

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

[Docket Nos. NHTSA–2019–0030 and NHTSA–2021–0066; Notice 2]

**Volkswagen Group of America, Inc., Denial of Petitions for Decision of Inconsequential Noncompliance**

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

**ACTION:** Denial of petitions.

**SUMMARY:** Volkswagen Group of America, Inc. (Volkswagen or the “Petitioner”) has determined that certain model year (MY) 2019 and 2021 Audi motor vehicles do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 135, *Light Vehicle Brake Systems*. Volkswagen filed noncompliance reports dated March 27, 2019, and July 26, 2021. Volkswagen petitioned NHTSA (the “Agency”) on April 17, 2019, and August 25, 2021, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This notice announces the denial of Volkswagen’s petitions.

**FOR FURTHER INFORMATION CONTACT:** Vince Williams, Office of Vehicle Safety Compliance, National Highway Traffic Safety Administration (NHTSA), telephone (202) 366–2319.

**SUPPLEMENTARY INFORMATION:****I. Overview**

Volkswagen has determined that certain MY 2019 Audi A6 and Audi A7 and MY 2021 Audi A6 Sedan, A6 Allroad, A7, RS6 Avant, RS7, S6 Sedan, and S7 motor vehicles do not comply with the requirements of paragraph S5.4.3 of FMVSS No. 135, *Light Vehicle Brake Systems* (49 CFR 571.135). Volkswagen filed noncompliance reports dated March 27, 2019, and July 26, 2021, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports*. Volkswagen petitioned NHTSA on April 17, 2019, and August 25, 2021, 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*.

Notices of receipt of Volkswagen’s petitions were published on August 21, 2019 (84 FR 43660) and June 17, 2022 (87 FR 36574) in the **Federal Register** with a 30-day public comment period.

No comments were received. To view the petitions 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 numbers “NHTSA–2019–0030” and “NHTSA–2021–0066.”

**II. Vehicles Involved**

Approximately 3,908 MY 2019 Audi A6 and Audi A7 vehicles, manufactured between July 27, 2018 and November 6, 2018, are potentially involved.

Additionally, approximately 4,267 MY 2021 Audi A6 Sedan, A6 Allroad, A7, RS6 Avant, RS7, S6 Sedan, and S7 vehicles, manufactured between January 11, 2021, and April 14, 2021, are potentially involved.

**III. Noncompliance**

Volkswagen determined that a small number of the vehicles have a European-specification brake fluid reservoir cap instead of the reservoir cap required in S5.4.3 of FMVSS No. 135. The noncompliant brake fluid reservoir caps do not include the warning label required by FMVSS No. 135.

**IV. Rule Requirements**

S5.4.3 of FMVSS 135 requires that each vehicle equipped with hydraulic brakes have a brake fluid warning statement that reads as follows, in letters at least 3.2 mm (1/8 inch) high: “WARNING: Clean filler cap before removing. Use only \_\_\_ fluid from a sealed container.” (Manufacturers must insert the recommended type of brake fluid, as specified in 49 CFR 571.116, (e.g., “DOT 3.”) The lettering shall be permanently affixed, engraved, or embossed, and located so it is visible by direct view, either on or within 100 mm (3.94 inches) of the brake fluid reservoir filler plug or cap. The color of the lettering must also contrast with its background, if it is not engraved or embossed.

**V. Summary of Petition**

The following views and arguments presented in this section, “V. Summary of Volkswagen’s Petition,” are the views and arguments provided by Volkswagen and do not reflect the views of the Agency. Volkswagen describes the subject noncompliance and contends that the noncompliance is inconsequential as it relates to motor vehicle safety.

Volkswagen explains that it believes the subject noncompliance is inconsequential to motor vehicle safety because “the brake fluid cap clearly shows the specification of the brake fluid required” and “provides clear

symbols including one for caution and one for referring to owner manual instructions.” Volkswagen says that the owner’s manual also “indicates the proper brake fluid specification for use in the vehicle.” Volkswagen states that the “brake fluid cap conforms to the requirements of ISO 9128:2006 which is a requirement of UN–ECE Regulations 13 and 13h.”

Volkswagen contends that NHTSA has previously granted the following inconsequentiality petitions, which Volkswagen believes are similar to the subject petition:

- Jaguar Land Rover North America, LLC, Grant of Petition for Decision of Inconsequential Noncompliance, 84 FR 13095 (April 3, 2019).
- Ford Motor Company, Grant of Petition for Decision of Inconsequential Noncompliance, 78 FR 69931 (November 21, 2013).
- Hyundai Motor Company, Grant of Petition for Decision of Inconsequential Noncompliance, 73 FR 38290 (July 3, 2008).

According to Volkswagen, “service to the brake system involving an exchange of the brake fluid is not a standard maintenance activity” and repairs to the brake system “requires basic technical knowledge regarding the brake system and should be performed by a trained technician.”

Volkswagen states that it has not received any field or customer complaints or notifications about any accidents or injuries related to the subject noncompliance. In Volkswagen’s petition dated April 17, 2019, Volkswagen states that, as of November 7, 2018, production of the subject vehicles has been corrected (*i.e.*, are now compliant) and the vehicles “at the factory have been corrected and unsold units will be correct prior to sale.” In Volkswagen’s petition dated August 25, 2021, Volkswagen again states that production has been corrected and, as of April 14, 2021, the vehicles at its factory have been corrected and the subject vehicles still in its control will be corrected prior to sale.

Volkswagen concludes each petition by stating its belief that the subject noncompliance is inconsequential as it relates to motor vehicle safety, and that its petitions 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**

In determining inconsequentiality of a noncompliance, NHTSA focuses on the safety risk to individuals who

experience the type of event against which a recall would otherwise protect.<sup>1</sup> In general, NHTSA does not consider the absence of complaints or injuries when determining if a noncompliance is inconsequential to safety. The absence of complaints does not mean vehicle occupants have not experienced a safety issue, nor does it mean that there will not be safety issues in the future.<sup>2</sup>

Arguments that only a small number of vehicles or items of motor vehicle equipment are affected also do not justify granting an inconsequentiality petition.<sup>3</sup> Similarly, mere assertions that only a small percentage of vehicles or items of equipment are likely to actually exhibit a noncompliance are unpersuasive. The percentage of potential occupants that could be adversely affected by a noncompliance is not relevant to whether the noncompliance poses an inconsequential risk to safety. Rather, NHTSA focuses on the consequence to an occupant who is exposed to the consequence of that noncompliance.<sup>4</sup> The Safety Act is preventive, and manufacturers cannot and should not

wait for deaths or injuries to occur in their vehicles before they carry out a recall.<sup>5</sup> Indeed, the very purpose of a recall is to protect individuals from risk. *Id.*

NHTSA has evaluated the merits of these inconsequentiality petitions and determined that Volkswagen has not met its burden of persuasion that the subject noncompliance is inconsequential to motor vehicle safety. S5.4.3 of FMVSS No. 135 requires the following four essential components of the brake fluid cap label: (1) the brake fluid warning statement “Warning: Clean filler cap before removing. Use only fluid from a sealed container.” (Inserting the recommended type of brake fluid as specified in 49 CFR 571.116, *e.g.* “DOT 3”), the lettering shall be (2) permanently affixed, engraved or embossed, (3) located so as to be visible by direct view, either on or within 100mm (3.94in) of the brake fluid reservoir filler plug or cap, and (4) of a color that contrasts with its background, if it is not engraved or embossed. Of the required components of the brake fluid cap reservoir labeling, the statements “Clean filler cap before removing.” and “Use only fluid from a sealed container.” are missing and an exclamation point symbol is used instead of the word “Warning”. Volkswagen argues that the brake fluid cap indicates the proper fluid type and contains the symbols conforming to ISO 9128:2006, which is a requirement of UN-ECE Regulations 13 and 13h. These include the aforementioned exclamation mark, a symbol for the brake system, and a third symbol apparently directing the viewer to consult the vehicle’s owner’s manual or service information. NHTSA notes that the symbols on the ISO brake fluid cap are, at best, partially familiar to U.S. vehicle owners and users and are not the equivalent of the printed information required by the safety standard.

Furthermore, Volkswagen added that normal brake fluid upkeep is not considered a basic maintenance that a consumer would handle on their own and the servicing of the brake system should be performed by a trained technician with technical knowledge of the brake system. The contention that owners do not perform brake service was not supported by data and is an assumption that becomes increasingly more indefensible as a vehicle ages. When a consumer must check or add brake fluid, it is important to have the required warnings in place to preserve

the performance and durability of the brake system.

While prior NHTSA determinations that a noncompliance was inconsequential are not considered as binding precedent and the Agency considers each petition on its own merits, the prior decisions cited by the Petitioner have limited applicability in this case. One decision involved a placard with all the required warnings permanently attached to the brake fluid reservoir, but not to the cap itself. The two other decisions that the Petitioner cited involved a single symbol being substituted for a required word or phrase. Conversely, the Petitioner’s subject noncompliance involves multiple symbols that are missing from the noncompliant cap including the statement “Clean filler cap before removing” which is required to prevent unnecessary contamination from being introduced into the brake system when a customer or service technician tries to inspect the brake fluid, as well as the statement “Use only fluid from a sealed container” which is intended to prevent a customer or technician from adding the incorrect grade of brake fluid or contaminated fluid when adding or replenishing the brake fluid. Both of the aforementioned conditions could lead to a degradation of the vehicle’s brake system performance and present an unintended risk to the driver and the driving public.

## VII. NHTSA’s Decision

In consideration of the foregoing, NHTSA finds that Volkswagen has not met its burden of persuasion that the subject FMVSS No. 135 noncompliance is inconsequential to motor vehicle safety. Accordingly, these petitions are hereby denied and Volkswagen is consequently obligated to provide notification of and free remedy for that noncompliance under 49 U.S.C. 30118 and 30120.

The Agency also notes that these petitions involve the same noncompliance that occurred initially in several months of production in 2018 and then reoccurred again in vehicles produced over several months in 2021. Vehicle manufacturers have a legal obligation to ensure that their vehicles manufactured for the U.S. fully comply with applicable FMVSS and are required to exercise reasonable care in certifying their vehicles as compliant. 49 U.S.C. 30115(a). Volkswagen should ensure it has improved its processes to prevent further reoccurrence of this issue.

<sup>1</sup> 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).

<sup>2</sup> See *Morgan 3 Wheeler Limited; Denial of Petition for Decision of Inconsequential Noncompliance*, 81 FR 21663, 21666 (Apr. 12, 2016); see also *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”).

<sup>3</sup> 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).

<sup>4</sup> 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).

<sup>5</sup> See, *e.g.*, *United States v. Gen. Motors Corp.*, 565 F.2d 754, 759 (D.C. Cir. 1977).

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

**Otto G. Matheke, III,**  
Acting Associate Administrator for  
Enforcement.

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## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

[Docket No. NHTSA-2022-0094; Notice 2]

#### Hitachi Cable America Inc., Now Known as Proterial Cable America, Inc., and Harley-Davidson Motor Company, Receipt of Supplemental Petitions for Decision of Inconsequential Noncompliance

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

**ACTION:** Receipt of supplemental  
petitions.

**SUMMARY:** Hitachi Cable America Inc. (HCA), now known as Proterial Cable America, Inc. (PCA), and Harley-Davidson Motor Company (Harley-Davidson) (collectively, “the Petitioners”) have determined that certain PVC, Nylon, and “Revised Socket” Nylon brake hose assemblies equipped in certain model year (MY) 2008–2022 Harley-Davidson motorcycles, and also sold to Harley-Davidson dealers as replacement parts, do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 106, *Brake Hoses*. The Petitioners filed the appropriate noncompliance reports and subsequently petitioned NHTSA (the “Agency”) for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. Notice of receipt was first published on April 13, 2023. This document announces receipt of the Petitioners’ supplemental petitions.

**DATES:** The comment period for the notice published on April 13, 2023, at 88 FR 22523, is extended. Send comments on or before September 21, 2023.

**ADDRESSES:** Interested persons are invited to submit written data, views, and arguments on this petition. Comments must refer to the docket and notice number cited in the title of this notice and may be submitted by any of the following methods:

- **Mail:** Send comments by mail addressed to the U.S. Department of Transportation, Docket Operations, M–

30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

- **Hand Delivery:** Deliver comments by hand to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The Docket Section is open on weekdays from 10:00 a.m. to 5:00 p.m., except on Federal Holidays.

- **Electronically:** Submit comments electronically by logging onto the Federal Docket Management System (FDMS) website at <https://www.regulations.gov/>. Follow the online instructions for submitting comments.

- Comments may also be faxed to (202) 493–2251.

Comments must be written in the English language, and be no greater than 15 pages in length, although there is no limit to the length of necessary attachments to the comments. If comments are submitted in hard copy form, please ensure that two copies are provided. If you wish to receive confirmation that comments you have submitted by mail were received, please enclose a stamped, self-addressed postcard with the comments. Note that all comments received will be posted without change to [https://www.regulations.gov](https://www.regulations.gov/), including any personal information provided.

All comments and supporting materials received before the close of business on the closing date indicated above will be filed in the docket and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the fullest extent possible.

When the petitions are granted or denied, notice of the decision will also be published in the **Federal Register** pursuant to the authority indicated at the end of this notice.

All comments, background documentation, and supporting materials submitted to the docket may be viewed by anyone at the address and times given above. The documents may also be viewed on the internet at [https://www.regulations.gov](https://www.regulations.gov/) by following the online instructions for accessing the dockets. The docket ID number for these petitions is shown in the heading of this notice.

DOT’s complete Privacy Act Statement is available for review in a **Federal Register** notice published on April 11, 2000 (65 FR 19477–78).

**FOR FURTHER INFORMATION CONTACT:** Manuel Maldonado, General Engineer, NHTSA, Office of Vehicle Safety Compliance, (202) 366–7235.

#### SUPPLEMENTARY INFORMATION:

**I. Overview:** The Petitioners determined that certain PVC, Nylon, and “Revised Socket” Nylon brake hose assemblies equipped in certain MY 2008–2022 Harley-Davidson Touring, CVO Touring, Trike, Softail, Revolution Max, VRSC, XG750A, and XL Sportster motorcycles, and also sold as replacement parts, do not fully comply with paragraph S5.3 of FMVSS No. 106, *Brake Hoses* (49 CFR 571.106).

PCA filed its initial noncompliance report on July 27, 2022, and amended the report on August 25, 2022, October 18, 2022, October 26, 2022, November 16, 2022, March 30, 2023, and May 15, 2023, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports*. PCA petitioned NHTSA on August 19, 2022, and later amended its petition on November 10, 2022, December 2, 2022, April 21, 2023,<sup>1</sup> and May 15, 2023, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that the subject noncompliances are inconsequential as they relate 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*.

Harley-Davidson filed its initial noncompliance report on August 9, 2022, and later amended the report on December 6, 2022, February 7, 2023, February 8, 2023, March 8, 2023, May 11, 2023, and June 21, 2023, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports*. Harley-Davidson petitioned NHTSA on September 2, 2022, and amended its petition on December 29, 2022, and June 2, 2023, 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 the Petitioners’ prior petitions was published on April 13, 2023, in the **Federal Register** (88 FR 22523). To view the petitions 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–2022–0094.”

This notice of receipt of the Petitioners’ supplemental petitions is

<sup>1</sup> The supplemental petition submitted on April 21, 2023, was incorrectly dated as April 21, 2022.