



DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 578

[Docket No. NHTSA-2015-0090]

RIN 2127-AL38

Civil Penalty Procedures and Factors

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: NHTSA is proposing a rule prescribing procedures for the assessment of civil penalties and for interpreting the factors for determining the amount of a civil penalty or the amount of a compromise under the National Traffic and Motor Vehicle Safety Act (Safety Act), to implement the Moving Ahead for Progress in the 21st Century Act (MAP-21). MAP-21 states that the Secretary of Transportation shall determine the amount of civil penalty or compromise under the Safety Act. MAP-21 identifies mandatory factors that the Secretary must consider and discretionary factors for the Secretary to consider as appropriate in making such determinations. MAP-21 further directs NHTSA to issue a rule providing an interpretation of these penalty factors.

NHTSA is also proposing to update our regulations to conform it to the statutory civil penalty maximums enacted in MAP-21, the increased penalties and damages for odometer fraud,

and the statutory penalty for knowingly and willfully submitting materially false or misleading information to the Secretary after certifying the same information as accurate.

DATES: Submit comments on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments to the docket number identified in the heading of this document by any of the following methods:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- Mail: Docket Management Facility, U.S. Department of Transportation, West Building, Ground Floor, Rm. W12-140, 1200 New Jersey Avenue S.E., Washington, DC 20590.
- Hand Delivery or Courier: West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue S.E., between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.
- Fax: (202) 493-2251.

Regardless of how you submit your comments, please be sure to mention the docket number of this document.

You may call the Docket at 202-366-9322.

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.

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 ([65 FR 19477-78](#)).

FOR FURTHER INFORMATION CONTACT: Thomas Healy, Office of the Chief Counsel, NHTSA, 1200 New Jersey Ave., S.E., West Building, W41-211, Washington, DC 20590.

Telephone: (202) 366-2992 Fax: (202) 366-3820.

SUPPLEMENTARY INFORMATION:

- I. Executive Summary
- II. Civil Penalties under the Safety Act Prior to MAP-21
- III. NHTSA's Proposed Procedures for Its Assessment of Civil Penalties under the Safety Act
 - A. Initiation of the Proceeding by NHTSA
 - B. Election of Process by the Respondent
 - C. Administrative Appeal
 - D. The Proposed Procedures Comport With Due Process
- IV. NHTSA's Proposed Interpretation of the MAP-21 Civil Penalty Factors
 - A. General Penalty Factors
 - B. Discretionary Penalty Factors
- V. Codification of Other MAP-21 Penalty Changes in 49 CFR Part 578
- VI. Rulemaking Analyses and Notices

I. Executive Summary

The Moving Ahead for Progress in the 21st Century Act (MAP-21 or the Act) was signed into law on July 6, 2012 (Pub. L. 112-141). Section 31203(a) of MAP-21 amends the civil penalty provision of the Safety Act, as amended and recodified, 49 U.S.C. chapter 301, by requiring the Secretary of Transportation to consider various factors in determining the amount of a civil penalty or compromise. This statutory language confirms that the Secretary has the power to assess civil penalties. The factors that the Secretary shall consider in determining the amount of civil penalty or compromise are codified in amendments to 49 U.S.C. 30165(c). Section 31203(b) of MAP-21 requires the Secretary to issue a final rule, in accordance with 5

U.S.C. 553, providing an interpretation of the penalty factors set forth in MAP-21. Public Law 112-141, section 31203, 126 Stat. 758 (2012). This NPRM proposes an interpretation of the civil penalty factors in 49 U.S.C. 30165(c) for NHTSA to consider in determining the amount of civil penalty or compromise and proposes procedures for NHTSA to assess civil penalties under a delegation from the Secretary, 49 CFR 1.95 and 1.81. The proposed procedure for assessing civil penalties and the proposed interpretation of the civil penalty factors is intended to apply only to matters falling under section 30165.

This rulemaking also sets forth NHTSA's amendment of its penalty regulation, 49 CFR 578.6, to conform it to the statutory language and maximums enacted in MAP-21.

II. Civil Penalties under the Safety Act Prior to MAP-21

Prior to the enactment of MAP-21, 49 U.S.C. 30165(c) stated, "In determining the amount of a civil penalty or compromise, the appropriateness of the penalty or compromise to the size of the business of the person charged and the gravity of the violation shall be considered." 49 U.S.C. 30165(c) (2011). The statute did not specify who would assess the civil penalties. However, the statute specifically stated that "The Secretary of Transportation may compromise the amount of a civil penalty imposed under this section." 49 U.S.C. 30165(b)(1). Construing these provisions, NHTSA, through the authority delegated from the Secretary of Transportation pursuant to 49 CFR 1.50 (2011), compromised civil penalties, but did not assess them.

NHTSA has in fact compromised, or settled, many civil penalty actions.¹ However, if the action was not compromised, NHTSA had relied on the U.S. Department of Justice to initiate an action in U.S. District Court for the assessment of civil penalties.²

Congress has revised the language in 49 U.S.C. 30165(c), which now states in part that “In determining the amount of a civil penalty or compromise under this section, the Secretary of Transportation shall consider the nature, circumstances, extent, and gravity of the violation.” The plain language of the statute indicates Congress’ intent that the Secretary of Transportation is authorized to determine the amount of a civil penalty and to impose such penalty.

NHTSA’s reading of the statute, as amended, is supported by the legislative history. For example, on July 29, 2011, Senator Pryor introduced S. 1449, the Motor Vehicle and Highway Safety Improvement Act of 2011 (Mariah’s Act). This bill contained language listing the factors that the Secretary of Transportation shall consider in determining the amount of civil penalty or compromise.³ According to a Senate report, the provisions of S. 1449 were enacted into law, with modifications, as title I of division C of the Moving Ahead for Progress in the 21st Century Act (MAP-21, 126 Stat. 732), which was signed into law on July 6, 2012.⁴ The Report of the Senate Committee on Commerce, Science, and Transportation made clear that NHTSA was

¹ See, e.g., “Civil Penalty Settlement Amounts,” 1999-2012, at http://www.nhtsa.gov/Laws+&+Regulations/Civil_Penalties_1999-2012; “Civil Penalty Settlement Amounts” at <http://www.nhtsa.gov/Laws+&+Regulations/Civil+Penalty+Settlement+Amounts>.

² See, e.g., *United States v. General Motors Corp.*, 385 F.Supp. 598 (D.D.C. 1974), *vacated and remanded by United States v. General Motors Corp.*, 527 F.2d 853 (D.C. Cir. 1975); *United States v. General Motors Corp.*, 417 F.Supp. 933 (D.D.C. 1976), *judgment remanded by United States v. GM*, 565 F.2d 754 (D.C. Cir. 1977); and *United States v. Snyder Computer Sys., Inc. dba Wildfire Motors*, No. 2:13-cv-311 (S.D. Ohio)(filed April 3, 2013).

³ Motor Vehicle and Highway Safety Improvement Act of 2011 or “Mariah’s Act”. S. 1449, 112 Cong. (2011) at p. 65-66.

⁴ U.S. Senate, Report of the Committee on Commerce, Science, and Transportation on S. 1449, S. Report No. 112-261 at 6-7.

authorized to impose “fines.” For example, it stated, “Before issuing a fine, the Secretary would be required to consider several relevant factors in setting the level of the fine, including the nature of the violation; the severity of the risk of injury; the actions taken by the person charged to identify, investigate, or mitigate the violation; the nature of the defect or noncompliance; and the size of the company.”⁵ The use of the words “issuing a fine” indicates that the monetary amount is due and owing to the public treasury. *See, e.g., Black’s Law Dictionary* (10th ed. 2014) (defining “fine” as “[a] pecuniary criminal punishment or civil penalty payable to the public treasury.”).

NHTSA historically has considered the gravity of the violation when compromising civil penalties. Consideration of the gravity of the violation has involved a variety of factors, depending on the case. The factors that have been important or germane have included the nature of the violation, the nature of a safety-related defect or noncompliance with Federal Motor Vehicle Safety Standards (“FMVSS”), the safety risk, the number of motor vehicles or items of motor vehicle equipment involved, the delay in submitting a defect and noncompliance information report, the information in the possession of the violator regarding the violation, other actions by the violator, and the relationship of the violation to the integrity and administration of the agency’s programs.⁶

⁵ *Id.* at 14-15.

⁶ *See, e.g.,* April 5, 2010 Demand Letter for TQ10-002 available at <ftp://ftp.nhtsa.dot.gov/TQ10-002/TQ10-002%20Resumes/TQ10-002%20Closing%20Resume/TQ10-002%20Sticky%20Pedal%20Demand%20Letter%204-5-10%20FINAL%20Signed.pdf> (In discussing the gravity of Toyota’s apparent violations as severe and potentially life-threatening, the agency stated, “Toyota determined that the accelerator pedals installed on a significant number of vehicles sold and leased in the United States contained a safety-related defect as evidenced by, among other things, its issuance of a Technical Instruction and production improvement information on September 29, 2009, in 31 countries across Europe. Toyota knew or should have known that the same or substantially similar accelerator pedals were installed on approximately 2.3 million

In the past, NHTSA also has considered the size of the violator when compromising civil penalties. With respect to civil penalties involving small businesses, among the factors that have been considered are the violator's ability to pay, including its ability to pay over time, and any effect on the violator's ability to continue to do business.

III. NHTSA's Proposed Procedures for Its Assessment of Civil Penalties under the Safety Act

MAP-21 vests authority, responsibility, and discretion in the Secretary to impose civil penalties for violations of the Safety Act and regulations thereunder. Pursuant to 49 CFR 1.95, this authority has been delegated to NHTSA. The amendments to MAP-21 providing the Secretary with the authority to assess civil penalties do not establish procedures for the assessment of those penalties. In order to ensure that NHTSA's assessment of civil penalties, as delegated to NHTSA by the Secretary, comports with the constitutional requirements of due process, NHTSA is proposing to adopt informal procedures to assess civil penalties pursuant to 49 U.S.C. 30165.⁷ These procedures include three options for the respondent⁸ to elect after

vehicles sold or leased in the United States, and continued to sell and lease vehicles equipped with a defective accelerator pedal for months after this determination. Nonetheless, Toyota Motor Corporation affirmatively-and inexplicably-instructed Toyota Motor Engineering and Manufacturing North America, Inc. *not* to implement an Engineering Change Instruction in the U.S. market. Toyota gave this instruction despite the fact that it had issued similar or identical instructions in Canada and Europe and knew that the very same issues that prompted the European and Canadian actions existed on a significant number of vehicles in the United States. The result of these decisions by Toyota was to expose millions of American drivers, passengers and pedestrians to the dangers of driving with a defective accelerator pedal that could result, in Toyota's words, in 'sticky accelerator pedals, sudden rpm increase and/or sudden vehicle acceleration.'").

⁷ NHTSA notes that the proposed procedures for assessing civil penalties in this NPRM do not, are not intended to, displace the agency's existing practice of compromising civil penalties. *See, e.g.*, Consent Order Between NHTSA and FCA US LLC (July 24, 2015), *available at* http://www.safercar.gov/rs/chrysler/pdfs/FCA_Consent_Order.pdf ; Consent Order Between NHTSA and Forest River, Inc. (July 8, 2015), *available at* <http://www.safercar.gov/staticfiles/safercar/pdf/Forest-River-consent-order.pdf>; Consent Order Between NHTSA and Spartan Motors, Inc., *available at* <http://www.safercar.gov/staticfiles/safercar/pdf/Spartan-consent-order.pdf> (July 8, 2015).

NHTSA makes an initial demand for civil penalties: (1) pay the demanded penalty; (2) provide an informal response, or (3) request a hearing.

In developing the procedures for conducting a hearing to impose civil penalties, NHTSA considered its past practices with respect to civil penalty actions related to odometer fraud under 49 U.S.C. chapter 327, proceedings under 49 CFR part 599, as well as its other procedures relating to making determinations related to violations of the Safety Act and the practices of other operating administrations of the Department of Transportation.

The procedures for a hearing to assess civil penalties need not take all the formal trappings of a trial in a court of law. The Supreme Court has recognized that due process is flexible and that the procedural protections needed to ensure due process differ as the situation demands. *See Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). An Agency has discretion to formulate its procedures. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978).

NHTSA does not believe that a formal adjudication is required in order to impose civil penalties for a violation of the Safety Act or regulations thereunder. If Congress wanted a proceeding with a formal adjudication on the record, it would have made that intent clear. Indeed, in another statute administered by NHTSA, such a procedure is required to determine certain violations. *See e.g.* 49 U.S.C. 32911(a) (stating that “The Secretary of Transportation shall conduct a proceeding, with an opportunity for a hearing on the record, to decide whether a person has committed a violation.”). As NHTSA does not believe that a formal adjudication

⁸ For the sake of consistence and clarity, we will refer to the person charged with liability for a civil penalty for a violation of the Safety Act or regulations as the “respondent” in this notice and in the proposed rule.

falling within the purview of sections 5, 7, and 8 of the Administrative Procedure Act (5 U.S.C. 554, 556, 557) is required, NHTSA is adopting informal procedures that provide respondents with administrative due process, that will allow for the efficient enforcement of statutes administered by NHTSA, and that will lead to the creation of a record in each individual proceeding that can form the basis for judicial review without a new trial of all the facts and issues in the district court. NHTSA anticipates that judicial review of orders assessing civil penalties issued pursuant to these procedures will consist of the “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” standard prescribed by 5 U.S.C. 706(2)(A).

A. Initiation of the Proceeding by NHTSA

Under the proposed procedures, NHTSA, through the Assistant Chief Counsel for Litigation and Enforcement, will begin a civil penalty proceeding by serving a notice of initial demand for civil penalties on a person (i.e. respondent) charging him or her with having violated one or more laws administered by NHTSA. This notice of initial demand for civil penalties will include a statement of the provision(s) which the respondent is believed to have violated as of the date of the initial demand for civil penalties; a statement of the factual allegations upon which the proposed civil penalty is being sought; notice of the maximum amount of civil penalty for which the respondent may be liable as of that date for the violations alleged; notice of the amount of the civil penalty proposed to be assessed; a description of the manner in which the respondent should make payment of any money to the United States; a statement of the respondent’s right to present written explanations, information or any materials in answer to the charges or in mitigation of the penalty; and a statement of the respondent’s right to request a

hearing and the procedures for requesting a hearing. The notice will include a statement that failure: (i) to pay the amount of the civil penalty; (ii) to elect to provide an informal response; or (iii) to request a hearing within 30 days of the date of the initial demand authorizes the NHTSA Chief Counsel, without further notice to the respondent, to find the facts to be as alleged in the initial demand for civil penalties and to assess an appropriate civil penalty.

The notice will also include documentation that the Assistant Chief Counsel for Litigation and Enforcement relied on to determine the alleged violations of a statute or regulation administered by NHTSA giving rise to liability for civil penalties or the amount of civil penalties in the initial demand.⁹ This notice may be amended at any time prior to the entry of an order assessing a civil penalty, including amendment to the amount of civil penalties demanded. The notice of initial demand for civil penalties may contain proposed civil penalties for multiple unrelated violations. The maximum civil penalty stated in the notice of initial demand for civil penalties will reflect whether the violations in the notice are related or unrelated.

NHTSA proposes that the Assistant Chief Counsel for Litigation and Enforcement or his or her designee serve the initial demand for civil penalties via U.S mail, overnight or express courier service, facsimile, electronic mail, or personally. NHTSA proposes that service of the initial demand for civil penalties or order by a person's duly authorized representative (including, but not limited to, a person's agent for accepting service designated pursuant to 49 CFR part 551) constitutes service upon that person.

⁹ This documentation may be redacted if permitted or required by Federal law.

B. Election of Process by the Respondent

Within 30 calendar days of the date on which the initial demand for civil penalties is issued, the respondent must pay the amount of the civil penalty, elect to provide an informal response, or request a hearing. If the respondent does not pay the amount of the civil penalty, elect to provide an informal response, or request a hearing within the 30 day limit, NHTSA proposes to construe this as a waiver of the respondent's right to appear and contest the allegations. This would authorize the Chief Counsel, without further notice to the respondent, to find the facts to be as alleged in the initial demand for civil penalties and to assess an appropriate civil penalty.

1. Payment of the Civil Penalty Proposed

The respondent may elect to pay the civil penalty that was proposed in the initial demand. If the respondent elects to make the payment, NHTSA will direct the respondent as to how to make the payment, including any installment plan permitted.

2. Election of Informal Response

If the respondent to the initial demand for civil penalties elects to make an informal response, that person must submit to the Chief Counsel and to the Assistant Chief Counsel for Litigation and Enforcement in writing any arguments, views or supporting documentation that dispute or mitigate that person's liability for, or the amount of, civil penalties to be imposed. The respondent must submit these materials within 30 days of the date on which the initial demand for civil penalties is issued. A person who has elected to make an informal response to an initial demand for civil penalties may also request a conference with the Chief Counsel. Because traveling to the Department of Transportation's headquarters in Washington, D.C. may

be burdensome for some smaller companies responding to an initial demand for civil penalties, we are proposing to allow a person responding to an initial demand for civil penalties to request that the conference with the Chief Counsel be conducted by telephone. If the respondent elects to request a conference with the Chief Counsel and fails to attend the conference without good cause shown, the Chief Counsel may, without further notice to the respondent, find the facts to be as alleged in the initial demand for civil penalties and assess an appropriate civil penalty. This decision will constitute final agency action and no appeal to the Administrator will be permitted.

The Assistant Chief Counsel for Litigation and Enforcement would be permitted to provide rebuttal information to the Chief Counsel, replying to the information submitted by the respondent. After consideration of the submissions of the Assistant Chief Counsel and the Respondent, including any relevant information presented at a conference, the Chief Counsel may dismiss the initial demand for civil penalties in whole or in part. If the Chief Counsel does not dismiss the demand in its entirety, he or she may issue an order assessing a civil penalty. For civil penalty orders exceeding \$1,000,000, the decision of the Chief Counsel becomes a final decision 20 days (including weekends and holidays) after it is issued unless the respondent files a timely appeal with the Administrator. If the respondent elects not to appeal to the Administrator within the 20-day period, then the Chief Counsel's decision is a final decision subject to judicial review. Civil penalty orders of \$1,000,000 or less are final upon issuance by the Chief Counsel and subject to judicial review at that time.

Any assessment of civil penalties will be made only after considering the nature, circumstances, extent and gravity of the violation. As appropriate, the determination will

include consideration of the nature of the defect or noncompliance; knowledge by the respondent of its obligations under 49 U.S.C. chapter 301; the severity of the risk of injury posed by the defect or non-compliance; the occurrence or absence of injury; the number of motor vehicles or items of motor vehicle equipment distributed with the defect or noncompliance; actions taken by the respondent to identify, investigate, or mitigate the condition; the appropriateness of such penalty in relation to the size of the business of the respondent, including the potential for undue adverse economic impacts; and other relevant and appropriate factors.

NHTSA intends for this informal response process to be less rigid than the procedures for conducting a hearing discussed below. For example, a respondent that elects an informal response would be permitted to bring in employees or other representatives (within reason) to explain facts and circumstances relating to the events described in the initial demand for civil penalties or any other factors that the respondent believes are relevant. A respondent may find it beneficial to be able to present the views of employees or representatives to the Chief Counsel in person, considering that if the respondent elects a hearing the presentation of witness testimony will be committed to the discretion of the Hearing Officer. Further, NHTSA envisions that any written materials that the respondent provides as part of an informal response would not have the formality of legal briefs submitted pursuant to the hearing procedures in this proposal and would allow for flexibility in the respondent's response. It is also NHTSA's intent that the conference between the Chief Counsel and the respondent consist of informal discussion and would not take on the structure of an adversarial proceeding.

3. Election of a Hearing

If, in response to an initial demand for civil penalties, a person requests a hearing, the Chief Counsel will designate a Hearing Officer to preside over the hearing. The Hearing Officer appointed by the Chief Counsel may have no other responsibility, either direct or supervisory, for the investigation or enforcement of the violation for which the initial demand for civil penalties relates and will not have any prior connection to the case.

The Hearing Officer will have the authority to conduct the proceeding and arrange for NHTSA and the person served with the initial demand for civil penalties to submit additional documents for the administrative record, regulate the course of the hearing, and take notice of matters that are not subject to a bona fide dispute and are commonly known in the community or are ascertainable from readily available sources of known accuracy.

With respect to the type of hearing proposed, NHTSA believes that most civil penalty determinations can be made based solely on written submissions because in the vast majority of instances, the evidence to establish, or refute, a respondent's liability for civil penalties and facts for the application of the penalty factors will consist of documents. Therefore, we are proposing that the Hearing Officer will have the discretion to conduct an in-person hearing and allow witness testimony only if an in-person hearing is needed, in the opinion of the Hearing Officer, to resolve any factual and/or legal issues that cannot be easily resolved by written submissions.

If the respondent elects to request a hearing, the respondent must submit to the Assistant Chief Counsel for Litigation and Enforcement two complete copies via hand delivery, use of an overnight or express courier service, facsimile, or electronic mail containing: (1) A detailed statement of factual and legal issues in dispute; and (2) all statements and documents supporting

the respondent's case within 30 days of the date on which the initial demand for civil penalties is issued. If the respondent wishes for the hearing to be conducted in-person, the respondent must also submit the basis for its request for the in-person hearing (i.e. why an in-person hearing and witness testimony are necessary to resolve any factual or legal issues present in the case), a list of witnesses that the respondent wishes to call at the hearing, a description of each witness's expected testimony, a description of the factual basis for each witness's expected testimony, and whether the respondent will arrange to have a verbatim transcript prepared at its own expense.¹⁰ These materials must be provided within 30 days of the date on which the initial demand for civil penalties is issued. If an in-person hearing is requested, the Hearing Officer will notify the respondent and NHTSA in writing of his or her decision to grant or deny a request for an in-person hearing.

If an in-person hearing is granted and the respondent fails to attend the in-person hearing without good cause shown, the Hearing Officer is authorized, without further notice to the respondent, to find the facts as alleged in the initial demand for civil penalties and to assess an appropriate civil penalty. This decision will constitute final agency action and no appeal to the Administrator will be permitted.

NHTSA may supplement the record with additional information, including disclosure of proposed witnesses and their expected testimony, prior to the hearing. A copy of such information will be provided to the respondent no later than 3 days before the hearing. These

¹⁰ NHTSA has determined that in order to minimize the expense of conducting a hearing, a verbatim transcript of any in-person hearing will not normally be prepared. Any person requesting an in-person hearing in response to an initial demand for civil penalties may arrange for a transcript to be created at its own expense if an in-person hearing is granted.

procedures allow the Hearing Officer to focus the inquiry at the hearing and eliminate the need for discovery because both the agency and respondent will be in possession of the documents on which the other party intends to rely and appraised of all expected witness testimony. Therefore, we propose that discovery not be permitted in any hearing conducted pursuant to these procedures.

The administrative record of an in-person hearing shall contain the notice of initial demand for civil penalties and any supporting documentation that accompanied the initial demand; any documentation submitted by the respondent, any further documentation submitted by the Agency as a reply to the request for a hearing or presented at an in-person hearing; any additional materials presented at an in-person hearing; the transcript of the hearing (if any); and any other materials that the Hearing Officer determines are relevant. In considering the admission of evidence into the administrative record, the Hearing Officer will not be bound by the Federal Rules of Evidence.

In the event that the Hearing Officer determines that witness testimony is not necessary, the Assistant Chief Counsel for Litigation and Enforcement will submit a written reply with the agency's responses to the arguments and documents included in the respondent's request for a hearing. With respect to the administrative record where there is no in-person hearing, NHTSA proposes that all documents contained in and with its initial demand, any response thereto, or any reply automatically would be part of the administrative record. In considering the admission of evidence into the administrative record, the Hearing Officer will not be bound by the Federal Rules of Evidence.

At the hearing, NHTSA will have the evidentiary burden of establishing the violation giving rise to civil penalties under 49 U.S.C. 30165. In the event that the hearing is conducted by written submission, the Hearing Officer will make his or her decision based on NHTSA's initial demand for civil penalties and any included documents, the respondent's request for a hearing and any included documents, NHTSA's reply (including any documents) to the arguments and documents provided in the respondent's request for a hearing, and any other evidence in the record.

In the event that the Hearing Officer grants an in-person hearing, NHTSA will first present any evidence the agency believes is relevant for the administrative record. If permitted by the Hearing Officer, NHTSA may call witnesses. No later than three days prior to the hearing NHTSA will provide a list of witnesses that it expects to call at the hearing, a description of the witnesses' expected testimony and the factual basis for the expected testimony to the respondent. At the close of NHTSA's presentation of evidence, the respondent will have the right to respond to and rebut evidence and arguments presented by NHTSA. The respondent or his or her counsel may offer relevant information including testimony (if permitted) regarding the respondent's liability for civil penalties and the application of the penalty factors. At the close of the respondent's presentation of evidence, the Hearing Officer may allow the presentation of rebuttal evidence by NHTSA. The Hearing Officer, in his or her discretion, may allow the respondent to reply to any such rebuttal evidence submitted.

In the event that the Hearing Officer grants an in-person hearing, the Assistant Chief Counsel for Litigation and Enforcement and the respondent may present arguments on the issues involved in the case after all the evidence has been presented.

A respondent challenging the amount of a civil penalty proposed to be assessed will have the burden of proving the mitigating circumstances. For example, a respondent challenging the amount of a civil penalty on the grounds that the penalty would have an undue adverse economic impact would have the burden of proving that undue impact. It is appropriate that the burden is placed on the respondent as the respondent is more likely to have relevant financial evidence than NHTSA.

After the hearing is completed, the Hearing Officer will issue a written decision based solely on the administrative record, including any testimony offered at an in-person hearing. Any assessment of civil penalties will be made only after considering the nature, circumstances, extent and gravity of the violation. As appropriate, the determination will include consideration of the nature of the defect or noncompliance, knowledge by the respondent of its obligations under 49 U.S.C. chapter 301, the severity of the risk of injury, the occurrence or absence or injury, the number of motor vehicles or items of motor vehicle equipment distributed with the defect or noncompliance, actions taken by the respondent to identify, investigate, or mitigate the condition, the appropriateness of such penalty in relation to the size of the business of the respondent, including the potential for undue adverse economic impacts, and other relevant and appropriate factors, including those discussed below.

For civil penalties exceeding \$1,000,000, the decision of the Hearing Officer will become a final decision 20 calendar days (including weekends and holidays) after it is issued, unless the respondent files a timely appeal with the Administrator before the expiration of 20 days. If the respondent elects not to appeal to the Administrator within the 20-day period, then the Hearing Officer's decision is a final decision subject to judicial review. Civil penalty orders of

\$1,000,000 or less are final upon issuance by the Hearing Officer and subject to judicial review at that time.

C. Administrative Appeal

In matters where the civil penalties assessed by either the Chief Counsel or the Hearing Officer exceed \$1,000,000, the proposed regulations provide an opportunity for the respondent aggrieved by the order assessing a civil penalty to file an appeal with the Administrator.

The Administrator will affirm the order unless the Administrator finds that the order was unsupported by the record as a whole; based on a mistake of law; or that new evidence, not available at the hearing, is available. Appeals that fail to allege and provide supporting basis for one of these grounds of appeal will be summarily dismissed. If the Administrator finds that the order was unsupported, based on a mistake of law, or that new evidence is available, then the Administrator may assess or modify a civil penalty; rescind the initial demand for civil penalty; or remand the case for new or additional proceedings. In the absence of a remand, the decision of the Administrator in an appeal is a final agency action.

If the Administrator affirms the order assessing civil penalties and the respondent does not pay the civil penalty in the manner specified by the order within thirty (30) days after the Administrator's decision on appeal is issued, the matter may be referred to the Attorney General with a request that an action to collect the penalty be brought in the appropriate United States District Court pursuant to 49 U.S.C. 30163(c). *See also* 28 U.S.C. 1331. A party aggrieved by a final order from the Administrator or a final order from the Hearing Officer or Chief Counsel, may file a civil action in United States District Court seeking review of the final order pursuant to the Administrative Procedure Act. *See* 5 U.S.C. 706.

D. The Proposed Procedures Comport with Due Process

The proposed procedures for adjudicating civil penalties are consistent with the requirements for due process established by the U.S. Supreme Court in *Mathews v. Eldridge*. In that case the Court stated that three factors should be considered when determining what procedures must be provided before the government deprives a person of a property interest.

The factors that the Court considers are:

the private interest that will be affected by the official action; . . . the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and . . . the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See Eldridge*, 424 U.S. at 335.

In examining whether the private interest at stake requires additional procedural safeguards, the Supreme Court looks to the “degree of potential deprivation,” and the gravity of the hardship borne by an entity wrongfully deprived of a property interest. *See id.* at 341, 343. In determining whether additional procedures would add to the fairness and reliability of the proceeding, the courts consider the nature of the issue at controversy. *See id.* Factors that the court considers include the nature of the evidence to be presented, such as whether the evidence consists mainly of documents or whether the resolution of the controversy hinges on the credibility of witness testimony. *See id.* at 343-44. When considering the government interest at stake, the courts examine the administrative burdens created by additional procedures and other societal costs that additional procedures would impose. *See id.* at 347.

NHTSA believes that the private interest at stake in a proceeding to assess civil penalties, while substantial for some of the entities NHTSA regulates, does not rise to the level of hardship for which the Supreme Court has required heightened procedural protections.¹¹ In many cases in which NHTSA has settled civil penalty liability with motor vehicle manufacturers, the total civil penalty amount was a small percentage of the company's annual revenue.¹² NHTSA will also apply its Civil Penalty Policy Under the Small Business Regulatory Enforcement Fairness Act when assessing a civil penalty against a small entity.¹³ As NHTSA considers a business' size in determining the penalty amount under this policy, the relative magnitude of the potential deprivation of the interest of smaller entities subject to civil penalties is minimized.¹⁴

¹¹ See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that because the wrongful deprivation of a person's interest in welfare would deny the person of their means for subsistence, due process required a pre-termination evidentiary hearing).

¹² Compare Consent Order between NHTSA and General Motors Co. p. 4 (May 16, 2014) (agreeing to a civil penalty of \$35 million and a penalty of \$7,000 per day for failure to fully respond to a Special Order), available at <http://www.nhtsa.gov/staticfiles/communications/pdf/May-16-2014-TQ14-001-Consent-Order.pdf>, with General Motors Co., 2013 Annual Report p. 12 (2014) (showing \$155 billion in revenue for the 2013 Fiscal Year). Compare Consent Order between NHTSA and American Honda Motor Co. p. 5 (Dec. 29, 2014) (agreeing to a civil penalty of \$70 million), available at <http://www.nhtsa.gov/staticfiles/communications/pdf/Honda-consent-order-12292014.pdf>, with Honda Motor Co., 2013 Annual Report p. 4 (2014) (showing \$83 billion in revenue for the 2013 Fiscal Year). Cf. Consent Order between NHTSA and Ferrari S.p.A. and Ferrari North America p. 4 (agreeing to pay a civil penalty of \$3.5 million), available at <http://www.nhtsa.gov/staticfiles/communications/pdf/2014-10-31-Ferrari-Consent-Order.pdf>.

¹³ See NHTSA, Civil Penalty Policy Under the Small Business Regulatory Enforcement Fairness Act, 62 FR 37115 (July 10, 1997).

¹⁴ See e.g. Settlement Agreement between NHTSA and Chapman Chevrolet LLC p. 2 (Oct. 1, 2014) (Chapman Chevrolet LLC agreed to pay a civil penalty of \$50,000), available at <http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/UCM465636/INOT-AQ12002-60546.pdf>; Settlement Agreement between NHTSA and Gwinnett Place Nissan p. 2 (Nov. 24, 2014) (Gwinnett Place Nissan agreed to pay a civil penalty of \$110,000), available at <http://www-odi.nhtsa.dot.gov/acms/cs/jaxrs/download/doc/UCM469202/INOT-AQ12003-61067.pdf>; Consent Order between NHTSA and Ricon Corporation (Feb. 6, 2015) (agreeing to pay a civil penalty of \$1.75 million) available at <http://www.nhtsa.gov/staticfiles/communications/pdf/Ricon-NHTSA-Consent-Order-02-2015.pdf>.

NHTSA does not believe that additional procedural safeguards beyond what are proposed in today's NPRM would add to the fairness and reliability of civil penalty determinations under the proposed procedures. NHTSA believes that most of the evidence regarding a person's liability for civil penalties will consist of documents such as test reports, documents submitted in compliance with 49 CFR part 579 subpart C, *Reporting of Early Warning Information*; technical service bulletins and other notices submitted in compliance with 49 CFR 579.5, *Notices, Bulletins, Customer Satisfaction Campaigns, Consumer Advisories and Other Communications*; vehicle owner questionnaires submitted by consumers; and documents and responses submitted in response to Information Requests, General Orders, and Special Orders. This is the type of evidence for which witness demeanor and credibility is not at issue and a hearing conducted by written submission is appropriate. *See Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 717 (9th Cir. 2011) (stating that, in the context of an administrative adjudication, documentary "evidence lends itself to the kind of paper review a district court might engage in on a motion for summary judgment and does not require a full trial."). In the rare instance in which liability for civil penalties hinges on issues that involve witness credibility, the Hearing Officer will have the discretion to permit witness testimony and cross examination.

NHTSA also does not believe that additional procedures for conducting administrative discovery before the hearing would increase the reliability or fairness of a hearing to determine liability for civil penalties. *See Eldridge*, 424 U.S. at 343. Under the proposed hearing procedures, the Assistant Chief Counsel for Litigation and Enforcement must attach to the notice of initial demand for civil penalties any documentation that he or she relied on in determining an alleged violation of a statute or regulation that NHTSA contends gives rise to liability for civil

penalties or the amount of civil penalties in the initial demand. If NHTSA later wishes to present materials not provided with the initial demand, NHTSA must provide these materials to the respondent. These procedures will ensure that the respondent receives all of the materials that the agency will rely on to establish a violation giving rise to civil penalties and to support its demanded amount.¹⁵ Furthermore, most of the materials relevant to the respondent's liability for civil penalties will have been obtained by NHTSA from the respondent in the first instance (either through the reporting requirements in 49 CFR part 579 or during the course of an investigation by the Agency), or will otherwise be publicly available. Therefore, we propose that discovery not be permitted in any hearing conducted pursuant to these procedures.

Finally, the procedures for determining civil penalties proposed in today's NPRM will advance the government's interest in increasing the administrative efficiency of the resolution of civil penalty cases. The proposed procedures will also serve society's interests by allowing NHTSA to more efficiently and effectively enforce the Safety Act and regulations prescribed thereunder by allowing the Agency to assess civil penalties without protracted proceedings. Fair, timely, and efficient imposition of civil penalties on persons who violate the statutes administered by NHTSA and regulations prescribed thereunder should lead to greater compliance with those statutes and regulations.

Moreover, a final order on civil penalties would be a final agency action subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* A challenge to a NHTSA civil penalty final order could be brought in the appropriate United States district court and subject to all of the procedural rights and protections afforded by federal courts in reviewing

¹⁵ NHTSA may rely on documents not provided to the respondent with the initial demand for civil penalties to rebut statements made on behalf of the respondent.

final agency orders. *See e.g.* 49 U.S.C. 30163(c), 28 U.S.C. 1331. We anticipate that the standard of review in the U.S. district court would be the “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” standard prescribed by 5 U.S.C. 706(2)(A).¹⁶

For these reasons NHTSA believes that the procedures in today’s NPRM would provide due process to persons alleged to have violated the statutes or regulations administered by NHTSA and regulations prescribed thereunder.

IV. NHTSA’s Proposed Interpretation of the MAP-21 Civil Penalty Factors

The MAP-21 legislation sets forth civil penalty factors to be considered by NHTSA in determining the amount of a civil penalty or compromise. The general provision in the amended section 30165(c) calls for consideration of the nature, circumstances, extent and gravity of the violation. The term “violation” refers to any violation addressed by 49 U.S.C. 30165(a)(1), (2), (3), or (4). The Secretary has the discretion to consider the totality of the circumstances surrounding a violation. The Secretary also has the discretion to consider the factors in 30165(c)(1) through (9) as appropriate.

Our proposed approach to interpreting the MAP-21 factors is based on the language of the statute, informed NHTSA’s years of day-to-day enforcement experience, and the manner in which NHTSA has compromised penalties in the past. In this section, we begin with our

¹⁶ The statute providing the Secretary the authority to assess civil penalties does not expressly state the standard of review for actions challenging an order assessing civil penalties. NHTSA believes that the “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” standard prescribed by 5 U.S.C. 706(2)(A) would apply. *See Snyder Computer Systems, Inc. v. U.S. Dep’t of Transp.*, 13 F.Supp.3d 848, 859-60 (S.D. Ohio 2014) (stating that because the Safety Act did specify a standard of review for recall remedy orders, the arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law standard of reviewed applied).

proposed interpretation of the general penalty factors: the nature, circumstances, extent, and gravity of the violation. Then we provide our proposed interpretation for each of the nine discretionary penalty factors. For each of the nine discretionary penalty factors, we provide an explanation of NHTSA’s proposed interpretation, which may include specific examples of how the interpretation may be applied in practice, and/or illustrative scenarios and issues.

A. General Penalty Factors

First, we propose to interpret the nature of the violation to mean the essential, fundamental character or constitution of the violation.¹⁷ This includes, but is not limited to, the nature of the defect (in a case involving a safety-related defect) or noncompliance. It also includes what the violation involves, for example, a violation of the Early Warning Reporting (“EWR”) requirements, the failure to provide timely notification of a safety-related defect or noncompliance, the failure to remedy, the lack of a reasonable basis for certification to the FMVSS, the sale of unremedied vehicles, or the failure to respond fully and timely to a request issued under 49 U.S.C. 30166.

Second, we propose to interpret the circumstances of the violation to mean the context, facts, and conditions having bearing on the violation.¹⁸ This would include whether the manufacturer has been recalcitrant or shown disregard for its obligations under the Safety Act.

Third, we propose to interpret the extent of the violation to mean the range of inclusiveness over which the violation extends including the scope, time frame, and/or the degree

¹⁷ See e.g. *Webster’s Third New International Dictionary Unabridged*, 1507 (defining nature as “the essential character or constitution of something”); *Black’s Law Dictionary* (10th ed. 2014) (defining nature as “[a] fundamental quality that distinguishes one thing from another; the essence of something.”).

¹⁸ See e.g. *Ehlert v. United States*, 422 F.2d 332, 335 (9th Cir. 1970) (Duniway, J. concurring) (stating that Webster’s New International Dictionary, 2d ed. defines “circumstances” as “conditions under which an act or event takes place or with respect to which a fact is determined.”).

of the violation.¹⁹ This includes the number of violations and whether the violations are related or unrelated.

Finally, we propose to interpret the gravity of the violation to mean the importance, significance, and/or seriousness of the violation.²⁰

B. Discretionary Penalty Factors

The penalty factors listed in 49 U.S.C. 30165(c)(1) through (9) are discretionary factors that NHTSA may apply in making civil penalty amount determinations and determining the amount of compromise.

1. The nature of the defect or noncompliance.

We propose to interpret “the nature of the defect or noncompliance,” 49 U.S.C. 30165(c)(1), to mean the essential, fundamental characteristic or constitution of the safety-related defect or noncompliance. This is consistent with the dictionary definition of “nature.”²¹ “Defect” is defined at 49 U.S.C. 30102(a)(2) as including “any defect in performance, construction, a component, or material or a motor vehicle or motor vehicle equipment.” “Noncompliance” under this statutory factor includes a noncompliance with an FMVSS, as well as other violations subject to penalties under 49 U.S.C. 30165. Noncompliance may include, but is not limited to, noncompliance(s) with the FMVSS; the manufacture, sale, or importation of noncomplying motor vehicles and equipment or defective vehicles or equipment

¹⁹ See e.g. *Webster’s Third New International Dictionary Unabridged*, 805 (defining extent as the “range (as of inclusiveness or application) over which something extends.”).

²⁰ See e.g. *Black’s Law Dictionary* (10th ed. 2014) (defining “gravity” as “[s]eriousness of harm, an offense, etc., as judged from an objective, legal standpoint.”); *Webster’s Third New International Dictionary Unabridged*, 993 (defining gravity as the importance, significance, or seriousness).

²¹ See e.g. *Webster’s Third New International Dictionary Unabridged*, 1507 (defining nature as “the essential character or constitution of something”); *Black’s Law Dictionary* (9th ed. 2009) (defining nature as “[a] fundamental quality that distinguishes one thing from another; the essence of something.”).

covered by a notice or order regarding the defect; failure to certify or have a reasonable basis to certify that a motor vehicle or item of motor vehicle equipment complies with applicable motor vehicle safety standards; failure to maintain records as required; failure to provide timely notification of defects and noncompliances with the FMVSS; failure to follow the notification procedures set forth in 49 U.S.C. 30119 and regulations prescribed thereunder; failure to remedy defects and noncompliances pursuant to 49 U.S.C. 30120 and regulations prescribed thereunder; making safety devices and elements inoperative; failure to comply with regulations relating to school buses and school bus equipment; failure to comply with Early Warning Reporting requirements; and/or the failure to respond to an information request, Special Order, General Order, subpoena or other required reports.²²

When considering the nature of a safety-related defect or noncompliance with an FMVSS, NHTSA may examine the conditions or circumstances under which the defect or noncompliance arises, the performance problem, and actual and probable consequences of the defect or noncompliance. When considering the nature of the noncompliance with the Safety Act or a regulation promulgated thereunder, NHTSA may examine the circumstances surrounding the violation.

For example, NHTSA has a process by which a manufacturer can petition for an exemption from the notification and remedy requirements of 49 U.S.C. 30118 and 30120 on the basis that a noncompliance is inconsequential to motor vehicle safety. 49 U.S.C. 30118(d) and 30120(h), 49 CFR part 556. If a petition for inconsequential noncompliance is granted, then it could serve as mitigation under this factor.

²² The foregoing list is intended to be illustrative only, and is not exhaustive.

When considering the nature of the noncompliance with the Safety Act or a regulation promulgated thereunder, NHTSA also may examine the circumstances surrounding the violation.

2. Knowledge by the respondent of its obligations under this chapter.

We propose to interpret the “knowledge by the . . . [respondent] of its obligations under this chapter,” 49 U.S.C. 30165(c)(2), as all knowledge, legal and factual, actual, presumed and constructive, of the respondent of its obligations under 49 U.S.C. chapter 301. We propose that if a respondent is other than an individual, including but not limited to a corporation or a partnership, then the knowledge of an employee or employees of that non-natural person be imputed to that non-natural person. We propose to interpret the knowledge of an agent as being imputed to a principal. We propose that a non-natural person, such as a corporation, with multiple employees will be charged with the knowledge of each employee, regardless of whether the employees have communicated that knowledge among each other or to a decision maker for the non-natural person.

Under this proposed interpretation of “knowledge,” delays resulting from or caused by a manufacturer’s internal reporting processes would not excuse a manufacturer’s failure to report a defect or noncompliance to NHTSA. Further, NHTSA may examine the actions of a respondent in assessing or imputing knowledge. For instance, NHTSA may examine such factors as whether the respondent is a new manufacturer or whether the respondent began producing parts to remedy a particular defect or noncompliance with an FMVSS prior to reporting the defect or noncompliance with an FMVSS to NHTSA. NHTSA may also consider communication between the respondent (e.g. a manufacturer) and other entities such as dealers and owners in determining its knowledge of a violation. NHTSA may consider the information NHTSA

provided to the respondent, including notification of apparent noncompliance, information on the recall process, information on governing regulations, and information on consequences of failure to comply with regulatory requirements. NHTSA may also consider whether the respondent has been proactive in discerning other potential safety issues, and whether it has attempted to mislead the agency or conceal its full information, including its knowledge of a defect or noncompliance.

3. The severity of the risk of injury.

We propose to interpret the “severity of the risk of injury,” 49 U.S.C. 30165(c)(3), as the gravity of exposure to potential injury, including the potential for injury or death of drivers, passengers, other motorists, pedestrians and others. The severity of the risk includes the likelihood of an injury occurring and the population group exposed.

The severity of the risk of injury may depend on the component of a motor vehicle that is defective or noncompliant with an FMVSS. For example, a defective steering component or airbag system may pose a more severe risk of injury than a defective door handle. A grant of a petition for inconsequential noncompliance could serve as a mitigation under this penalty factor.

4. The occurrence or absence of injury.

We propose to interpret “the occurrence or absence of injury,” 49 U.S.C. 30165(c)(4), as whether injuries or deaths have occurred as a result of a defect, noncompliance, or other violation of the Safety Act or implementing regulations. NHTSA may also take into consideration allegations of death or injury.

In evaluating this factor, it is important to emphasize that the absence of deaths or injuries is not dispositive of the existence of a defect or noncompliance or a person's liability for civil penalties.

5. The number of motor vehicles or items of motor vehicle equipment distributed with the defect or noncompliance.

We propose to interpret “the number of motor vehicles or items of motor vehicle equipment distributed with the defect or noncompliance,” 49 U.S.C. 30165(c)(5), as referring to the total number of vehicles or items of motor vehicle equipment distributed with the defect or noncompliance with an FMVSS, or the percentage of the vehicles or items of motor vehicle equipment of the subject population with the defect or noncompliance with an FMVSS. That is, NHTSA may look not only at absolute numbers of motor vehicles or items of motor vehicle equipment; rather it may also take into account the portion of a vehicle or equipment population with the defect, noncompliance, or other violation. NHTSA may also consider the percentage of motor vehicles that contain the defect or noncompliance with an FMVSS as a percentage of the manufacturer's total annual production of vehicles if multiple make, model and model years of motor vehicles are affected by the defect or noncompliance with an FMVSS.

Further, NHTSA may choose to make a distinction between those defective or noncompliant products distributed in commerce that consumers received, and those defective or noncompliant products distributed in commerce that consumers have not received.

6. Actions taken by the respondent to identify, investigate, or mitigate the condition.

We propose to interpret “actions taken by the . . . [respondent] to identify, investigate, or mitigate the condition,” 49 U.S.C. 30165(c)(6), as actions actually taken, the time frame when

those actions were taken, what those actions involved and how they ameliorated or otherwise related to the condition, what remained after those actions were taken, and the speed with which the actions were taken. We propose that in assessing actions, a failure to act may also be considered.

For example, under this factor, NHTSA may consider whether the respondent has been diligent in endeavoring to meet the requirements of the Safety Act and regulations thereunder, including whether it has set up processes to facilitate timely and accurate reporting, and whether it has audited such systems. NHTSA may also consider the measures taken by the respondent to proactively bring potential issues to NHTSA's attention, including whether the respondent timely informed NHTSA of potential violations of Safety Act requirements. NHTSA may also take into account the investigative activities the respondent has undertaken relating to the scope of the issues identified by NHTSA. NHTSA may also consider whether the respondent delayed in reporting a safety-related defect or a noncompliance with an FMVSS (a person is required to file a 49 CFR part 573 report not more than five working days after a person knew or should have known of the safety-related defect or noncompliance with an FMVSS). NHTSA may also consider whether the respondent remedied the safety-related defect or noncompliance with an FMVSS in a timely manner. For instance, NHTSA may consider whether a recall remedy is adequate, whether a new safety-related defect or noncompliance with an FMVSS arose from an inadequate recall remedy, and whether the scope of a recall was adequate. NHTSA may also consider the timeliness and adequacy of the respondent's communications with owners and dealers.

7. The appropriateness of such penalty in relation to the size of the business of the respondent, including the potential for undue adverse economic impacts.

NHTSA takes the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) into account prior to setting any final penalty amount.²³ This policy will continue in light of the MAP-21 amendments to 49 U.S.C. 30165(c).

Upon a showing by a violator that it is a small entity, NHTSA will make appropriate adjustments to the proposed penalty or settlement amount (although certain exceptions may apply).²⁴ If the respondent wants to assert it is a “small business,” NHTSA expects the respondent to provide the supporting documentation. Under the Small Business Administration’s standards, an entity is considered “small” if it is independently owned and operated and is not dominant in its field of operation,²⁵ or if its number of employees or the dollar volume of its business does not exceed specific thresholds.²⁶ For example, 13 CFR Section 121.201 specifically identifies as “small entities” manufacturers of motor vehicles, passenger car bodies, and motor homes that employ 1,000 people or less, manufacturers of motor vehicle parts and accessories that employ 750 people or less, automobile and tire wholesalers that employ 100 people or less, new car dealers that employ 200 people or less and automotive parts and accessory stores with annual receipts less than \$15 million.

NHTSA interprets “potential for undue adverse economic impacts,” 49 U.S.C. 30165(c)(7), as the possibility that payment of a civil penalty amount would affect the ability of the respondent to continue to operate. NHTSA may consider a respondent’s ability to pay,

²³ See NHTSA, Civil Penalty Policy Under the Small Business Regulatory Enforcement Fairness Act, 62 FR 37115 (July 10, 1997).

²⁴ *Id.* at 37117.

²⁵ *Id.* at 37115.

²⁶ *Id.*

including in installments over time, and any effect of a penalty on that person's ability to continue to do business. The ability of a business to pay a penalty is not dictated by its size. In some cases for small businesses, however, these two considerations may relate to one another. NHTSA may consider relevant financial factors such as capitalization, liquidity, solvency, and profitability to determine a small business' ability to pay a penalty. NHTSA may also consider whether the business has been deliberately undercapitalized. The burden to present sufficient evidence relating to a charged business' size and ability to pay rests on that business. More generally, in cases where the respondent claims that it is financially unable to pay the civil penalty or that the penalty would have undue adverse economic impacts, the burden of proof is on the respondent. In the case of closely-held or privately-held companies, NHTSA may provide the respondent the opportunity to submit personal financial documentation for consideration.

8. Whether the respondent has been assessed civil penalties under this section during the most recent 5 years.

We propose to interpret "whether the [respondent] has been assessed civil penalties under this section during the most recent 5 years," 49 U.S.C. 30165(c)(8), as including an assessment of civil penalties, a settlement agreement containing a penalty, or a consent order or a lawsuit involving a penalty or payment of a civil penalty in the most recent 5 years from the date of the alleged violation, regardless of whether there was any admission of a violation or of liability under 49 U.S.C. 30165.

9. Other appropriate factors.

We propose to interpret other appropriate factors as factors not specifically identified in Section 31203(a) of MAP-21 which are appropriately considered, including both aggravating and mitigating factors.

Such factors may include, but are not limited to:

- a. A history of violations. NHTSA may increase penalties for repeated violations of the Safety Act or implementing regulations, or for a pattern or practice of violations.
- b. An economic gain from the violation. NHTSA may consider whether the respondent benefitted economically from a violation, including a delay in complying with the Safety Act, a failure to comply with the Safety Act, or a delay or failure to comply with the regulations thereunder.
- c. Effect of the respondent's conduct on the integrity of programs administered by NHTSA. The Agency's programs depend in large part on timely and accurate reporting and certification by manufacturers. Therefore, NHTSA may consider whether a person has been forthright with the Agency. NHTSA may also consider whether a person has attempted to mislead the Agency or conceal relevant information. For instance, NHTSA may consider whether a manufacturer has provided accurate and timely statements consistent with its Early Warning Reporting obligations. NHTSA may also consider whether a registered importer has provided accurate conformity packages and/or other information consistent with 49 U.S.C. 30141-30147 and the implementing regulations.
- d. Responding to requests for information or remedial action. NHTSA may consider a person's failure to respond in a timely and complete fashion to requests from NHTSA for information or for remedial action. NHTSA may also consider whether the agency needed to make multiple requests to receive requested information.

V. Codification of Other MAP-21 Penalty Changes in 49 CFR Part 578

MAP-21 increased the maximum penalties under the Safety Act, 49 U.S.C. 30165(a)(1),(3) to \$35,000,000. MAP-21 31203(a), 126 STAT. 758. It also increased the penalties and damages for odometer fraud. MAP-21 31206, 126 STAT. 761. MAP-21 also established civil penalties for violations of corporate responsibility provisions in 49 U.S.C. 30166 of \$5,000 per day and a maximum penalty of \$1,000,000. MAP-21 31304(b), 126 STAT. 764. These new penalties and increased penalties and damages are all currently in effect. NHTSA intends to amend its penalty regulation, 49 CFR 578.6, to conform it to MAP-21 amendments.

Where changes to provisions, penalties and damages are made by statute, NHTSA may amend its penalty regulation, 49 CFR 578.6, without notice and comment, effective the date of the statutory amendment. *See e.g.*, 65 FR 68108-68110 (Nov. 14, 2000). While notice is not required, this provides notice of NHTSA's intention to amend its penalty regulations to conform to the statutory changes made by MAP-21.

VI. Rulemaking Analyses and Notices

Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures

NHTSA has considered the impact of this rulemaking action under Executive Order 12866, Executive Order 13563, and the Department of Transportation's regulatory policies and procedures. This rulemaking document was not reviewed under Executive Order 12866 or Executive Order 13563. This action would establish procedures for NHTSA to follow when assessing civil penalties and state how NHTSA would apply the civil penalty factors in 49 U.S.C. 30165. Because this rulemaking only seeks to explain and streamline the process by

which the agency determines and resolves civil penalties and does not change the number of entities subject to civil penalties or the amount of civil penalties,²⁷ the impacts of the rule are limited. Therefore, this rulemaking has been determined to be not “significant” under the Department of Transportation’s regulatory policies and procedures and the policies of the Office of Management and Budget.

Regulatory Flexibility Act

We have also considered the impacts of this notice under the Regulatory Flexibility Act. I certify that this rule is not expected to have a significant economic impact on a substantial number of small entities. The following provides the factual basis for this certification under 5 U.S.C. 605(b). The amendments almost entirely affect manufacturers of motor vehicles and motor vehicle equipment.

SBA uses size standards based on the North American Industry Classification System (“NAICS”), Subsector 336--Transportation Equipment Manufacturing, which provides a small business size standard of 1,000 employees or fewer for automobile manufacturing businesses. Other motor vehicle-related industries have lower size requirements that range between 100 and 750 employees.

For example, according to the SBA coding system, businesses that manufacture truck trailers, travel trailers/campers, and vehicular lighting equipment, qualify as small businesses if they employ 500 or fewer employees. Many small businesses are subject to the penalty

²⁷ MAP-21 increased the amount of civil penalties for a related series of violations of the Vehicle Safety Act to \$35,000,000. The proposed revisions to the to the civil penalty amounts in this rulemaking merely update 49 CFR 578.6 to reflect the maximum civil penalty already in effect and therefore do not increase the maximum penalty that NHTSA may seek for violations of the Safety Act or implementing regulations.

provisions of 49 U.S.C. 30165 and therefore may be affected by the procedures for assessing civil penalties and the civil penalty factors in this NPRM. The impacts of this rulemaking on small businesses are minimal, as NHTSA will continue to consider the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).²⁸

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This NPRM would not materially affect our civil penalty policy toward small businesses. Because NHTSA will continue to consider SBREFA and consider the business' size including the potential that a civil penalty would have undue adverse economic impacts on a small business before assessing a civil penalty, the impacts of this rulemaking on small businesses are minimal.

Executive Order 13132 (Federalism)

Executive Order 13132 requires NHTSA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Under Executive Order 13132, the agency may not issue a regulation with Federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State

²⁸ See NHTSA, Civil Penalty Policy under the Small Business Regulatory Enforcement Fairness Act, 62 FR 37115 (July 10, 1997).

and local governments, the agency consults with State and local governments, or the agency consults with State and local officials early in the process of developing the proposed regulation.

This NPRM would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132.

This proposed rule generally would apply to private motor vehicle and motor vehicle equipment manufacturers (including importers), entities that sell motor vehicles and equipment and motor vehicle repair businesses. Thus, Executive Order 13132 is not implicated and consultation with State and local officials is not required.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, Public Law 104-4, requires agencies to prepare a written assessment of the cost, benefits and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than \$100 million annually. Because this rulemaking would not have a \$100 million effect, no Unfunded Mandates assessment will be prepared.

Executive Order 12988 (Civil Justice Reform)

With respect to the review of the promulgation of a new regulation, section 3(b) of Executive Order 12988, “Civil Justice Reform” (61 FR 4729; Feb. 7, 1996), requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect; (2) clearly specifies the effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct, while promoting

simplification and burden reduction; (4) clearly specifies the retroactive effect, if any; (5) specifies whether administrative proceedings are to be required before parties file suit in court; (6) adequately defines key terms; and (7) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. This document is consistent with that requirement.

Pursuant to this Order, NHTSA notes as follows: This proposed rule would establish procedures for NHTSA to follow in assessing civil penalties pursuant to 49 U.S.C. 30165 under delegation from the Secretary of Transportation. The proposed rule clearly identifies the section of the Safety Act or regulation thereunder that, if violated, would subject a person to a demand for civil penalties pursuant to the procedures in this NPRM. This proposed rule also lists the mandatory and discretionary factors for NHTSA to consider when assessing civil penalties. The rule would not have retroactive effect.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980, we state that there are no requirements for information collection associated with this rulemaking action.

Regulatory Identifier Number (RIN)

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

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 (65 FR 19477-78).

List of Subjects in 49 CFR Part 578

Administrative practice and procedure, Civil and criminal penalties, Civil penalty factors, Imports, Motor vehicle safety, Motor vehicles, Rubber and rubber products, Tires.

Proposed Regulatory Text

For the reasons set forth in the preamble, NHTSA proposes to amend 49 CFR part 578 as follows:

PART 578 – CIVIL AND CRIMINAL PENALTIES

1. The authority citation for part 578 is revised to read as follows:

Authority: Pub. L. No. 101–410, Pub. L. No. 104–134, Pub. L. No. 112-141, 49 U.S.C. 322, 30165, 30170, 30505, 32308, 32309, 32507, 32709, 32710, 32902, 32912, and 33115 as amended; delegation of authority at 49 CFR 1.81 and 1.95.

2. Revise § 578.1 to read as follows:

§ 578.1 Scope.

This part specifies the civil penalties for violations of statutes and regulations administered by the National Highway Traffic Safety Administration (NHTSA), as adjusted for inflation. It also sets forth the procedures NHTSA must follow in assessing civil penalties under

49 U.S.C. chapter 301. This part also sets forth NHTSA's interpretation of the civil penalty factors listed in 49 U.S.C. 30165(c). In addition, this part sets forth the requirements regarding the reasonable time and the manner of correction for a person seeking safe harbor protection from criminal liability under 49 U.S.C. 30170(a).

3. Revise § 578.2 to read as follows:

§ 578.2 Purpose.

One purpose of this part is to effectuate the remedial impact of civil penalties and to foster compliance with the law by specifying the civil penalties for statutory and regulatory violations, as adjusted for inflation. Another purpose of this part is to set forth the procedures for assessing civil penalties under 49 U.S.C. chapter 301. A third purpose of this part is to set forth NHTSA's interpretation of the civil penalty factors listed in 49 U.S.C. 30165(c). A fourth purpose of this part is to set forth the requirements regarding the reasonable time and the manner of correction for a person seeking safe harbor protection from criminal liability under 49 U.S.C. 30170(a).

4. Revise § 578.3 to read as follows:

§ 578.3 Applicability.

This part applies to civil penalties for violations of chapters 301, 305, 323, 325, 327, 329, and 331 of title 49 of the United States Code or a regulation prescribed thereunder. This part applies to civil penalty factors under section 30165(c) of title 49 of the United States Code. This part also applies to the criminal penalty safe harbor provision of section 30170 of title 49 of the United States Code.

5. Amend § 578.4 by adding in alphabetical order definitions of "Person" and "Respondent" to read as follows:

§ 578.4 Definitions.

* * * * *

Person means any individual, corporation, company, limited liability company, trust, association, firm, partnership, society, joint stock company, or any other entity.

Respondent means any person charged with liability for a civil penalty for a violation of sections 30112, 30115, 30117 through 30122, 30123(a), 30125(c), 30127, 30141 through 30147, or 30166 of title 49 of the United States Code or a regulation prescribed under any of those sections or any person to whom an initial demand for civil penalties is sent.

6. Amend § 578.6 by revising paragraphs (a)(1) and (3), adding paragraph (a)(4), and revising paragraph (f) to read as follows:

§ 578.6 Civil penalties for violations of specified provisions of title 49 of the United States Code.

(a) *Motor vehicle safety*— (1) *In general*. A person who violates any of sections 30112, 30115, 30117 through 30122, 30123(a), 30125(c), 30127, or 30141 through 30147 of title 49 of the United States Code or a regulation prescribed under any of those sections is liable to the United States Government for a civil penalty of not more than \$7,000 for each violation. A separate violation occurs for each motor vehicle or item of motor vehicle equipment and for each failure or refusal to allow or perform an act required by any of those sections. The maximum civil penalty under this paragraph for a related series of violations is \$35,000,000.

* * * * *

(3) *Section 30166*. Except as provided in paragraph (a)(4) of this section, a person who violates section 30166 of title 49 of the United States Code or a regulation prescribed under that section is liable to the United States Government for a civil penalty for failing or refusing to allow or perform an act required under that section or regulation. The maximum penalty under this paragraph is \$7,000 per violation per day. The maximum penalty under this paragraph for a related series of daily violations is \$35,000,000.

(4) *Section 30166(o)*. A person who knowingly and willfully submits materially false or misleading information to the Secretary, after certifying the same as accurate under the process established pursuant to section 30166(o), shall be subject to a civil penalty of not more than \$5,000 per day. The maximum penalty under this paragraph for a related series of daily violations is \$1,000,000.

* * * * *

(f) *Odometer tampering and disclosure*. (1) A person that violates 49 U.S.C. chapter 327 or a regulation prescribed or order issued thereunder is liable to the United States Government for a civil penalty of not more than \$10,000 for each violation. A separate violation occurs for each motor vehicle or device involved in the violation. The maximum civil penalty under this paragraph for a related series of violations is \$1,000,000.

(2) A person that violates 49 U.S.C. chapter 327 or a regulation prescribed or order issued thereunder, with intent to defraud, is liable for three times the actual damages or \$10,000, whichever is greater.

* * * * *

§ 578.7 [Redesignated as § 578.15]

7. Redesignate § 578.7 as § 578.15.

8. Add new § 578.7 to read as follows:

§ 578.7 Notice of initial demand for civil penalties.

(a) NHTSA, through the Assistant Chief Counsel for Litigation and Enforcement, begins a civil penalty proceeding by serving a notice of initial demand for civil penalties on a person (i.e. respondent) charging the person with having violated one or more provisions of 49 U.S.C. 30112, 30115, 30117-30122, 30123(a), 30125(c), 30127, 30141-30147, or 30166, or the regulations prescribed thereunder.

(b) A notice of initial demand for civil penalties issued under this section includes:

(1) A statement of the provision(s) which the respondent is alleged to have violated as of the date of the initial demand for civil penalties;

(2) A statement of the factual allegations upon which the proposed civil penalty is being sought;

(3) Notice of the maximum amount of civil penalty for which the respondent may be liable at the time of the notice for the violations alleged;

(4) Notice of the amount of the civil penalty proposed to be assessed;

(5) A description of the manner in which the respondent should make payment of any money to the United States;

(6) A statement of the respondent's right to present written explanations, information or any materials in answer to the charges or in mitigation of the penalty;

(7) A statement of the respondent's right to request a hearing and the procedures for requesting a hearing;

(8) A statement that failure to pay the amount of the civil penalty, to elect to provide an informal response, or to request a hearing within 30 days of the date of the initial demand authorizes the NHTSA Chief Counsel, without further notice to the respondent, to find the facts to be as alleged in the initial demand for civil penalties and to assess an appropriate civil penalty; and

(9) Documents relied on by the Assistant Chief Counsel for Litigation and Enforcement to establish that the person is liable for civil penalties or to determining the amount of the initial demand. The documents may be provided in redacted form.

(c) NHTSA may amend the initial demand for civil penalties at any time prior to the entry of an order assessing a civil penalty including by amending the amount of civil penalties demanded. If the amendment contains any new material allegation of fact, the respondent is given an opportunity to respond. In an amended notice, NHTSA may change the proposed amount of civil penalty up to and including the maximum penalty amount for each violation, to and including the maximum penalty amount for a related series of violations.

(d) An initial demand for civil penalty, reply, or order issued by NHTSA under this section or §§ 578.8, 578.9, 578.10, and 578.11 may be delivered to the party by:

- (1) Mailing to the party (certified mail is not required);
- (2) Hand delivery;
- (3) Use of an overnight or express courier service; or
- (4) Facsimile transmission or electronic mail to the party or an agent or employee of the party.

(e) Service of an initial demand for civil penalty or order by a person's duly authorized representative (including, but not limited to, a person's agent for accepting service designated pursuant to 49 CFR part 551) constitutes service upon that person.

(f) Within thirty (30) calendar days of the date on which the initial demand for civil penalties is issued under this section, the respondent must:

- (1) Pay the amount of civil penalty proposed and thereby close the case;
- (2) Make an informal response as provided in § 578.9; or
- (3) Request a hearing as provided in § 578.10.

9. Add § 578.8 to read as follows:

§ 578.8 Default judgments.

(a) Failure of the respondent to reply by taking one of the three actions described in § 578.7(f) within the period provided constitutes a waiver of his or her right to appear and contest the allegations and authorizes the Agency's Chief Counsel, without further notice to the respondent, to find the facts to be as alleged in the initial demand for civil penalties and to assess an appropriate civil penalty. This decision by the Chief Counsel will constitute final agency action. No appeal to the Administrator is permitted.

(b) If respondent elects to request a conference with the Chief Counsel and fails to attend the conference without good cause shown, the Chief Counsel may, without further notice to the respondent, find the facts to be as alleged in the initial demand for civil penalties and assess an appropriate civil penalty. This decision by the Chief Counsel will constitute final agency action. No appeal to the Administrator is permitted.

(c) If the respondent elects to request a hearing and is granted an in-person hearing, failure of the respondent to attend the hearing without good cause shown authorizes the Hearing Officer, without further notice to the respondent, to find the facts to be as alleged in the initial demand for civil penalties and assess an appropriate civil penalty. This decision by the Hearing Officer will constitute final agency action. No appeal to the Administrator is permitted.

10. Add § 578.9 to read as follows:

§ 578.9 Procedures when an informal response is elected.

(a) If a respondent elects to make an informal response to an initial demand for civil penalties, the respondent shall submit to the Chief Counsel and to the Assistant Chief Counsel for Litigation and Enforcement in writing any arguments, views or supporting documentation that dispute or mitigate that person's liability for, or the amount of, civil penalties to be imposed within 30 calendar days of the date on which the initial demand for civil penalties is issued. The informal response shall be submitted via hand delivery, use of an overnight or express courier service, facsimile or electronic mail. The respondent may include in his or her informal written response a request for a conference. Upon receipt of such a request, the Chief Counsel will arrange for a conference as soon as practicable at a time of mutual convenience. Unless otherwise specified by the Chief Counsel, the conference will take place at the Department's headquarters. Respondent may also request to conduct the conference by telephone if traveling to the Department's headquarters would be unduly burdensome.

(b) Written explanations, information or materials submitted by the respondent and relevant information presented during any conference held under this section are considered by

the Chief Counsel in reviewing the notice of initial demand for civil penalties and determining the fact of violation and the amount of any penalty to be assessed.

(c) The Assistant Chief Counsel for Litigation and Enforcement is permitted to provide rebuttal information to the Chief Counsel replying to the information submitted by the respondent.

(d) After consideration of the submissions in paragraphs (a) and (c) of this section, and any relevant information presented at a conference, the Chief Counsel may dismiss the initial demand for civil penalties in whole or in part. If the Chief Counsel does not dismiss the initial demand in its entirety, the Chief Counsel may issue an order assessing a civil penalty.

(e) The NHTSA Chief Counsel will assess civil penalties under this section only after considering the nature, circumstances, extent and gravity of the violation. The determination may consider the nature of the defect or noncompliance; knowledge by the respondent of its obligations under this chapter; the severity of the risk of injury posed by the defect or noncompliance; the occurrence or absence of injury; the number of motor vehicles or items of motor vehicle equipment distributed with the defect or noncompliance; actions taken by the respondent to identify, investigate, or mitigate the condition; the appropriateness of such penalty in relation to the size of the business of the respondent, including the potential for undue adverse economic impacts; and other relevant and appropriate factors and information.

(f) An order by the Chief Counsel assessing civil penalties exceeding \$1,000,000 becomes a final decision 20 calendar days after it is issued unless the respondent files an appeal under § 578.11 within the 20 day period. An order by the Chief Counsel assessing civil penalties of \$1,000,000 or less is a final decision upon issuance.

11. Add § 578.10 to read as follows:

§ 578.10 Procedures when a hearing is elected.

(a) A respondent or counsel for a respondent, responding to an initial demand for civil penalties by requesting a hearing must provide with the request for hearing two complete copies (via hand delivery, use of an overnight or express courier service, facsimile or electronic mail) containing a detailed statement of factual and legal issues in dispute and all statements and documents supporting the respondent's case within 30 calendar days of the date on which the initial demand for civil penalties is issued. If the respondent wishes to request an in-person hearing and the opportunity to present witness testimony, the respondent must also provide with the request for a hearing a statement of the factual and/or legal issues that an in-person hearing is necessary to resolve, a statement containing the names of individuals whom the respondent wishes to call as witnesses at the hearing, a description of the witnesses' expected testimony and the factual basis for such testimony, and whether the respondent will arrange to have a verbatim transcript prepared at its own expense. One copy of the respondent's submission set shall be labeled "For Hearing Officer." Failure to specify any issue in the respondent's written submission will preclude its consideration.

(b) When a hearing is requested and scheduled under this section, a Hearing Officer designated by the Chief Counsel convenes and presides over the hearing. The Hearing Officer is solely responsible for the case referred to him or her. The Hearing Officer shall have no other responsibility, direct or supervisory, for the investigation of the case referred for the assessment of civil penalties and must have no prior connection with the case. The Agency will be represented in the hearing by an attorney designated by the Chief Counsel.

(c) The hearing will be conducted by written submission unless an in-person hearing is requested and the Hearing Officer determines that an in-person hearing is necessary to resolve factual or legal issues presented in the case. In a hearing conducted by written submission, the Assistant Chief Counsel for Litigation and Enforcement will submit a reply responding to the statement of factual and legal issues in dispute and the statements and documents provided with the respondent's request for a hearing submitted under paragraph (a) of this section. In a hearing by written submission, the Hearing Officer's decision will be based on the initial demand for civil penalties and all attached documents, the respondent's request for a hearing submitted under paragraph (a) of this section and all attached documents and statements, and the reply to the respondent's request for a hearing (including any documents) submitted under this paragraph. All of the materials described in this subsection are automatically part of the administrative record.

(d) If the Hearing Officer determines that an in-person hearing is necessary to resolve factual and/or legal issues present in the case, the Hearing Officer will notify the respondent and NHTSA of his or her decision in writing and schedule an in-person hearing.

(e) In order to regulate the course of a hearing, the Hearing Officer may:

(1) Direct or arrange for the submission of additional materials for the administrative record in written form;

(2) Receive testimony from witnesses during an in-person hearing;

(3) Convene, recess, reconvene, and adjourn and otherwise regulate the course of the in-person hearing; and

(4) Take administrative notice of matters that are not subject to a bona fide dispute and are commonly known in the community or are ascertainable from readily available sources of known accuracy. Prior to taking notice of a matter, the Hearing Officer shall give NHTSA and the respondent an opportunity to show why notice should not be taken. In any case in which notice is taken, the Hearing Officer shall place a written statement of the matters as to which notice was taken in the record, with the basis for such notice, including a statement that the parties consented to the notice being taken or a summary of each party's objections.

(f) In considering the admission of evidence, the Hearing Officer is not bound by the Federal Rules of Evidence. In evaluating the evidence presented, the Hearing Officer must give due consideration to the reliability and relevance of each item of evidence.

(g) If, in response to a request for an in-person hearing, the Hearing Officer determines that an in-person hearing is necessary, the respondent may appear and be heard on his or her own behalf or through counsel of his or her choice. The respondent or his or her counsel may offer relevant information which he or she believes should be considered in defense of the allegations or which may bear on the penalty proposed to be assessed. The respondent may also call witnesses at the in-person hearing, if permitted by the Hearing Officer. A respondent represented by counsel bears all of its own attorneys' fees and costs. If a respondent wishes to present testimony through a personal appearance, the respondent is responsible for any costs associated with such appearance. The Hearing Officer may, at his or her discretion, accept a stipulation, declaration, or affidavit in lieu of testimony.

(h) If, in response to a request for an in-person hearing, the Hearing Officer determines that an in-person hearing is necessary, NHTSA may supplement the record with information

prior to the in-person hearing. A copy of such information will be provided to the respondent no later than 3 days before the hearing. NHTSA may also call witnesses at the in-person hearing, if permitted by the Hearing Officer. NHTSA will provide to the respondent a list of witnesses that it expects to call at the in-person hearing, a description of the witnesses' expected testimony, and the factual basis for the expected testimony no later than three days prior to the in-person hearing. The Hearing Officer may, at his or her discretion, accept a stipulation, declaration, or affidavit in lieu of testimony.

(i) If, in response to a request for an in-person hearing, the Hearing Officer determines that an in-person hearing is necessary, the Hearing Officer may allow for cross examination of witnesses.

(j) A verbatim transcript of any in-person hearing will not normally be prepared. A respondent may, solely at its own expense, cause a verbatim transcript to be made. If a verbatim transcript is made, the respondent shall submit two copies to the Hearing Officer not later than 15 days after the in-person hearing. The Hearing Officer shall include such transcript in the record. A respondent who wishes a verbatim transcript of the in-person hearing to be made must notify the Hearing Officer and the Assistant Chief Counsel for Litigation and Enforcement in advance of the hearing.

(k) The administrative record of an in-person hearing shall contain the notice of initial demand for civil penalties and any supporting documentation described in § 578.7; any timely documentation submitted by the respondent; any further documentation submitted by the Agency or presented at an in-person hearing; any additional materials presented at an in-person hearing;

the transcript of the hearing (if any); and any other materials that the Hearing Officer determines are relevant.

(l) During an in-person hearing, NHTSA makes the first presentation of evidence. At the close of NHTSA's presentation of evidence, the respondent will have the right to respond to and rebut evidence and argument presented by NHTSA. The respondent or his or her counsel may offer relevant information including testimony (if permitted by the Hearing Officer) regarding the respondent's liability for civil penalties and the application of the penalty factors. At the close of the respondent's presentation of evidence, the Hearing Officer may allow the presentation of rebuttal evidence by NHTSA. The Hearing Officer, in his or her discretion, may allow the respondent to reply to any such rebuttal evidence submitted. NHTSA has the burden at the hearing of establishing a violation charged in § 578.7 giving rise to liability for a civil penalty. A respondent challenging the amount of a proposed civil penalty will have the burden to establish mitigating circumstances. After the evidence in the case has been presented, NHTSA and the respondent may present arguments on the issues in the case. The decision of the Hearing Officer shall be made solely on the administrative record developed during the course of the hearing.

(m) A Hearing Officer's decision and order assessing civil penalties exceeding \$1,000,000 becomes a final order 20 calendar days after it is issued unless the respondent files an appeal within the 20 day period to the Administrator under § 578.11. A Hearing Officer's decision and order assessing civil penalties of \$1,000,000 or less is a final order upon issuance.

(n) The Hearing Officer will assess civil penalties under this section only after considering the nature, circumstances, extent and gravity of the violation. The determination

may consider the nature of the defect or noncompliance; knowledge by the respondent of its obligations under this chapter; the severity of the risk of injury; the occurrence or absence or injury; the number of motor vehicles or items of motor vehicle equipment distributed with the defect or noncompliance; actions taken by the respondent to identify, investigate, or mitigate the condition; the appropriateness of such penalty in relation to the size of the business of the respondent, including the potential for undue adverse economic impacts; and other relevant and appropriate factors and information.

12. Add § 578.11 to read as follows:

§ 578.11 Appeals to the Administrator.

(a) A respondent aggrieved by an order issued by the Chief Counsel or Hearing Officer assessing a civil penalty of more than \$1,000,000 may file an appeal with the Administrator. The appeal must be filed within twenty (20) calendar days of date on which the order was issued and state the grounds for appeal and the factual or legal basis supporting the appeal. If no appeal is filed within 20 days of the date on which the order was issued, the order by the Chief Counsel or the Hearing Officer shall become a final agency order.

(b) The Administrator will affirm the decision unless the Administrator finds that the decision was unsupported by the record as a whole; based on a mistake of law; or that new evidence, not available at the hearing, is available. Absent any of these bases, the appeal will be summarily dismissed.

(c) If the Administrator finds that the decision was unsupported, in whole or in part; based on a mistake of law; or that new evidence is available, then the Administrator may: assess

or modify a civil penalty; rescind the initial demand for civil penalties; or remand the case back for new or additional proceedings.

(d) In the absence of a remand, the decision of the Administrator in an appeal is a final agency action.

13. Add § 578.12 to read as follows:

§ 578.12 Collection of assessed penalties.

(a) Payment of a civil penalty shall be made by check, postal money order, or electronic transfer of funds, as provided in instructions by the Agency.

(b) Failure by the respondent to submit in writing his/her acceptance of the terms of an order directing payment of a civil penalty and to remit the civil penalty to NHTSA within 30 days after an agency decision becomes final, may result in the institution of an action in an appropriate United States District Court to collect the civil penalty.

14. Add § 578.13 to read as follows:

§ 578.13 Judicial review.

(a) Any party to the underlying proceeding who is adversely affected by a final order issued under this part may petition for review of the order in the appropriate United States district court.

(b) Judicial review will be based on whether the final order was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. No objection that has not been raised before the Agency will be considered by the court, unless reasonable grounds existed for failure to do so.

(c) The commencement of proceedings under this section will not, unless ordered by the court, operate as a stay of the final order the Agency.

15. Add § 578.14 to read as follows:

§ 578.14 Civil penalty factors under 49 U.S.C. chapter 301.

(a) General civil penalty factors. This subsection interprets the terms nature, circumstances, extent, and gravity of the violation consistent with the factors in 49 U.S.C. 30165(c).

(1) Nature of the violation means the essential, fundamental character or constitution of the violation. It includes but is not limited to the nature of a safety-related defect or noncompliance. It also includes what the violation involves.

(2) Circumstances of the violation means the context, facts, and conditions having bearing on the violation.

(3) Extent of the violation means the range of inclusiveness over which the violation extends including the scope, time frame and/or the degree of the violation. This includes the number of violations and whether the violations are related or unrelated.

(4) Gravity of the violation means the importance, significance, and/or seriousness of the violation.

(b) Discretionary civil penalty factors. This paragraph interprets the nine discretionary factors in 49 U.S.C. 30165(c)(1) through (9) that NHTSA may apply in making civil penalty amount determinations.

(1) The nature of the defect or noncompliance means the essential, fundamental characteristic or constitution of the defect or noncompliance.

(i) “Defect” is as defined in 49 U.S.C. 30102(a)(2). “Noncompliance” under this factor includes a noncompliance with a Federal Motor Vehicle Safety Standard (“FMVSS”), as well as other violations subject to penalties under 49 U.S.C. 30165.

(ii) When considering the nature of a safety-related defect or noncompliance with an FMVSS, NHTSA may examine the conditions or circumstances under which the defect or noncompliance arises, the performance problem, and actual and probable consequences of the defect or noncompliance. When considering the nature of the noncompliance with the Safety Act or a regulation promulgated thereunder, NHTSA may also examine the circumstances surrounding the violation.

(2) Knowledge by the respondent of its obligations under this chapter means all knowledge, legal and factual, actual, presumed and constructive, of the respondent of its obligations under 49 U.S.C. chapter 301. If a respondent is other than a natural person, including but not limited to a corporation or a partnership, then the knowledge of an employee or employees of that non-natural person shall be imputed to that non-natural person. The knowledge of an agent is imputed to a principal. A person, such as a corporation, with multiple employees is charged with the knowledge of each employee, regardless of whether the employees have communicated that knowledge among each other, or to a decision maker for the non-natural person.

(3) The severity of the risk of injury means the gravity of exposure to potential injury and includes the potential for injury or death of drivers, passengers, other motorists, pedestrians, and others. The severity of the risk includes the likelihood of an injury occurring and the population group exposed.

(4) The occurrence or absence of injury means whether injuries or deaths have occurred as a result of a defect, noncompliance, or other violation of 49 U.S.C. chapter 301 or chapter 5 of title 49 of the Code of Federal Regulations. NHTSA may also take into consideration allegations of death or injury. The absence of deaths or injuries shall not be dispositive of manufacturer's liability for civil penalties.

(5) The number of motor vehicles or items of motor vehicle equipment distributed with the defect or noncompliance means the total number of vehicles or items of motor vehicle equipment distributed with the defect or noncompliance with an FMVSS or the percentage of vehicles or items of motor vehicle equipment of the subject population with the defect or noncompliance with an FMVSS. If multiple make, model and model years of motor vehicles are affected by the defect or noncompliance with an FMVSS, NHTSA may also consider the percentage of motor vehicles that contain the defect or noncompliance with an FMVSS as a percentage of the manufacturer's total annual production of vehicles. NHTSA may choose to make distinction between those defective or noncompliant products distributed in commerce that consumers received, and those defective or noncompliant products distributed in commerce that consumers have not received.

(6) Actions taken by the respondent to identify, investigate, or mitigate the condition means actions actually taken, the time frame when those actions were taken, what those actions involved and how they ameliorated or otherwise related to the condition, what remained after those actions were taken, and the speed with which the actions were taken. A failure to act may also be considered.

(7) The appropriateness of such penalty in relation to the size of the business of the respondent, including the potential for undue adverse economic impacts. NHTSA takes the Small Business Regulatory Enforcement Fairness Act of 1996 into account. Upon a showing that a violator is a small entity, NHTSA may include, but is not limited to, requiring the small entity to correct the violation within a reasonable correction period, considering whether the violation was discovered through the participation by the small entity in a compliance assistance program sponsored by the agency, considering whether the small entity has been subject to multiple enforcement actions by the agency, considering whether the violations involve willful or criminal conduct, considering whether the violations pose serious health, safety or environmental threats, and requiring a good faith effort to comply with the law. NHTSA may also consider the effect of the penalty on ability of the person to continue to operate. NHTSA may consider a person's ability to pay, including in installments over time, any effect of a penalty on the respondent's ability to continue to do business, and relevant financial factors such as liquidity, solvency, and profitability. NHTSA may also consider whether the business has been deliberately undercapitalized.

(8) Whether the respondent has been assessed civil penalties under this section during the most recent 5 years means whether the respondent has been assessed civil penalties, including a settlement agreement containing a penalty, a consent order or a lawsuit involving a penalty or payment of a civil penalty in the most recent 5 years from the date of the alleged violation, regardless of whether there was any admission of a violation or of liability, under 49 U.S.C. 30165.

(9) Other appropriate factors means other factors not identified above, including but not limited to aggravating and mitigating factors relating to the violation, such as whether there is a history of violations, whether a person benefitted economically from a violation, the effect of the respondent's conduct on the integrity of programs administered by NHTSA, and whether there was a failure to respond in a complete and timely manner to requests for information or remedial action.

Issued in Washington, D.C. on September 8, 2015, under authority delegated pursuant to 49 CFR 1.95.

Paul A. Hemmersbaugh
Acting Chief Counsel

BILLING CODE: 4910-59-P

[FR Doc. 2015-23164 Filed: 9/18/2015 08:45 am; Publication Date: 9/21/2015]