

DEPARTMENT OF TRANSPORTATION**National Highway Traffic Safety Administration**

[Docket No. NHTSA-2008-0181, Notice 1
Modena Design SpA]

Receipt of Application for a 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 receipt of petition for temporary exemption from certain provisions of Federal Motor Vehicle Safety Standard (FMVSS) No. 208, Occupant Crash Protection.

SUMMARY: In accordance with the procedures in 49 CFR Part 555, Modena Design SpA has petitioned the agency for a temporary exemption from certain advanced air bag requirements of FMVSS No. 208. The basis for the application is that compliance would cause substantial economic hardship to a manufacturer that has tried in good faith to comply with the standard.¹

This notice of receipt of an application for temporary exemption is published in accordance with statutory provisions. NHTSA has not made any judgment on the merits of the application.

DATES: You should submit your comments not later than December 26, 2008.

FOR FURTHER INFORMATION CONTACT: Ari Scott, 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.

Comments: We invite you to submit comments on the application described above. You may submit comments identified by docket number at the heading of this notice by any of the following methods:

- **Web Site:** <http://www.regulations.gov>. Follow the instructions for submitting comments on the electronic docket site by clicking on "Help and Information" or "Help/Info."

- **Fax:** 1-202-493-2251.
- **Mail:** U.S. Department of Transportation, Docket Operations, M-30, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

- **Hand Delivery:** 1200 New Jersey Avenue, SE., West Building Ground

Floor, Room W12-140, Washington, DC, between 9 am and 5 pm, Monday through Friday, except Federal Holidays.

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number. Note that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. Please see the Privacy Act discussion below. We will consider all comments received before the close of business on the comment closing date indicated above. To the extent possible, we will also consider comments filed after the closing date.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> at any time or to 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12-140, Washington, DC 20590, between 9 am and 5 pm, Monday through Friday, except Federal Holidays. Telephone: (202) 366-9826.

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) or you may visit <http://www.dot.gov/privacy.html>.

Confidential Business Information: If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, at the address given under **FOR FURTHER INFORMATION CONTACT**. In addition, you should submit two copies, from which you have deleted the claimed confidential business information, to Docket Management at the address given above. When you send a comment containing information claimed to be confidential business information, you should include a cover letter setting forth the information specified in our confidential business information regulation (49 CFR Part 512).

I. Advanced Air Bag Requirements and Small Volume Manufacturers

In 2000, NHTSA upgraded the requirements for air bags in passenger cars and light trucks, requiring what are commonly known as "advanced air bags."² The upgrade was designed to meet the 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 advanced air bag requirements were a culmination of a comprehensive plan that the agency announced in 1996 to address the adverse effects of air bags. 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 September 1, 2006, but their efforts to bring their respective vehicles into compliance with these requirements began several years before that. However, because the new requirements were challenging, major air bag suppliers concentrated their efforts on working with large volume manufacturers, and thus, some small volume manufacturers have had limited access to advanced air bag technology. Because of the nature of the requirements for protecting out-of-position occupants, "off-the-shelf" systems could not be readily adopted. Further complicating matters, because small volume manufacturers build so few vehicles, the costs of developing custom advanced air bag systems compared to potential profits discouraged some air bag suppliers from working with small volume manufacturers.

The agency has carefully tracked occupant fatalities resulting from air bag deployment. Our data indicate that the agency's efforts in the area of consumer education and manufacturers' providing depowered air bags were successful in reducing air bag fatalities even before advanced air bag requirements were implemented.

As always, we are concerned about the potential safety implication of any temporary exemptions granted by this agency. In the present case, we are seeking comments on a petition for a temporary exemption from the advanced air bag requirements submitted by Modena Design SpA

¹ To view the application, go to <http://www.regulations.gov> and enter the docket number set forth in the heading of this document.

(“Modena Design”), a company operated by Horacio Pagani, regarding a high-performance sports car, the C9 ZONDA (the “C9”).

II. Overview of Petition for Economic Hardship Exemption

In accordance with 49 U.S.C. 30113 and the procedures in 49 CFR Part 555, Modena Design has petitioned the agency for a temporary exemption from certain advanced air bag requirements of FMVSS No. 208. The basis for the application is that compliance would cause substantial economic hardship to a manufacturer that has tried in good faith to comply with the standard. A copy of the petition³ is available for review and has been placed in the docket for this notice. Specifically, Modena Design has requested an exemption for a period of three years from the date of granting, which the petitioner has estimated to be around December 31, 2011. Modena Design has requested an exemption from the advanced air bag requirements of FMVSS 208, set forth in S14. While Modena Design stated that the C9 will be equipped with standard air bags, and that the company will use its best efforts to comply with the S14 requirements for belted 50th percentile and 5th percentile dummies, it was uncertain as to whether that would be possible, and therefore requested an exemption from the entirety of S14. We note that a number of petitions for exemptions from advanced air bags include not only requests for exemption from S14.5.2, but 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), the requirements to provide protection for infants and children (S19, S21, and S23) and the requirement using an out-of-position 5th percentile adult female test dummy at the driver position (S25). We also note that several small vehicle manufacturers have provided standard air bags that comply with the provisions of S14 in force before the advanced air bag rules came into effect.

III. Requirements for Economic Hardship Petitions

a. General Requirements for Petitions for Exemptions

In order to file a petition for exemption based on substantial economic hardship, a manufacturer must satisfy relevant requirements specified in 49 CFR Part 555, *Temporary Exemption from Motor Vehicle Safety and Bumper Standards*. All petitions for exemption must conform to the requirements in 49 CFR 555.5, “Application for exemption.” A petition must, among other requirements, state the number and title, and the text or substance of the standard for which the temporary exemption is sought, and the length of time of the requested exemption. The petitioner must set forth the basis of the petition (the requirements listed under Part 555.6(a) for petitions based on economic hardship). The petition must specify any information withheld from public disclosure under Part 512. Finally, the petitioner must set forth the reasons why the granting of the exemption would be in the public interest, and, as applicable, consistent with the objectives of 49 U.S.C. 301 or 325.

b. Requirements Specific for Exemptions Based on Substantial Economic Hardship

i. Statement on Eligibility

The substantial economic hardship exemption is limited to those manufacturers whose motor vehicle production in its most recent year of production did not exceed 10,000 vehicles, as determined by the NHTSA Administrator (See 49 CFR 555.6(a)(2)(v)). 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 include any provision indicating that a manufacturer might have substantial responsibility as a 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 secondary manufacturer of a vehicle assembled by a primary manufacturer, if the secondary manufacturer had a substantial role in

the development and manufacturing process of that vehicle. In the event of such a finding, if either manufacturer has produced over 10,000 vehicles in the previous 12 months, neither manufacturer would be eligible to receive an economic hardship exemption for the vehicle in question.

ii. Basis for Application

A petition for exemption based on economic hardship must meet the requirements set forth in Part 555.6, “Basis for Application,” specifically those in 49 CFR 555.6(a). One of these requirements, specified at 49 CFR 555.6(a)(1), is for the manufacturer to provide engineering and financial information demonstrating how compliance would cause substantial hardship. More specifically, it is required that a manufacturer: (1) State a list or description of each item that would need to be modified to achieve compliance; (2) state the itemized estimated cost of the modifications if compliance were to be achieved under three different time scenarios; and (3) state the estimated cost increase of compliance on a per-vehicle basis. Additionally, the manufacturer must provide corporate balance sheets and income statements for the fiscal year immediately preceding the application, as well as projected statements for the year following a hypothetical denial of the application for exemption. Finally, a manufacturer must provide a discussion of any other hardships that may result from the denial of an application.

The petition must also contain the information specified in 49 CFR 555.6(a)(2), which relate to a manufacturer’s efforts to achieve compliance. This section requires that a petition must contain a description of the manufacturer’s efforts to comply with the standard. The required information includes: (1) A chronological analysis of such efforts showing its relationship to the rulemaking history of Standard No. 208; (2) a discussion of alternate means of compliance considered, and rationales for the rejection of those means; (3) a discussion of any other factors that the petitioner desires NHTSA to consider in deciding that it tried in good faith to comply with the standard; and (4) a description of its planned efforts to achieve compliance during the exemption period, and the estimated date by which compliance will be achieved or, alternatively, production ceased. Finally, the petitioner must provide the agency with the total number of vehicles produced by or on behalf of the petitioner during 12-month period prior to filing the petition, in

³ The company requested confidential treatment under 49 CFR Part 512 for certain business and financial information submitted as part of its petition for temporary exemption. Accordingly, the information placed in the docket does not contain information subject to a claim of confidentiality.

order to establish that the manufacturer is eligible to receive the exemption, as stated above.

IV. Petition of Modena Design

The following section briefly summarizes the pertinent portions of the petition related to completeness and eligibility. We note that the full petition can be viewed by accessing the docket via <http://www.regulations.gov>, or by any of the other means listed above in the **COMMENTS** section.

a. Requested Exemption

Modena Design has requested an exemption from paragraph S14 of FMVSS No. 208, "Occupant Crash Protection." It has requested that the exemption extend for three years upon the date of publication in the **Federal Register**.

b. Petitioner's Statements Relating to Eligibility

Modena Design asserts that current production volume ranges from 15 to 17 vehicles per year, well under the 10,000 vehicle limit. To date, Modena Design has only produced 85 vehicles since 1999, all of them the C8 ZONDA model. Modena Design has provided the following figures with regard to past production:

- 2004: 9 vehicles
- 2005: 8 vehicles
- 2006: 16 vehicles
- 2007 (as of November 8): 17 vehicles

Modena Design states that it is an independent vehicle manufacturer specialized in the design, development, and construction of high performance vehicles. Specifically, Modena Design states that it performs the following tasks:

- Design, Style Interior/Exterior.
- Design of the bodywork.
- Design of the chassis/suspensions/brakes.
- Study of the vehicle dynamics.
- Study of the elasto-kinematics.
- Design of the wiring system.
- Design of the models and moulds for the composite materials.

Modena Design states that due to the small size of the company (it states that it has a work force of 30 employees), it contracts out the other aspects of vehicle development. However, it also states that the company does do all of the assembly of its vehicles, and that no third party company is involved with that process, although Mercedes acts as an arms-length engine supplier. Additionally, Modena Design's sister company, Pagani Automobili SpA, performs the marketing work on Modena Design's vehicles. Both companies are owned and run by the Pagani family.

c. Petitioner's Statements Concerning Substantial Economic Hardship

While Modena Design has posted a profit in recent years, it claims that it is still suffering from economic hardship, and needs the requested exemption in order to expand into the U.S. market. According to the documentation that Modena Design provided, the company has posted a profit ranging from \$19,990–81,463 (€13,327–54,309) during the past four years. Comparatively, it estimates that the cost of developing a standard air bag system will be approximately \$3,570,000, and the cost of developing an advanced air bag system an additional \$4 million above that.

Modena Design asserts that because of the overwhelming cost of design for standard and advanced air bags, it requires U.S. exempted-vehicle sales to "bridge the gap," that is, to provide the necessary financing to fund its air bag development efforts. It states that if the company is not able to sell vehicles in the U.S., it will not have the funds to develop FMVSS-compliant successor vehicles.

Financially, Modena Design states that the financial impact of the exemption will be approximately \$12,000,000 (€8,000,000) over the period from 2007–2011. Modena Design states that the full cost of developing the C9 will be approximately \$19,500,000 (€13,000,000). To offset this, Modena Design provides two projections for net income during the exemption period, from 2009 to 2011. The first, assuming the exemption is denied, would mean that there are no U.S. sales during the period, and the net income for the company (excluding development costs) would be \$13,783,500 (€9,189,000). This means that the company would incur a total of \$5,700,000 (€3,800,000) shortfall as a result of its investment in the C9. The second projection assumes that an exemption is granted, and that the company would be able to sell vehicles in the U.S. during the aforementioned period, with the resulting net income being \$25,869,000 (€17,246,000). This figure implies a profit of \$6,375,000 (€4,250,000) with regard to the C9 over the period from 2007–2011.

Additionally, Modena Design asserts that it requires a substantial amount of time to design systems that comply with the FMVSSs. In its petition, the company claims that its system of building test prototypes means that it will take a significant investment of time and resources to design new systems for the C9. It states that it takes six months for Modena Design to build

a test car, and "if the company were to devote all resources to prototype building, then it would have to cease building what few C8 production cars [are currently] being built."

Finally, Modena Design states that there is no possibility of technology transfer that could aid it with its homologation projects. As an independent manufacturer, Modena Design asserts that there is "no possibility of technology transfer from a larger parent company that also manufactures motor vehicles."

d. Petitioner's Statements Regarding Efforts To Comply With the Standard

In explaining why it has not been currently able to meet the air bag requirements, Modena Design points to the difficulty that many small vehicle manufacturers have had in obtaining items of specialized vehicle equipment. Nonetheless, according to the petition, Modena has made efforts to achieve compliance with the FMVSS. These efforts involve work with several suppliers to develop compliant air bags for the U.S. market.

To begin, Modena Design asserts in its petition that an air bag project is already underway. This project aims first to create standard, and then advanced air bags, at a total cost of around \$7,500,000. To this end, Modena Design states that it has partnered with Applus+ IDIATA, a Spanish engineering services company that has previously provided advanced air bag development solutions and testing for small volume manufacturers. According to figures presented in the petition, a total of \$3,828,000 (€2,552,000) has been invested in the development of standard air bags, and an additional \$4,288,500 (€2,859,000) has been invested in the development of advanced systems. Modena Design provided fairly detailed specifications of the engineering efforts and the design specifications of its air bag systems in its petition.

e. Petitioner's Statements Concerning Intent To Comply or Cease Production Upon Expiration of Requested Temporary Exemption

Modena Design states that it "expects its smart air bag system to be ready in December 2011." We note that Modena Design asserted that due to the long product cycle, it expects the C9 to be in production until 2015.

f. Petitioner's Statements Concerning Why Granting Exemption Would Be in the Public Interest and Consistent With the Objectives of 49 U.S.C. Chapter 301 or 325

Modena Design argues that the vehicle 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. 301). The petitioner asserts that the Pagani 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 can stay rigid during repeated impacts, providing an additional source of protection in the event of a potentially penetrating impact. Modena Design implies that these features serve, in part, to mitigate

the diminished crashworthiness caused by the lack of FMVSS-compliant air bags.

Modena Design lists six additional rationales as to why an exemption would be in the public interest. They are repeated below:

- All exempted cars will have standard air bags which comply with the pre-S14 provisions of FMVSS No. 208.
- Exempted vehicles will comply with all Federal safety standards other than the provisions that are subject to the exemption.
- Due to the extremely small number of exempted vehicles (even with an increase in production capability, Modena Design states that it will only produce around 50 vehicles per year), the effect on motor vehicle safety will be de minimus.
- If an exemption is not granted, U.S. consumer choice would be adversely affected.
- Modena Design vehicles will not be used extensively, due to their "second vehicle" nature.
- Because of the nature of the C9 as a high-performance sports car, it is not expected to typically transport children, thereby reducing the importance of

advanced air bags, which are, in part, aimed at protecting children.

V. NHTSA's Initial Review of Petition as to Completeness/Eligibility

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 is complete and the petitioner eligible to apply for the requested petition. The agency has not made any judgment on the merits of the application.

VI. Issuance of Notice of Final Action

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: November 19, 2008.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

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