



DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA-2020-0064; Notice 2]

Mercedes-Benz USA, LLC, Denial of Petition for Decision of Inconsequential

Noncompliance

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

ACTION: Denial of petition.

SUMMARY: Mercedes-Benz AG and Mercedes-Benz USA, LLC, (collectively, “Mercedes-Benz” or “Petitioner”) have determined that certain model year (MY) 2020 Mercedes-Benz GLS 580 motor vehicles do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 118, *Power-operated Window, Partition, and Roof Panel Systems*. Mercedes-Benz filed a noncompliance report dated May 11, 2020, and subsequently petitioned NHTSA on June 3, 2020, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This notice announces the denial of Mercedes-Benz’s petition.

FOR FURTHER INFORMATION CONTACT: Frederick Smith, Office of Vehicle Safety Compliance, the National Highway Traffic Safety Administration (NHTSA), telephone (202) 366-7487, facsimile (202) 366-3081.

SUPPLEMENTARY INFORMATION:

I. Overview: Mercedes-Benz has determined that certain MY 2020 Mercedes-Benz GLS 580 motor vehicles do not fully comply with the requirements of paragraph S6(a)(1) of FMVSS No. 118, *Power-operated Window, Partition, and Roof Panel Systems* (49 CFR 571.118). Mercedes-Benz filed a noncompliance report dated May 11, 2020, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports*. Mercedes-Benz subsequently petitioned NHTSA on June 3, 2020, for an exemption from the notification and remedy requirements of 49 U.S.C.

Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, *Exemption for Inconsequential Defect or Noncompliance*.

Notice of receipt of Mercedes-Benz petition was published with a 30-day public comment period, on October 23, 2020, in the **Federal Register** (85 FR 67604). No comments were received. To view the petition and all supporting documents log onto the Federal Docket Management System (FDMS) website at <https://www.regulations.gov/>. Then follow the online search instructions to locate docket number “NHTSA-2020-0064.”

II. Vehicles Involved: Mercedes-Benz stated that it determined that 22 MY 2020 Mercedes-Benz GLS 580 motor vehicles manufactured between February 8, 2019, and September 20, 2019, do not meet the requirements of FMVSS No. 118, S6(a)(1).

III. Noncompliance: Mercedes-Benz explains that the noncompliance is that the automatic reversal systems and actuation devices for the sunroofs in the subject vehicles do not fully comply with paragraph S6(a)(1) of FMVSS No. 118. Specifically, when the vehicle’s “car wash mode” is activated by using the central touch display in the center console, the sunroof may close automatically.

IV. Rule Requirements: Paragraph S6(a)(1) of FMVSS No. 118 includes the requirements relevant to this petition. An actuation device must not cause a window, partition, or roof panel to begin to close from any open position when tested using a stainless steel sphere having a surface finish between 8 and 4 micro inches and a radius of $20\text{ mm} \pm 0.2\text{ mm}$, when the surface of the sphere is placed against any portion of the actuation device.

V. Summary of Mercedes-Benz’s Petition: The following views and arguments presented in this section are the views and arguments provided by Mercedes-Benz and do not reflect the views of NHTSA. Mercedes-Benz describes the subject noncompliance and contends that the noncompliance is inconsequential as it relates to motor vehicle safety.

In support of its petition, Mercedes-Benz offers the following reasoning:

1. Mercedes-Benz alleges that “due to their specific operating parameters, even though the buttons used to activate car wash mode do not meet the performance requirement of paragraph S6(a), the condition does not create an increased safety risk.”
2. First, Mercedes-Benz states, “the car wash mode feature must first be activated by the user. Car wash mode is not automatically enabled unless and until the operator activates the feature by affirmatively accepting the option and turning the feature on. Thus, unless car wash mode is already active within the vehicle, the condition described above cannot occur.”
3. Mercedes-Benz further states, “[o]nce the vehicle has initialized car wash mode, the feature can only be activated through a series of steps using either the vehicle’s central touch display or from a touchpad located in the center console. Activating car wash mode is a multi-step process and the process varies depending on the current menu contained on the display screen. For example, if car wash mode has been programmed by the user inside the “favorites” menu, then a series of two touches is needed to activate car wash mode. In all other cases, the operator would first need to change the display screen to the vehicle menu first and from there, navigate to the car wash mode icon. In either case, car wash mode will not become active unless each of these steps is executed in the corresponding order. Because of the complexity involved in navigating through the required sequence of events there is an extremely low likelihood of the car wash mode being inadvertently activated in the first place.”
4. Further, Mercedes-Benz claims “the sunroofs in the subject vehicles contain an auto-reverse feature. Upon detecting an object or obstruction inside the sunroof, it will automatically stop and reverse course and fully retract. While the sunroofs do not meet the requirements of paragraph S5, Mercedes-Benz states that they are certified to the European standard UN-R-21. The European standard incorporates many of the performance features included in the automatic reversal function contained in

FMVSS No. 118, paragraph S5. The sunroofs in the subject vehicles will automatically reverse prior to exerting 100 Newtons of pinch force, and consistent with the options provided at paragraph S5.2, the sunroof will either retract to a position at least as wide as the initial position before closing or will allow a 200-mm rod to be inserted in the gap.”

5. Mercedes-Benz says that NHTSA “has previously granted petitions for inconsequential treatment for FMVSS No. 118 involving similar circumstances and vehicle features. NHTSA granted a petition by General Motors involving a noncompliance with FMVSS No. 118, paragraph S4(e), where for 60 seconds after the vehicles are started, an issue with the sunroof module would allow the sunroof to close via the control button if the engine is turned off and a front door is opened. In that instance, in order to activate the sunroof, a series of specific steps must be taken in order and the steps must be completed within a 60-second time frame. *See* General Motors Corporation, Grant of Petition for Decision of Inconsequential Noncompliance, 73 FR 22459 (April 25, 2008). In granting the petition, the Agency found that the potential for entrapment in a power operated sunroof presented less of a risk of entrapment than power-operated windows because, in general, sunroofs are less physically accessible than power-operated windows. The decision also focused on the presence of an auto-reverse feature, which would reverse the movement of the sunroof before it exerted a pressure of 100 Newtons. In granting the petition, the Agency noted the presence of this auto-reverse feature as one that would further reduce the risk of entrapment.”
6. Mercedes-Benz further asserts that “much like the conditions present in the General Motors Corporation vehicles, the noncompliance in the car wash mode feature of the subject vehicles similarly does not create an increased safety risk. Assuming that the function has been initialized by the operator, a series of specific and coordinated steps

must occur in order to activate car wash mode. If those steps are not carried out in the precise order required, then the car-wash mode program will not be activated.

Even in the unlikely event that the car wash mode function is inadvertently activated, there is no enhanced risk of injury because of the sunroof auto-reverse feature.”

Mercedes-Benz concludes by again contending that the subject noncompliance is inconsequential as it relates to motor vehicle safety, and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

VI. NHTSA’s Analysis: The burden of establishing the inconsequentiality of a failure to comply with a *performance requirement* in a standard—as opposed to a *labeling requirement with no performance implications*—is more substantial and difficult to meet. Accordingly, NHTSA has not found many such noncompliances inconsequential.¹ Potential performance failures of safety-critical equipment, like seat belts or air bags, are rarely deemed inconsequential.

An important issue to consider in determining inconsequentiality based upon NHTSA’s prior decisions on noncompliance issues was the safety risk to individuals who experience the type of event against which the recall would otherwise protect.² In general, NHTSA does not consider the absence of complaints or injuries to show that the issue is inconsequential to safety. “Most importantly, the absence of a complaint does not mean there have not been any safety issues, nor does it mean that there will not be safety issues in the future.”³ “[T]he fact that in

¹ Cf. *Gen. Motors Corporation; Ruling on Petition for Determination of Inconsequential Noncompliance*, 69 FR 19897, 19899 (Apr. 14, 2004) (citing prior cases where noncompliance was expected to be imperceptible, or nearly so, to vehicle occupants or approaching drivers).

² See *Gen. Motors, LLC; Grant of Petition for Decision of Inconsequential Noncompliance*, 78 FR 35355 (June 12, 2013) (finding noncompliance had no effect on occupant safety because it had no effect on the proper operation of the occupant classification system and the correct deployment of an air bag); *Osram Sylvania Prods. Inc.; Grant of Petition for Decision of Inconsequential Noncompliance*, 78 FR 46000 (July 30, 2013) (finding occupant using noncompliant light source would not be exposed to significantly greater risk than occupant using similar compliant light source).

³ *Morgan 3 Wheeler Limited; Denial of Petition for Decision of Inconsequential Noncompliance*, 81 FR 21663, 21666 (Apr. 12, 2016).

past reported cases good luck and swift reaction have prevented many serious injuries does not mean that good luck will continue to work.”⁴

Arguments that only a small number of vehicles or items of motor vehicle equipment are affected have also not justified granting an inconsequentiality petition.⁵ Similarly, NHTSA has rejected petitions based on the assertion that only a small percentage of vehicles or items of equipment are likely to actually exhibit a noncompliance. The percentage of potential occupants that could be adversely affected by a noncompliance does not determine the question of inconsequentiality. Rather, the issue to consider is the consequence to an occupant who is exposed to the consequence of that noncompliance.⁶ These considerations are also relevant when considering whether a defect is inconsequential to motor vehicle safety.

NHTSA has reviewed the Mercedes-Benz inconsequentiality petition and does not concur with Mercedes-Benz’s conclusion that the noncompliance is inconsequential to motor vehicle safety and is denying Mercedes-Benz’s petition.

FMVSS 118 S6 sets performance requirements intended to mitigate the potential for injury from a window or sunroof being inadvertently closed when a person is in its path. Under the standard, the operating controls may not allow a window, sunroof or partition to close when a test sphere (simulating a child’s knee) is pressed against the control. Specifically, FMVSS No. 118 S6(a)(1) requires that “an actuation device must not cause a window, partition, or roof panel to begin to close from any open position when tested . . . [u]sing a stainless steel sphere having a

⁴ *United States v. Gen. Motors Corp.*, 565 F.2d 754, 759 (D.C. Cir. 1977) (finding defect poses an unreasonable risk when it “results in hazards as potentially dangerous as sudden engine fire, and where there is no dispute that at least some such hazards, in this case fires, can definitely be expected to occur in the future”).

⁵ *See Mercedes-Benz, U.S.A., L.L.C.; Denial of Application for Decision of Inconsequential Noncompliance*, 66 FR 38342 (July 23, 2001) (rejecting argument that noncompliance was inconsequential because of the small number of vehicles affected); *Aston Martin Lagonda Ltd.; Denial of Petition for Decision of Inconsequential Noncompliance*, 81 FR 41370 (June 24, 2016) (noting that situations involving individuals trapped in motor vehicles—while infrequent—are consequential to safety); *Morgan 3 Wheeler Ltd.; Denial of Petition for Decision of Inconsequential Noncompliance*, 81 FR 21663, 21664 (Apr. 12, 2016) (rejecting argument that petition should be granted because the vehicle was produced in very low numbers and likely to be operated on a limited basis).

⁶ *See Gen. Motors Corp.; Ruling on Petition for Determination of Inconsequential Noncompliance*, 69 FR 19897, 19900 (Apr. 14, 2004); *Cosco Inc.; Denial of Application for Decision of Inconsequential Noncompliance*, 64 FR 29408, 29409 (June 1, 1999).

surface finish between 8 and 4 micro inches and a radius of 20 mm $\pm$ 0.2 mm, place the surface of the sphere against any portion of the actuation device.”

According to the Mercedes-Benz petition, “the actuation devices used to engage car wash mode do not meet the inadvertent activation provisions of FMVSS No. 118 S6(a)(1).” However, Mercedes-Benz argues activating car-wash mode is a multi-step process and the process varies depending on the current menu contained on the display screen of a particular vehicle. After considering information provided by Mercedes-Benz and from online descriptions of the system, NHTSA believes there is a minimal level of complexity involved in navigating through the required sequence of events to actuate and close the sunroof. The controls at issue include those located on the console between the front seats where a child could easily stand or kneel. Given the unpredictable behavior of an unattended child, inadvertent selection of the “Quick Access” or “Favorite” hard buttons, where the “Car Wash Mode” icon can be located, is a foreseeable and appreciable risk. Car Wash Mode can be programmed as the only selectable icon within the “Favorite” menu, increasing its susceptibility to accidental engagement.

In their petition, Mercedes-Benz states, “the sunroofs in the subject vehicles contain an auto-reverse feature. Upon detecting an object or obstruction inside the sunroof, it will automatically stop and reverse course and fully retract. While the sunroofs do not meet the requirements of S5, they are certified to the European standard UN-R-21. The European standard incorporates many of the performance features included in the automatic reversal function contained in FMVSS 118, S5.” NHTSA acknowledges that the sunroofs in the Mercedes-Benz vehicles in question are compliant with UN-R-21, but Mercedes-Benz concedes they do not comply with FMVSS 118 S5, NHTSA’s regulations governing automatic reversal systems. While UN-R-21 does provide a level of safety, FMVSS 118 S5 provides a greater level of protection from pinching injuries, particularly to smaller appendages like a child’s fingers.

Finally, in the petition Mercedes-Benz claims the circumstances here are analogous to the circumstances in a previous NHTSA determination that noncompliance was inconsequential.

NHTSA considers each petition on its own merits and the prior decision cited by the Petitioner has limited applicability in this case. NHTSA believes the circumstances for accidental window/sunroof closure involved in the cited General Motors (GM) petition are significantly different than those required under Mercedes-Benz current petition. In granting the GM petition, the agency was persuaded that the high level of complexity involved in navigating through the required sequence of events effectively eliminated any entrapment risk, particularly the limited timeframe within which the events would have to occur. Specifically, NHTSA stated, “[i]t is very unlikely that the entire sequence of events—starting the engine, turning the engine off, opening a front door, a person becoming positioned in the sunroof opening, and pushing the sunroof close button—will occur in less than 60 seconds from the time the ignition is turned off and the vehicle operator has exited the vehicle and left the immediate area.” General Motors, Decision Granting Petition for Inconsequential Noncompliance, 73 Fed. Reg. 22459 (April 25, 2008). In contrast, the noncompliance in the Mercedes-Benz petition does not involve as great a level of complexity in the required sequence of events that would lead to sunroof engagement. The Mercedes-Benz petition states, in the subject vehicles, as few as two inputs to the centralized control devices is sufficient to actuate and close the sunroof, i.e., with Car Wash Mode included in the “Favorites” menu. Furthermore, the touch screens at issue here remain activated indefinitely until the vehicle is turned off or a user activates a command. NHTSA therefore does not agree that the prior determination in the GM case is analogous or persuasive here.

Therefore, Mercedes-Benz has not met its burden of persuasion and for the reasons described herein NHTSA does not find that the subject noncompliance is inconsequential to motor vehicle safety.

VII. NHTSA’s Decision: In consideration of the foregoing analysis, NHTSA finds that Mercedes-Benz has not met its burden of persuasion that the FMVSS No. 118 noncompliance at issue is inconsequential to motor vehicle safety.

Accordingly, Mercedes-Benz's petition is hereby denied and Mercedes-Benz is consequently obligated to provide notification of, and a free remedy for, the noncompliance under 49 U.S.C. 30118 and 30120.

(Authority: 49 U.S.C. 30118, 30120; delegations of authority at 49 CFR 1.95 and 501.8)

Cem Hatipoglu,

Acting Associate Administrator for Enforcement.

[FR Doc. 2023-23528 Filed: 10/24/2023 8:45 am; Publication Date: 10/25/2023]