

to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

**DATES:** Submit comments on or before October 28, 2011.

**ADDRESSES:** Comments should refer to docket number MARAD-2011-0123. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590. You may also send comments electronically via the Internet at <http://www.regulations.gov>. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Joann Spittle, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue, SE., Room W21-203, Washington, DC 20590. Telephone 202-366-5979, e-mail [Joann.Spittle@dot.gov](mailto:Joann.Spittle@dot.gov).

**SUPPLEMENTARY INFORMATION:** As described by the applicant the intended service of the vessel WILDFLOWER is:

*Intended Commercial Use of Vessel:*

"Day and overnight charters focused on outdoor adventure."

*Geographic Region:* "Hawaii, California, Oregon, Washington, and Alaska."

The complete application is given in DOT docket MARAD-2011-0123 at <http://www.regulations.gov>. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

## Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78).

By Order of the Maritime Administrator.

Dated: September 22, 2011.

**Julie P. Agarwal,**

*Secretary, Maritime Administration.*

[FR Doc. 2011-24974 Filed 9-27-11; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

[Docket No. NHTSA-2011-0070]

#### Tesla Motors, Inc. Grant of Petition for Renewal of a Temporary Exemption From the Advanced Air Bag Requirements of FMVSS No. 208

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

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

**SUMMARY:** This notice grants the petition of Tesla Motors, Inc. (Tesla) for the renewal of a temporary exemption of its Roadster model from the advanced air bag requirements of FMVSS No. 208. The basis for the exemption is that compliance with the standard would cause substantial economic hardship to a manufacturer that has tried to comply with the standard in good faith.

**DATES:** The exemption remains in effect until November 7, 2011.

**FOR FURTHER INFORMATION CONTACT:** David Jasinski, 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>1</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>2</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>3</sup> The upgrade was designed to meet the twin goals of improving protection for occupants of all sizes, belted and 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

<sup>1</sup> Traffic Safety Facts—2009 Data—Occupant Protection, NHTSA Report No. DOT HS 811 390, Washington, DC 2010.

<sup>2</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>3</sup> See 65 FR 30680 (May 12, 2000).

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>4</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.

The agency requested comments on these issues in recent notices of receipt, including the one for Tesla.

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.

We discuss comments concerning this issue that were submitted in response to the notice of receipt of the Tesla petition later in this document.

## 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 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.

While 49 U.S.C. 30113(b) states that exemptions from a Safety Act standard are to be granted on a “temporary basis,”<sup>5</sup> the statute also expressly provides for renewal of an exemption on reapplication. Manufacturers are

nevertheless cautioned that the agency’s decision to grant an initial petition in no way predetermines that the agency will repeatedly grant renewal petitions, thereby imparting semi-permanent status to an exemption from a safety standard. Exempted manufacturers seeking renewal must bear in mind that the agency is directed to consider financial hardship as but one factor, along with the manufacturer’s on-going good faith efforts to comply with the regulation, the public interest, consistency with the Safety Act, generally, as well as other such matters provided in the statute.

Finally, we note that under 49 CFR 555.8(e), “If an application for renewal of temporary exemption that meets the requirements of § 555.5 has been filed not later than 60 days before the termination date of an exemption, the exemption does not terminate until the Administrator grants or denies the application for renewal.” In the case of the petition for renewal from Tesla, the petition for renewal was submitted by the deadline stated in 49 CFR 555.8(e).

## III. Overview of Petition

In accordance with 49 U.S.C. 30113 and the procedures in 49 CFR part 555, Tesla Motors, Inc., (Tesla) has submitted a petition asking the agency for renewal of its temporary exemption from certain advanced air bag requirements of FMVSS No. 208, *Occupant Crash Protection*. The basis for the application is that compliance would cause the petitioner substantial economic hardship and that the petitioner has tried in good faith to comply with the standard. In its petition, Tesla requested a renewal of its exemption for a period of two years from January 29, 2011, to January 28, 2013 for the Roadster model.

Specifically, the petition requests an exemption from the advanced air bag requirements (S14), with the exception of the belted, rigid barrier provisions of S14.5.1(a); the rigid barrier test requirement using the 5th percentile adult female test dummy (belted and unbelted, S15); the offset deformable barrier test requirement using the 5th percentile adult female test dummy (S17); and the requirements to provide protection for infants and children (S19, S21, and S23).

In a **Federal Register** document dated January 28, 2008, Tesla was granted a temporary exemption from the advanced air bag requirements of FMVSS No. 208 listed above for the Roadster.<sup>6</sup> The exemption was granted for the period from the date of publication until January 28, 2011. The

<sup>4</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).

<sup>5</sup> 49 U.S.C 30113(b)(1).

<sup>6</sup> 73 FR 4944 (Docket No. NHTSA–2008–0013).

basis for the grant was that compliance with the advanced air bag requirements of FMVSS No. 208 would cause substantial economic hardship to a manufacturer that has tried in good faith to comply with the standard and that such exemption was in the public interest and consistent with the objectives of traffic safety.

In a November 24, 2010 petition, Tesla sought renewal of its exemption. The basis for Tesla's application is substantial economic hardship to a manufacturer that has tried in good faith to comply with the standard. Tesla is a Delaware corporation headquartered in California with sales offices throughout the United States and overseas. Tesla currently sells only one vehicle, the Roadster. Tesla has sold or leased 287 Roadsters in the 12 months prior to filing its petition for renewal. Tesla states that it continues to be eligible for a financial hardship exemption, and that it has suffered substantial losses and will continue to do so while selling the Roadster.

Tesla began production of the all-electric Roadster in 2008. The Roadster has a single-speed electrically actuated automatic transmission and three phase, four pole AC induction motor. The Roadster has a combined range of 245 miles on a single charge. Under an agreement with Group Lotus plc (Lotus), Tesla purchases the Roadster "glider," which uses the chassis and several other systems of the Lotus Elise. The gliders are manufactured under Tesla's supervision and direction at a Lotus factory in the United Kingdom and then shipped to Menlo Park, California, where installation of the power train and other final steps are taken prior to sale of the vehicle in the United States. Tesla asserts in its petition that Lotus will cease manufacturing Roadster gliders in December 2011, and that Tesla plans to finish production in early 2012 and offer remaining Roadsters for sale during 2012.

According to Tesla, the Roadster was conceived as a limited proof-of-concept for later generations of Tesla vehicles. Tesla intends to introduce its next electric vehicle, a four-door fully electric sedan known as the Model S. Tesla states that the Model S would meet or exceed all FMVSSs in effect by the time the vehicle is released for production in 2012.

Tesla contends that it is eligible for an economic hardship exemption. Tesla has produced fewer than 10,000 vehicles since the company's founding in 2003. Worldwide production of the Roadster for calendar year 2010 will be approximately 600 to 700 vehicles. Tesla also states that it will not produce

more than 10,000 vehicles (combined Roadster and Model S production) per year during the requested exemption period.

In the January 2008 notice granting Tesla's original exemption, the agency determined that Lotus, as well as Tesla, was considered a manufacturer of the Roadster. The basis for this determination was information in the prior petition that Lotus would be assembling the Roadster. Nevertheless, the agency determined that Tesla was eligible for an economic hardship petition because the combined production of Lotus and Tesla was fewer than 10,000 vehicles.

In its petition for renewal, Tesla contends that the relationship between Lotus and Tesla does not involve ownership, sponsorship, or any type of control of one entity over the other. Tesla also reiterates that, even if the production of Lotus and Tesla vehicles are combined, the total production is far below the threshold 10,000 vehicle per year limit for hardship exemptions.

Tesla cites multiple reasons why the failure to obtain the requested extension of its exemption would cause substantial economic hardship. First, Tesla has incurred cumulative net losses of \$360 million since inception through September 30, 2010, and a net loss of \$100 million for the first nine months of 2010. Tesla also expects cumulative losses to almost double before launch of the Model S. Second, Tesla has committed certain remaining costs for the Roadster that cannot be cancelled, such as a fixed supply contract with Lotus and other suppliers until the end of 2011. Third, Tesla contends that ending U.S. sales of the Roadster would require Tesla to refund \$2.4 million in deposits on Roadster reservations, exacerbating its financial hardship. Additionally, because the Roadster is the only Tesla model available in the United States, Tesla states that cancellation of the program would result in a significant loss of market share.

Tesla also contends that Lotus, and by extension Tesla, has exerted good faith efforts to achieve compliance with the advanced air bag requirements. Tesla notes that the Roadster shares a number of common components and systems with the Lotus Elise, including the passive safety systems. Tesla believes that, for the reasons outlined in Lotus's petition for an renewal of its FMVSS No. 208 exemption for the Elise, Lotus has exerted good faith efforts to comply with the advanced air bag requirements. Furthermore, Tesla states that it is in no better position than Lotus to develop an advanced air bag system for the Elise-

based Roadster. Like the Lotus Elise, the Tesla Roadster is coming to the end of its model life. Given the limited number of Roadsters planned for production, Tesla believes that developing an advanced air bag system for the Roadster at this time is economically impracticable. Tesla also contends that it has been using the three years of its current exemption to develop the Model S, which will include advanced air bags.

Tesla also contends that the requested extension of its exemption is in the public interest for five reasons. First, Tesla states that granting the petition would encourage development and sale of highway-capable electric vehicles by Tesla and other manufacturers. Second, Tesla contends that the public interest considerations supporting other similar extension petitions previously granted by NHTSA exist for Tesla as well. Third, Tesla states that the Roadster has a high degree of safety because of its design. Even without advanced air bags, Tesla believes that the requested exemption would have a negligible impact on vehicle safety because of the limited number of vehicles that would be sold in the United States under the extension. Fourth, Tesla contends that the Roadster does not pose an unreasonable risk to safety of infants or children because young children are unlikely to be passengers in the Roadster and neither Tesla nor Lotus has received any complaints, reports, or information of air bag-related injuries. Fifth, Tesla contends that granting its petition will have a positive impact on U.S. employment in the automotive industry, and that denying its petition would not only directly impact the jobs of current Tesla employees supporting the Roadster, but also potentially compromise the company's ability to move forward with the Model S.

#### IV. Notice of Receipt and Summary of Comments

On June 8, 2011, we published in the **Federal Register** (76 FR 33402) a notice of receipt of Tesla's petition for renewal of a temporary exemption, and provided an opportunity for public comment. We received three comments, two comments from the Advocates for Highway & Auto Safety (Advocates) and one from Tesla.

Advocates first responded to NHTSA's request for comment regarding whether and under what circumstances the agency should continue to grant temporary exemptions from the advanced air bag requirements. Advocates concurred with NHTSA's concerns regarding the continuation of such exemptions. The organization noted that air bag technology is over 35

years old, the current requirements for advanced air bags are over ten years old and full compliance has been required for over five years. Advocates further noted that the FMVSSs are minimum performance requirements necessary for occupant protection and while the cost of production may impose an excessive burden when the technology is new, over time public safety concerns for vehicle occupants must outweigh manufacturer production costs, which the organization argued is especially true for manufacturers of high-end vehicles. Finally, Advocates noted that although physical testing is an essential component of the regulatory validation process, significant reductions in development costs have been realized through advanced computer simulation and should be considered when reviewing exemption petitions.

Advocates also recommended revising the petition process to create a rebuttable presumption that cost alone cannot provide a basis for a temporary exemption beyond four years following the compliance date. Additionally, the organization recommended that NHTSA require applicants to make a showing regarding recent advances in state-of-the-art research, design, and development that pertain to the requirements for which exemption is requested and explain why an exemption is still necessary.

Regarding Tesla's petition, Advocates noted that the company requests exemption from the unbelted test of the 50th percentile male occupant and the belted and unbelted tests of the 5th percentile adult female driver, and the out-of-position portions of the advanced air bag requirements for all children. Advocates asserted that in developing and testing air bag systems to meet these requirements, Tesla would only need to perform component level tests rather than more expensive full vehicle tests. Alternatively, Advocates stated that Tesla could meet these requirements by using an occupant detection system to suppress air bag deployment in specified situations, which, according to Advocates, costs approximately \$1,500. Advocates argued that Tesla had multiple ways to meet the requirements without being granted an extension of its exemption.

Advocates also addressed Tesla's assertions that an extension of its exemption would be consistent with the public interest and the objectives of the Safety Act. Specifically, Advocates stated that every safety regulation was developed for a specific reason and intended to provide a specific level of protection, and that the fact that the vehicle will meet other safety

requirements does not address the safety concerns that caused NHTSA to promulgate the requirements from which Tesla seeks exemption.

Advocates further argued that exemptions should not be based upon assumptions of the occupant population. The organization noted that, although many consumers would not purchase a Tesla Roadster as the primary means of transporting their children, there was no reason why Tesla vehicles would not be used to transport children and, in vehicles with two seats, any child riding in the vehicle would be located in the front seat. Additionally, the organization noted that one of the requirements from which exemption is sought is meant to address the safety of small-statured adult females, and that Tesla did not indicate why these women would not be occupants of the vehicles.

Advocates stated that, based on the foregoing, it could not support granting Tesla's petition for renewal of its temporary exemption.

Finally, Advocates argued that the procedure under which Tesla received an automatic extension of its exemption violates 49 U.S.C. section 30113(e). That statutory provision provides that an economic hardship exemption may not be granted for more than three years. As provided by 49 CFR 555.8(e), if a petition for renewal of a temporary exemption has been filed not later than 60 days before termination of an exemption, the exemption does not terminate until the Administrator grants or denies the petition for renewal. Advocates stated that this provision allows the agency, through inaction on a petition for renewal of an exemption, to extend the three-year limit of an exemption.

Tesla filed a response to Advocates' comment. With respect to Advocates' assertion regarding Tesla's ability to use off-the-shelf technology that would cost \$1,500 to comply with the advanced air bag requirements, Tesla stated that Advocates have understated the complexity of advanced air bag technology. Tesla noted that any modification to a vehicle requires full testing to ensure appropriate operation and compatibility. Further, with respect to the complexity of adding new components, Tesla stated that it has relied on the expertise of Lotus, whose assertions regarding the compatibility of existing air bag components should be given more weight than Advocates' speculative arguments.

With respect to Advocates' assertion regarding the hazard posed by the Roadster's existing air bag system, Tesla noted that Advocates have not provided data or statistics to validate their

assertions. In contrast, Tesla stated, it has over 12 million miles of real world driving in over 1,800 vehicles without a single report of serious injury or death caused by passenger air bags in the Roadster.

Advocates filed a second comment on the petition, asking the agency to take note of its comments filed on Tesla's petition for an exemption from the electronic stability control (ESC) requirements of FMVSS No. 126. Those comments raised two issues pertinent to Tesla's advanced air bag petition. First, Advocates believe the agency should consider the interaction between multiple exemptions sought by Tesla. Second, Advocates expressed a concern that, in its ESC petition, Tesla only sought an exemption through December 31, 2010 (later shortened to a 50-day period ending October 20, 2011),<sup>7</sup> whereas it sought an advanced air bag exemption that would not terminate until January 28, 2013.

#### **V. Agency Analysis, Response to Comment, and Decision**

In this section, we provide our analysis and decision regarding Tesla's temporary exemption request concerning the advanced air bag requirements of FMVSS No. 208, including our response to the comments received from Advocates and Tesla.

##### *A. General Issues Related to Petitions for Exemptions From Advanced Air Bag Requirements*

As noted earlier, NHTSA requested comments in the notice of receipt for the Tesla petition about a number of issues related to the justification for continuing to grant petitions for a hardship exemption from the advanced air bag requirements. The agency also requested comments on these issues in notices of receipt for other petitions.

This is not the first decision document we have issued since beginning to request comments on this issue, and we summarized our new position earlier in this document. In this section, we address the specific comments submitted in response to the notice of receipt for the Tesla petition.

To briefly summarize our new position, and the background for that position, the final rule requiring advanced air bags was published in 2000, and 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

<sup>7</sup> Tesla has recently clarified further that it can complete production in less than fifty days.

end of the phase-in period, i.e., September 1, 2006.

In addressing various petitions for exemption from the advanced air bag requirements of FMVSS No. 208 since that time, NHTSA has 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.

However, 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.

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. 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>8</sup> Accordingly, NHTSA has concluded 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.

Manufacturers are not precluded from submitting petitions for exemption in this area, and NHTSA may grant some such exemptions. However, manufacturers should understand that the circumstances in which we would grant such exemptions is expected to be significantly more limited than in the past.

We are not adopting Advocates' recommendation to change the exemption petition process. Although NHTSA may develop general policies on certain issues, the agency still analyzes each petition on a case-by-case basis and believes that this is the best approach for addressing the individual circumstances of each manufacturer seeking exemption. Moreover, with respect to that organization's suggestion that NHTSA should establish a rebuttable presumption that manufacturing cost alone cannot provide the basis for an application for a temporary exemption from safety requirements beyond four years following the date on which compliance with a vehicle safety standard or requirement is mandatory, we note that manufacturers should not assume that the agency would be likely to grant hardship exemptions based on manufacturing cost alone, even within that four-year period. We evaluate all relevant information and issues in deciding whether to grant petitions for exemptions.

#### *B. Decision on Tesla's Petition*

In response to Tesla's petition, and after considering all of the information provided as a response to the notice of receipt of the petition, NHTSA has decided to extend Tesla's temporary exemption from the advanced air bag requirements of FMVSS No. 208 for a period of 40 days after publication of notice of this decision in the **Federal Register**. We are not providing a longer exemption in light of the production plans set forth by Tesla in its petition for an exemption from the ESC requirements of FMVSS No. 126.

First, we find that Tesla is eligible for an economic hardship exemption. As discussed above, 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. 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.

We have considered whether an entity other than Tesla can be considered to manufacture the Roadster. Lotus, based on its involvement in the design and manufacture of the Roadster gliders is potentially an additional manufacturer of the Roadster.

However, as we have noted in a prior notice, Lotus is itself a small manufacturer and NHTSA granted a temporary exemption from the advanced air bag requirements for the Lotus Elise.<sup>9</sup> Both Tesla and Lotus separately meet the requirement that a manufacturer make fewer than 10,000 vehicles in a calendar year preceding the petition, counting all vehicles they manufacture (including ones that may also be attributable to another manufacturer). Given this, we find that Tesla continues to be eligible to apply for an economic hardship exemption, whether or not Lotus is considered to be a manufacturer of the Roadster.

Based on the information provided in Tesla's petition and its comments, NHTSA concludes that Tesla has demonstrated a good faith effort to bring its vehicle into compliance with the advanced air bag requirements of FMVSS No. 208. NHTSA also concludes that Tesla has demonstrated the requisite financial hardship. In reaching the conclusion about good faith efforts, we place significant weight on the fact that, before seeking renewals of existing exemptions, Tesla and Lotus again sought to determine whether it was feasible to include advanced air bags on the exempted vehicles.

As noted earlier, Advocates stated that in developing and testing air bag systems for meeting the sections of the standard related to out-of-position testing, Tesla only needs to perform component level tests as compared to full vehicle tests. It cited a retail price for an occupant detection system and claimed that there are cost effective alternative ways to meet the specific sections of the regulation without being granted an extension.

In response to Advocates' comment, we note that, in order to meet the advanced air bag requirements, Tesla's efforts are not limited to achieving compliance with the out-of-position requirements, but its vehicle must comply with all of the advanced air bag requirements including unbelted crash test requirements and crash test requirements using 5th percentile adult female dummies. While Advocates cited a retail price for an occupant detection system, it has not provided analysis demonstrating how a particular system could be incorporated into the Roadster

<sup>8</sup> The recent petitions for exemption support NHTSA's conclusion 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 recently sought exemption from the advanced air bag requirements 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>9</sup> See 71 FR 52851 (Sept. 7, 2006).

or analyzing the cost implications of such a redesign for it in the context of an extremely low volume vehicle. As noted earlier, Tesla explained in its petition that it has focused on developing advanced air bags for its successor vehicle, the Model S. Given the challenges that company has cited in meeting the advanced air bag requirements for the existing vehicle and the high costs in redesigning vehicles to meet the advanced air bag requirements, we believe Tesla's approach is consistent with good faith efforts to meet FMVSS No. 208. We caution, however, that vehicle manufacturers should not assume that we will grant multiple extensions of temporary exemptions because of continuing delays in completing the designs of successor vehicles.

Several factors support a finding that an extension of Tesla's exemption is in the public interest. NHTSA has traditionally found that the public interest is served by affording consumers a wider variety of motor vehicles, by encouraging the development of fuel-efficient and alternative-energy vehicles, and providing additional employment opportunities. We believe that all three of these public interest considerations would be served by granting Tesla's petition and note that the denial of this request would remove a vehicle that is currently being sold in the U.S. market.

There are other relevant considerations. The number of vehicles at issue is small. The total number of vehicles produced under this exemption, dating back to the expiration date of the initial exemption, is expected to be fewer than 500. Further, Tesla, based on assertions made in its submissions in support of its petition for exemption from the ESC requirements, expects to produce only 80 additional vehicles under this exemption.

In considering whether to grant a temporary exemption, including a renewal of a temporary exemption, we must consider all relevant factors. We have discussed earlier in this document the benefits provided by advanced air bags. In particular, the requirements for advanced air bags were designed to meet the twin goals of improving protection for occupants of all sizes, belted and 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. Vehicles without advanced air bags will present greater safety risks in these areas.

After considering all of the relevant information, we have decided to extend Tesla's temporary exemption from the advanced air bag requirements of FMVSS No. 208 for a period of 40 days after publication of this notice in the **Federal Register**. This is a relatively limited time period, but would accommodate the planned end of production of Roadster models for the United States market. In determining this date, we have taken into consideration submissions by Tesla in support of its petition for exemption from the requirements of FMVSS No. 126, Electronic Stability Control Systems, regarding its planned end of production of the Roadster, as suggested by the Advocates.<sup>10</sup>

Although Tesla requested an exemption for the Roadster from the advanced air bag requirements of FMVSS No. 208 based on substantial economic hardship pursuant to 49 U.S.C. 30113(b)(3)(B)(i), the agency has also considered whether the Roadster qualifies for an exemption as a low-emission vehicle pursuant to 49 U.S.C. 30113(b)(3)(B)(iii). Simultaneously with this determination, the agency has made the determination to grant a temporary exemption for the Roadster from the requirements of FMVSS No. 126 based upon 49 U.S.C. 30113(b)(3)(B)(iii). For the reasons explained therein, NHTSA also concludes for purposes of this determination that the Roadster is a low-emission vehicle and that this temporary exemption of the Roadster from the advanced air bag requirements of FMVSS No. 208 would make the development and field evaluation of a low-emission vehicle easier.

We note that, as explained below, prospective purchasers will be notified that the vehicle is exempted from the specified advanced air bag requirements of FMVSS No. 208. Under § 555.9(b), a manufacturer of an exempted passenger car must affix securely to the windshield or side window of each exempted vehicle a label containing a statement that the vehicle conforms to all applicable FMVSSs in effect on the date of manufacture "except for Standard Nos. [listing the standards by number and title for which an exemption has been granted] exempted pursuant to NHTSA Exemption No. \_\_\_\_\_." This label notifies prospective purchasers about the exemption and its subject. Under § 555.9(c), this

<sup>10</sup> With respect to the Advocates' argument that 49 CFR 555.8(e) is unlawful because it allows the agency to grant an exemption for a period longer than three years, we consider the argument moot in light of this decision to extend Tesla's exemption.

information must also be included on the vehicle's certification label.<sup>11</sup>

The text of § 555.9 does not expressly indicate how the required statement on the two labels should read in situations in which an exemption covers part, but not all, of a FMVSS. In this case, we believe that a statement that the vehicle has been exempted from Standard No. 208 generally, without an indication that the exemption is limited to the specified advanced air bag provisions, could be misleading. A consumer might incorrectly believe that the vehicle has been exempted from all of Standard No. 208's requirements. Moreover, we believe that the addition of a reference to such provisions by number would be of little use to consumers, since they would not know the subject of those specific provisions.<sup>12</sup> For these reasons, we believe the two labels should read in relevant part, "except for the Advanced Air Bag Requirements of Standard No. 208, Occupant Crash Protection, exempted pursuant to \* \* \*." We note that the phrase "Advanced Air Bag Requirements" is an abbreviated form of the title of S14 of Standard No. 208. We believe it is reasonable to interpret § 555.9 as requiring this language.

In accordance with 49 U.S.C. 30113(b)(3)(B)(i), Tesla is granted a renewal of NHTSA Temporary Exemption No. EX 08–01, from S14 (apart from section S14.5.1(a)), S15, S17, S19, S21, and S23 of 49 CFR 571.208.<sup>13</sup> The exemption is for the Roadster model and shall remain effective until 40 days following publication of notice of this decision in the **Federal Register**, as indicated in the **DATES** section of this document.

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

Issued on: September 22, 2011.

**David L. Strickland,**

*Administrator.*

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<sup>11</sup> Tesla's label would be required to list both its exemption from the advanced airbag requirements of FMVSS No. 208 and its exemption from the ESC requirements of FMVSS No. 126, which has been granted in a separate decision that is published in today's **Federal Register**.

<sup>12</sup> We recognize that, in prior grants of exemptions from the advanced air bag requirements, the agency has required the manufacturer to list the exempted paragraphs by number on the label.

<sup>13</sup> We note that, although the agency granted Tesla an exemption from paragraph S25 in its January 2008 decision, Tesla did not include paragraph S25 in its request for a renewal of its exemption.