



# National Transportation Safety Board

Washington, D.C. 20594

## Safety Recommendation

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**Date:** December 29, 2009

**In reply refer to:** H-09-42 and -43

Mr. Jayson P. Ahern  
Acting Commissioner  
U.S. Customs and Border Protection Agency  
1300 Pennsylvania Avenue, N.W.  
Washington, D.C. 20229

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The National Transportation Safety Board (NTSB) is an independent federal agency charged by Congress with investigating transportation accidents, determining their probable cause, and making recommendations to prevent similar accidents from occurring. We are providing the following information to urge your organization to take action on the safety recommendations in this letter. The NTSB is vitally interested in these recommendations because they are designed to prevent accidents and save lives.

These recommendations address importation requirements for foreign-manufactured vehicles in commercial motor vehicle operations in the United States. These recommendations are derived from the NTSB's investigation of the January 2, 2008, motorcoach accident that occurred near Victoria, Texas, and are consistent with the evidence we found and the analysis that we performed.<sup>1</sup> As a result of this investigation, the NTSB has issued 19 safety recommendations, 2 of which are addressed to the U.S. Customs and Border Protection Agency (CBP). Information supporting these recommendations is discussed below. The NTSB would appreciate a response from you within 90 days addressing the actions you have taken or intend to take to implement our recommendations.

On January 2, 2008, about 4:13 a.m., a 2005 Volvo 47-passenger motorcoach, operated by a 42-year-old driver and carrying 47 passengers, was proceeding northbound on U.S. Highway 59 (U.S. 59) about 5 miles south of Victoria, Texas, when the motorcoach driver partially drifted off the right edge of the roadway. The driver oversteered to the left to avoid leaving the roadway, resulting in the motorcoach coming back across both lanes, departing the left edge of the roadway, and partially entering an earthen median. The driver oversteered again to the right in an attempt to reenter the roadway and then oversteered to the left a second time upon realizing the motorcoach had gone too far right. As a result of the final oversteer, the

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<sup>1</sup> See *Motorcoach Rollover on U.S. Highway 59 Near Victoria, Texas, January 2, 2008*, Highway Accident Report NTSB/HAR-09/03/SUM (Washington, DC: National Transportation Safety Board, 2009), which is available on the NTSB website at <http://www.nts.gov/pubictn/2009/HAR0903.pdf>.

motorcoach yawed to the left, rotated counterclockwise, and overturned onto its right side. The motorcoach's right rear struck a guardrail as the motorcoach slid on its right side approximately 112 feet before coming to rest across the roadway. Within 5 minutes, and before emergency responders arrived on scene, a 2001 Ford Ranger pickup truck also traveling northbound on U.S. 59 struck the underside of the motorcoach forward of the rear axle. As a result of the initial motorcoach rollover, 1 passenger was fatally injured, and 46 passengers and the driver received injuries ranging from minor to serious. The driver of the pickup truck sustained minor injuries when the pickup truck struck the undercarriage of the motorcoach.

The NTSB determines that the probable cause of this accident was the driver's falling asleep, which caused him to partially drift off the road, resulting in oversteer corrections when the driver regained awareness, and subsequent vehicle loss of control and overturn. Contributing to the severity of the unrestrained passengers' injuries was their striking objects and other passengers inside the motorcoach, as well as the partial ejections that occurred when the motorcoach overturned during the accident.

During the course of the Victoria investigation and public hearing,<sup>2</sup> the NTSB discovered that the Federal Motor Carrier Safety Administration (FMCSA) does not currently enforce the requirement for passenger-carrying commercial motor vehicles to display a label of certification documenting the vehicle's compliance with all applicable motor vehicle safety standards. Although FMCSA representatives stated during the NTSB's public hearing that the FMCSA could effectively ensure a motor carrier's compliance with applicable *Federal Motor Vehicle Safety Standards* (FMVSSs) through continued vigorous enforcement of the *Federal Motor Carrier Safety Regulations* (FMCSRs), the NTSB notes that the U.S. Government relies upon the criteria established by the FMVSSs to show that a vehicle meets minimum acceptable safety requirements during crash and other testing. Although proper maintenance helps to ensure that non-FMVSS-compliant components will not malfunction, it cannot be determined, unless independently tested or involved in a real-world crash, whether the components would meet FMVSS criteria for preventing unreasonable risk of injury or death to vehicle occupants.

Without FMVSS certification and vehicle inspections (an unlikely occurrence given the low numbers of roadside passenger commercial motor vehicle inspections performed at border crossings),<sup>3</sup> no consistent or mutually supportive set of regulations or procedures ensures FMVSS compliance, which is incongruent with the intent of the Vehicle Safety Act. The Vehicle Safety Act's language is explicit in stating that preexisting motor carrier safety regulations should not differ in substance or impose any lesser standard of performance than manufacturing standards.<sup>4</sup> In its 2005 notice of proposed rulemaking (NPRM) withdrawal,<sup>5</sup> the FMCSA concluded that FMVSS certification labels were not needed and that the enforcement of the

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<sup>2</sup> Victoria, Texas, public hearing, October 7–8, 2008, Washington, D.C.

<sup>3</sup> Only 7.4 percent of motorcoaches entering the United States were stopped in 2007 for inspection, with only 1.2 percent of those motorcoaches receiving an inspection sufficient to detect potential problems with FMCSR items that cross-reference the FMVSSs.

<sup>4</sup> M. Schmidt and R. Havelaar, *Review of Canadian/Mexican Commercial Motor Vehicle Compliance With FMVSS: Final Report*, Texas Transportation Institute, Texas A&M University System submission to the FMCSA (April 30, 2006), p. 71.

<sup>5</sup> For further information, see *Federal Register*, vol. 70, no. 165 (August 26, 2005), pp. 50269–50290, docket nos. FMCSA-01-10886 and NHTSA-2005-22197.

FMCSRs would ensure compliance with the FMVSSs with which they were cross-referenced. However, according to the National Highway Traffic Safety Administration (NHTSA) in its public hearing testimony, an inspection cannot determine the dynamic capabilities of certain FMVSSs, and it would be very difficult to determine compliance with certain FMVSSs unless an inspector specifically looked for the certification label found inside the vehicle, which would definitively establish that the vehicle was originally manufactured to meet applicable FMVSSs. The NTSB therefore concludes that the FMCSA's policy of not enforcing the requirement for passenger-carrying commercial motor vehicles to display a label of certification documenting the vehicle's compliance with all applicable motor vehicle safety standards and its failure to help identify and place out of service non-FMVSS-compliant vehicles undermine NHTSA's efforts as a partner safety agency. The NTSB further concludes that current U.S. Department of Transportation (DOT) policy allowing the FMCSA to cross-reference the FMVSSs during a vehicle's inspection and, if the vehicle is not placed out of service, accept that as evidence of adherence to FMVSS performance standards, is faulty based on the FMCSRs' lack of performance testing during a vehicle inspection.

By granting a "passing grade" to non-FMVSS-compliant motorcoaches inspected roadside at the border or during annual or periodic inspections when they do not meet the FMVSSs (easily identifiable by the lack of a certification label), such as was the case with the accident bus, the FMCSA is tacitly permitting any non-FMVSS-compliant vehicle to operate on U.S. roads. During its investigation, the NTSB discovered numerous passenger-carrying vehicles operating in commercial interstate commerce that were not manufactured to FMVSS criteria; however, they were based, registered, and operated in the United States by domestic carriers, which appears contradictory to 49 *United States Code* 30112, which states:

A person may not manufacture for sale, sell, offer for sale, introduce or deliver for introduction in interstate commerce, or import in to the United States, any motor vehicle or motor vehicle equipment manufactured on or after the date an applicable motor vehicle safety standard prescribed under this chapter takes effect unless the vehicle or equipment complies with the standard and is covered by a certification...

Vehicles entering the United States from Mexico present specific difficulties in safety oversight for both the states and the FMCSA. Although the CBP inspects every vehicle for contraband, spending approximately 30 minutes per vehicle, the FMCSA does not conduct a roadside inspection of every vehicle to determine whether it complies with the FMCSRs, which are the regulations that establish safe operating and maintenance requirements for vehicles and their equipment. This practice leaves an enormous gap in a system meant to improve the safety of commercial vehicles and reduce crashes, injuries, and fatalities.

The CBP does not initiate an importation process for vehicles until an owner or importer declares a vehicle for importation. The regulations pertaining to imported vehicles state that they must either be FMVSS compliant or be brought in through the Registered Importer Program. Although some motorcoaches are currently being operated outside of the commercial zone (during cross-border line runs) by foreign-domiciled carriers under the instrument of international traffic (IIT) provisions, the IIT exemption has created a regulatory situation that is being exploited by U.S.-domiciled carriers. NHTSA stated at the NTSB's public hearing that it can work with the CBP, U.S. Immigration and Customs Enforcement, and U.S. Environmental

Protection Agency when it learns of vehicles being brought into the United States permanently without being declared and that do not have labels certifying compliance with applicable FMVSSs affixed by the original manufacturer. In the past, NHTSA's Import and Certification Division has taken action upon learning that imported, noncompliant motorcoaches were being operated in the United States, including seizing noncompliant motorcoaches.

Well-established law and regulation<sup>6</sup> require that all vehicles, including motorcoaches, operate in the United States only with appropriate certification provided by their original or final-stage manufacturers or by their importers. Given the low likelihood of a full vehicle inspection at the U.S.–Mexico border crossings, there is no guarantee of adherence to the FMVSSs or of disincentives for not doing so, such as penalties. The NTSB recommends that the DOT direct NHTSA and the FMCSA to work in conjunction with the CBP to develop and implement a process to detect motor carriers that are currently operating non-FMVSS-compliant motorcoaches or other passenger-carrying commercial motor vehicles, other than exempted vehicles, in the United States (outside of the commercial zone), and when such vehicles are detected, to ensure that the FMCSA has the authority to place such vehicles out of service and require that these motor carriers cease operating those vehicles in commercial interstate passenger service or face revocation of their operating authority. The NTSB also recommends that the CBP assist the DOT in developing a process to detect and report to the DOT information on motor carriers identified during its border crossing inspections of passenger-carrying commercial motor vehicles to be currently operating non-FMVSS-compliant passenger-carrying commercial motor vehicles, other than exempted vehicles, in the United States (outside of the commercial zone), and assist the Department in ensuring such vehicles are placed out of service and requiring these motor carriers cease operating those vehicles in commercial interstate passenger service.

Another issue that surfaced during the accident investigation and public hearing was the varying definitions of “importation” as applicable to vehicles. The CBP initially determined, according to CBP's regulations, that the motorcoach involved in the January 2, 2008, accident was not “imported” because it qualified as an “instrument of international traffic” under 19 CFR 10.41. The CBP further stated that other possible exceptions to the importation rules may have applied to the accident vehicle because it was considered a vehicle used in “international traffic” and Congress exempted certain vehicles from the application of U.S. Customs laws if such vehicles were engaged in international traffic (19 U.S.C. §1322). This statute, as implemented by 19 CFR 123.14, states that foreign-based vehicles engaged in international traffic may be admitted without formal entry. However, qualifying criteria for the international traffic exception can be found in 49 CFR 123.14(c) and 123.16(b) for vehicles used in “*local traffic*.” The CBP noted that section 12.80 of the FMVSSs provides an exception to importation regulations for “foreign-based” vehicles only, which was established to allow foreign-based carriers to operate in the United States on a limited or short-term basis and then

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<sup>6</sup> Title 49 *Code of Federal Regulations* Parts 591-593, 49 U.S.C 30112A and 30115, and Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Section 4139(c). NHTSA's 2002 NPRM on FMVSS certification (*Federal Register*, vol. 67, no. 53 [March 19, 2002], pp. 12789–12797) stated: “Neither the statute nor any agency regulation exempts commercial vehicles domiciled in Canada or Mexico from the requirement that the vehicles must have been manufactured to meet the FMVSSs in order to be imported into the United States.”

return to their home country, such as in the case of charter tours or privately owned vehicles not in commerce.

Based on a review of investigative information provided by the NTSB, the CBP has reconsidered its position regarding the accident motorcoach's import status.<sup>7</sup> The CBP states, "Evidence provided to CBP following the investigation by the NTSB shows a clear intent on the part of the owner of the motorcoach to circumvent CBP's laws," further stating that

As long as an operator has demonstrated the intention to establish a vehicle's base of operations and operate out of that location, and presents sufficient evidence to support that intention, CBP will generally point to that location as being the vehicle's base of operations. The preponderance of evidence provided to us in this case clearly indicates an intention on the part of the motorcoach's owner to establish its base of operations in the United States.

Consequently, the provisions found in Title 19 *Code of Federal Regulations*, section 123.14 (19 CFR 123.14) governing the use of foreign-based vehicles as IIT and their attendant exemption from the customs laws do not apply in this instance. Furthermore, the purchase of the bus, as reflected in documentary evidence provided, would have necessitated the making of a formal entry upon the vehicle's initial arrival in the United States, something which did not occur. The burden of making an entry is placed upon the importer and failure to do so subjects the importer to an assessment of a penalty.

On November 13, 2009, NHTSA informed the NTSB that, based upon CBP's decision that the accident motorcoach's owner intended to establish its base of operations within the United States and that the accident motorcoach should have been presented to the CBP for formal entry (import), NHTSA is considering whether enforcement action against the motorcoach's owner is warranted. Although the CBP has determined, in this case, that the accident motorcoach should have been declared for import by its owner (and thereby the NTSB believes this determination would apply to the other 2005 and two 2008 Volvo motorcoaches that the accident motorcoach's owner operated), such decisions are made on a case-by-case basis. A disconnect exists between the definition of interstate commerce in 49 CFR 390.5 (b), upon which the FMCSA bases its enforcement actions, and the definition of interstate commerce found in 19 CFR 12.80, upon which the CBP bases its enforcement actions, which has led to the loophole currently being taken advantage of by some passenger motor carriers, as was discovered during the Victoria, Texas, accident investigation.

The NTSB believes that if the CBP integrated the definition from 49 CFR 390.5 into the CBP regulations, it could utilize that information when inspecting vehicles at border crossings to determine whether foreign-manufactured vehicles being operated by U.S.-domiciled companies with destinations outside of the commercial zone should be FMVSS compliant and declared for import during entry. A CBP officer, upon determining that a vehicle is not FMVSS compliant and has not yet been through the importation process, could then prevent the vehicle from entering the United States until it is declared. Further, if a vehicle has not entered through the proper importation process before or cannot provide documentation of compliance with the FMVSS standards set forth in Title 49 CFR, the CBP could, with cause, seize the vehicle for failure to

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<sup>7</sup> CBP letter (regarding import status of accident vehicle) to NTSB, September 4, 2009.

declare. The NTSB concludes that the lack of a uniform, coherent definition for what constitutes an imported vehicle, in addition to a definition-of-use loophole in the NHTSA, FMCSA, and CBP regulations, has allowed some U.S.-domiciled motor carriers to effectively bypass the importation laws and inspection processes established to verify conformance with the FMVSSs and register their Mexican-manufactured vehicles within the United States. Currently, this is the only class of commercial and private vehicle able to make use of this safety loophole. The NTSB therefore recommends that the CBP incorporate the definition of interstate commerce from 49 CFR 390.5 into 19 CFR 12.80 in order to provide a uniform, coherent definition for what constitutes an imported vehicle.

As a result of the investigation, the NTSB makes the following recommendations to the U.S. Customs and Border Protection Agency:

Assist the U.S. Department of Transportation in developing a process to detect and report to the Department of Transportation information on motor carriers identified during your border crossing inspections of passenger-carrying commercial motor vehicles to be currently operating non-FMVSS-compliant passenger-carrying commercial motor vehicles, other than exempted vehicles, in the United States (outside of the commercial zone), and assist the Department in ensuring such vehicles are placed out of service and requiring these motor carriers cease operating those vehicles in commercial interstate passenger service. (H-09-42)

Incorporate the definition of interstate commerce from 49 *Code of Federal Regulations* 390.5 into 19 *Code of Federal Regulations* 12.80 in order to provide a uniform, coherent definition for what constitutes an imported vehicle. (H-09-43)

The NTSB also issued safety recommendations to the DOT, NHTSA, the FMCSA, the American Association of Motor Vehicle Administrators, the International Registration Plan, Inc., and the Commercial Vehicle Safety Alliance. The NTSB also reiterated two previously issued recommendations to the FMCSA.

In response to the recommendations in this letter, please refer to Safety Recommendations H-09-42 and -43. If you would like to submit your response electronically rather than in hard copy, you may send it to the following e-mail address: [correspondence@ntsb.gov](mailto:correspondence@ntsb.gov). If your response includes attachments that exceed 5 megabytes, please e-mail us asking for instructions on how to use our secure mailbox. To avoid confusion, please use only one method of submission (that is, do not submit both an electronic copy and a hard copy of the same response letter).

Chairman HERSMAN, Vice Chairman HART, and Member SUMWALT concurred in these recommendations.

*[Original Signed]*

By: Deborah A.P. Hersman  
Chairman