interest. The statute explicitly states that NHTSA may only grant an exemption from a federal safety standard due to economic hardship if the petition is both consistent with the public interest and the manufacturer would suffer substantial economic hardship if the petition was denied. The number of lives that a requested petition would endanger, by all means, is a critical factor in determining whether or not a requested exemption is consistent with the public interest. Additionally, in evaluating whether an exemption would be consistent with the public interest, NHTSA regularly takes into consideration the number of vehicles that would be sold under the exemption.<sup>1</sup></p> <p>Furthermore, NHTSA’s enabling statute requires the agency to improve overall safety. Cross Lander’s requested exemption would reduce vehicle safety, and thus, NHTSA may not grant Cross Lander’s requested exemption.</p>

<sup>1</sup> Federal Register, March 11, 1994; Federal Register, September 14, 1998; and Federal Register, February 10, 1999.

<p>4. “Cross Lander also stands by its position that if there were no Cross Lander available in the US, consumer choice would be negatively affected since there is no other serious off-road SUV in the same price range. Indeed, PC acknowledges that “currently there is no other off-road SUV in the price range of the 244X” (PC comment at 3-4), and even cites an article that concludes that the niche targeted by Cross Lander is in fact a viable market” (3).</p>	<p>These misleading statements neglect to mention the reason why Public Citizen cited the article: major manufacturers are currently cultivating the market niche that Cross Lander claims the 244X will exclusively occupy. When evaluating Cross Lander’s requested exemption, NHTSA must take into consideration the likelihood that other manufacturers will soon produce vehicles that offer consumers vehicles similar to the 244X, and comply with all federal safety standards. Additionally, in determining whether or not the petition is consistent with the public interest, whether or not the 244X would improve consumer choice is a secondary consideration to the effect that the exemption would have on safety.</p>
<p>5. “PC may be arguing that economic hardship exemptions should be limited only to companies already manufacturing or selling in the U.S. If this is what PC were saying, PC would be entering into very troubling territory (5).”</p>	<p>With the requested exemption, Cross Lander is seeking to expand the company’s sales to the U.S. market. A denial of its petition certainly would not cause Cross Lander to cease production of vehicles to the U.S., as Cross Lander is not currently producing vehicles for U.S. sales. Furthermore, Cross Lander has offered no proof that the company’s other plants would be forced to cease production if NHTSA rejected the petition. In fact, for the months in 2004 in which Cross Lander sold vehicles, the company showed positive pre-tax revenue. (See Cross Lander comments, August 10, 2004, Attachment 1.)</p>
<p>6. Even if NHTSA were inclined to change its well-established interpretation of the statute (as regards either “air bags / in the public interest” or the definition of “substantial economic hardship”), it could not do so without notice and comment and</p>	<p>Denying Cross Lander’s petition on grounds that it is not consistent with the public interest would not require a change in the agency’s interpretation of the statute. NHTSA has considered the effect an exemption would have on safety to be a critical factor in determining whether a</p>

<p>PROSPECTIVE application of the new interpretation (5).</p>	<p>petition is consistent with the public interest. In 1994, in evaluating whether a petition for exemption from FMVSS No. 208 would be consistent with the public interest, NHTSA stated:</p> <p style="padding-left: 40px;">The agency is cognizant that granting the petition would not appear to have a discernible impact upon safety. Bugatti now anticipates that, at the most, about 50 vehicles would not be provided with automatic restraints. Further, it is actively pursuing the possibility that these could be retrofitted to comply with driver airbags.<sup>2</sup></p> <p>Cross Lander’s requested exemption would place potentially 14,200 people at increased risk of fatality in crashes--142 times the number of people potentially threatened in the petition referenced above. Further, the manufacturer pursued the possibility of retrofitting vehicles with driver airbags, which would potentially further reduce the number of lives endangered by the requested exemption. Denying Cross Lander’s petition for the exaggerated threat it poses to the public would be consistent with the agency’s established approach to petitions for exemption from FMVSS 208, and no further or additional notice and comment is needed for the agency to continue its application of standing and well-articulated policy.</p>
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*Further Considerations*

In its comments submitted April 28, 2005, Cross Lander disagrees with Public Citizen’s assertion that that NHTSA has improperly expanded the economic hardship provision. Citing a sentence in Public Citizen’s last comments, Cross Lander states that

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<sup>2</sup> Federal Register, March 11, 1994.

“NHTSA has never stated that “the effect of a denial of a petition on a manufacturer’s present income alone” warrants an exemption. (4)”

However, Cross Lander takes Public Citizen’s assertion out of context. The statement Cross Lander cites is in the context of a discussion of Rep. Springer’s statement concerning the “substantial economic hardship” provision and refers to a “substantial economic hardship” exemption. Immediately prior to the statement Cross Lander cites, Public Citizen states:

NHTSA claimed that the Representative’s statement is “directly related to the effect of a denial upon a small manufacturer’s present income.”<sup>3</sup> 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. (PC comment at 5.)

Public Citizen maintains that NHTSA has used the effect of a denial of petition as the sole condition under which a manufacturer may qualify for a “substantial economic hardship” exemption, neglecting the other prerequisite conditions cited by Rep. Springer. In fact, in a 1994 response to a petition for exemption, NHTSA states that the agency “has tended to consider a continuing and cumulative net loss position as evidence per se of hardship.”<sup>4</sup>

However, Rep. Springer’s statement makes clear that Congress did not view a net loss condition alone as warranting a “substantial financial hardship” exemption under the provision. A start-up manufacturer will show a continuing and cumulative net loss position before sales commence, as the company must invest money in development, and yet has no return income. Similarly, a foreign company that does not sell vehicles that comply with U.S. standards would show a continuing and cumulative net loss if the money it invested in development to meet U.S. safety standards resulted in this condition. Under NHTSA’s interpretation, both manufacturers might qualify for a “substantial economic hardship” exemption.

In both cases, the economic hardship faced by the manufacturer results from investment in product development, which is simply the cost of preparing a product for sale. Congress did not intend to allow manufacturers to skirt important safety standards through a “substantial economic hardship” exemption simply because of the production costs associated with FMVSS compliance. Rep. Springer explicitly stated that a “substantial economic hardship” exemption is intended to prevent a cessation of sales in certain cases of economic hardship. Thus, Congress did not intend for demonstration of a “continuing and cumulative net loss position” alone to qualify a manufacturer for a “substantial economic hardship” exemption. Instead, a far narrower interpretation is the only one justified by the specific evidence of legislative intent on this point. Nothing in Rep. Springer statement indicates that Congress was writing a carte blanche to excuse companies from ordinary costs associated with entering a new marketplace. Because

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<sup>3</sup>Federal Register, March 11, 1994.

<sup>4</sup> Federal Register, March 11, 1994.

NHTSA's interpretation of Rep. Springer's statement ignores the need for proof that a manufacturer's hardship includes the risk of a cessation of sales, it is inaccurate.

An accurate interpretation of Rep. Springer's statement would still allow the "substantial economic hardship" provision to offer protection to small manufacturers in certain cases, as Congress intended, insofar as some market position had been established. In consideration of this, Cross Lander's statement that "such a view would turn on its head the whole idea behind economic hardship relief, because start-up companies are the ones most often facing the most economic hardship" (4 and 5) is off the mark.

Sincerely,  
Laura MacCleery  
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Public Citizen