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National Highway Traffic Safety Administration

49 CFR Part 578

[Docket No. NHTSA-2021-0001]

RIN 2127-AM32

Civil Penalties

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

ACTION: Interim final rule; request for comments; response to petition for rulemaking.

SUMMARY: On October 2, 2020, NHTSA received a petition for rulemaking from the Alliance for Automotive Innovation regarding when to apply an increase to the civil penalty rate applicable to automobile manufacturers that fail to meet applicable corporate average fuel economy (CAFE) standards and are unable to offset such a deficit with compliance credits. After carefully considering the issues raised, NHTSA has granted the petition and promulgates an interim final rule providing that the increase will go into effect beginning in model year 2022 in accordance with NHTSA's December 2016 rule on the same issue, except if the August 31, 2020 decision of the United States Court of Appeals for the Second Circuit in Case No. 19-2395 is vacated. This interim final rule amends the relevant regulatory text accordingly and requests comment. This document also responds to a petition for reconsideration of NHTSA's July 2019 rule from the Institute for Policy Integrity at New York University School of Law.

DATES: *Effective date:* This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comments: Comments must be received by [INSERT DATE 10 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, M-30, U.S. Department of Transportation, West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue S.E., Washington, D.C. 20590.
- Hand Delivery or Courier: U.S. Department of Transportation, West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m. Eastern time, Monday through Friday, except Federal holidays.
- Fax: 202-493-2251
- Instructions: NHTSA has established a docket for this action. Direct your comments to Docket ID No. NHTSA-2021-0001. See the SUPPLEMENTARY INFORMATION section on “Public Participation” for more information about submitting written comments.
- Docket: All documents in the docket are listed on the www.regulations.gov Web site. Although listed in the index, some information is not publicly available, e.g., confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the following location: Docket Management Facility, M-30, U.S. Department of Transportation, West Building, Ground Floor, Rm. W12-140, 1200 New Jersey Avenue S.E., Washington, D.C. 20590. The telephone number for the docket management facility is (202) 366-9324. The docket management facility is open between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Michael Koppersmith, Office of Chief Counsel, NHTSA, email michael.koppersmith@dot.gov, telephone (202) 366-2992, facsimile (202) 366-3820, 1200 New Jersey Ave, S.E., Washington, D.C. 20590.

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A. Public Participation

NHTSA requests comment on this interim final rule. This section describes how you can participate in this process.

(1) How do I prepare and submit comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the Docket, please include the Docket number NHTSA-2021-0001 in your comments. Your comments must not be more than 15 pages long.¹ NHTSA established this limit to encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents to your comments, and there is no limit on the length of the attachments. If you are submitting comments electronically as a PDF (Adobe) file, we ask that the documents submitted be scanned using the Optical Character Recognition (OCR) process, thus allowing the Agency to search and copy certain portions of your submissions.² Please note that pursuant to the Data Quality Act, in order for the substantive data to be relied upon and used by the Agency, it must meet the information quality standards set forth in the OMB and Department of Transportation (DOT) Data Quality Act guidelines. Accordingly, we encourage you to consult the guidelines in preparing your comments. OMB's guidelines may be accessed at <http://www.whitehouse.gov/omb/fedreg/reproducible.html>. DOT's guidelines may be accessed at <http://www.dot.gov/dataquality.htm>.

(2) Tips for Preparing Your Comments

When submitting comments, please remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, Federal Register date and page number).

¹ See 49 CFR 553.21

² Optical character recognition (OCR) is the process of converting an image of text, such as a scanned paper document or electronic fax file, into computer-editable text.

- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified in the DATES section above.

(3) How can I be sure that my comments were received?

If you submit your comments by mail and wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail.

(4) How do I submit confidential business information?

If you wish to submit any information under a claim of confidentiality, you should submit your complete submission, including the information you claim to be confidential business information (CBI), to the NHTSA Chief Counsel. When you send a comment containing CBI, you should include a cover letter setting forth the information specified in our CBI regulation.³ In addition, you should submit a copy from which you have deleted the claimed CBI to the Docket by one of the methods set forth above.

³ See 49 CFR part 512.

To facilitate social distancing due to COVID-19, NHTSA is treating electronic submission as an acceptable method for submitting CBI to the Agency under 49 CFR part 512. Any CBI submissions sent via email should be sent to an attorney in the Office of Chief Counsel at the address given above under FOR FURTHER INFORMATION CONTACT. Likewise, for CBI submissions via a secure file transfer application, an attorney in the Office of Chief Counsel must be set to receive a notification when files are submitted and have access to retrieve the submitted files. At this time, regulated entities should not send a duplicate hardcopy of their electronic CBI submissions to DOT headquarters.

Please note that these modified submission procedures are only to facilitate continued operations while maintaining appropriate social distancing due to COVID-19. Regular procedures for part 512 submissions will resume upon further notice, when NHTSA and regulated entities discontinue operating primarily in telework status.

If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the FOR FURTHER INFORMATION CONTACT section.

(5) How can I read the comments submitted by other people?

You may read the materials placed in the docket for this document (*e.g.*, the comments submitted in response to this document by other interested persons) at any time by going to <http://www.regulations.gov>. Follow the online instructions for accessing the dockets. You may also read the materials at the NHTSA Docket Management Facility by going to the street addresses given above under ADDRESSES.

B. Statutory and Regulatory Background

NHTSA sets⁴ and enforces⁵ corporate average fuel economy (CAFE) standards for the United States light-duty automobile fleet, and in doing so, assesses civil penalties against

⁴ 49 U.S.C. 32902. The authorities vested in the Secretary under chapter 329 of Title 49, U.S.C., have been delegated to NHTSA. 49 CFR 1.95(a).

⁵ 49 U.S.C. 32911, 32912.

manufacturers that fall short of their compliance obligations and are unable to make up the shortfall with credits obtained for exceeding the standards.⁶ The civil penalty amount for CAFE non-compliance was originally set by statute in 1975, and beginning in 1997, included a rate of \$5.50 per each tenth of a mile per gallon (0.1) that a manufacturer's fleet average CAFE level falls short of its compliance obligation. This shortfall amount is then multiplied by the number of vehicles in that manufacturer's fleet.⁷ The basic equation for calculating a manufacturer's civil penalty amount before accounting for credits, is as follows:

$$\text{(penalty rate, in \$ per 0.1 mpg per vehicle)} \times \text{(amount of shortfall, in tenths of an mpg)} \times \text{(# of vehicles in manufacturer's non-compliant fleet)}.$$

Starting with model year 2011, the CAFE program was amended by the Energy Independence and Security Act of 2007 (EISA) to provide for credit transfers among a manufacturer's various fleets.⁸ Starting with that model year, the law also provided for trading between vehicle manufacturers, which has allowed vehicle manufacturers the opportunity to acquire credits from competitors rather than paying civil penalties for non-compliance. Credit purchases involve significant expenditures, and NHTSA believes that an increase in the penalty rate would correlate with an increase in such expenditures.

C. Civil Penalties Inflation Adjustment Act Improvements Act of 2015

On November 2, 2015, the Federal Civil Penalties Inflation Adjustment Act Improvements Act (Inflation Adjustment Act or 2015 Act), Pub. L. 114-74, Section 701, was signed into law. The 2015 Act required Federal agencies to make an initial "catch-up" adjustment to the "civil monetary penalties," as defined, they administer through an interim final

⁶ Credits may be either *earned* (for over-compliance by a given manufacturer's fleet, in a given model year), *transferred* (from one fleet to another), or *purchased* (in which case, another manufacturer earned the credits by over-complying and chose to sell that surplus). 49 U.S.C. 32903.

⁷ A manufacturer may have up to three fleets of vehicles, for CAFE compliance purposes, in any given model year – a domestic passenger car fleet, an imported passenger car fleet, and a light truck fleet. Each fleet belonging to each manufacturer has its own compliance obligation, with the potential for either over-compliance or under-compliance. There is no overarching CAFE requirement for a manufacturer's total production.

⁸ Pub. L. 110-140, sec. 104.

rule and then to make subsequent annual adjustments for inflation. The amount of increase for any “catch-up” adjustment to a civil monetary penalty pursuant to the 2015 Act was limited to 150 percent of the then-current penalty. Agencies were required to issue an interim final rule for the initial “catch-up” adjustment by July 1, 2016, without providing the opportunity for public comment ordinarily required under the Administrative Procedure Act.

The Director of the Office of Management and Budget (OMB) provided guidance to all Federal agencies in a February 24, 2016 memorandum.⁹ For those penalties an agency determined to be “civil monetary penalties,” the memorandum provided guidance on how to calculate the initial adjustment required by the 2015 Act. The initial catch up adjustment is based on the change between the Consumer Price Index for all Urban Consumers (CPI-U) for the month of October in the year the penalty amount was established or last adjusted by Congress and the October 2015 CPI-U. The February 24, 2016 memorandum contains a table with a multiplier for the change in CPI-U from the year the penalty was established or last adjusted to 2015. To arrive at the adjusted penalty, an agency must multiply the penalty amount when it was established or last adjusted by Congress, excluding adjustments under the 1990 Inflation Adjustment Act, by the multiplier for the increase in CPI-U from the year the penalty was established or adjusted as provided in the February 24, 2016 memorandum. The 2015 Act limits the initial inflationary increase to 150 percent of the current penalty. To determine whether the increase in the adjusted penalty is less than 150 percent, an agency must multiply the current penalty by 250 percent. The adjusted penalty is the lesser of either the adjusted penalty based on the multiplier for CPI-U in Table A of the February 24, 2016 memorandum or an amount equal

⁹ Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Feb. 24, 2016), available online at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2016/m-16-06.pdf>.

to 250 percent of the current penalty. Ensuing guidance from OMB identifies the appropriate inflation multiplier for agencies to use to calculate the subsequent annual adjustments.¹⁰

The 2015 Act also gives agencies discretion to adjust the amount of a civil monetary penalty by less than otherwise required for the initial catch-up adjustment if an agency determines that increasing the civil monetary penalty by the otherwise required amount will have either a negative economic impact or if the social costs of the increased civil monetary penalty will outweigh the benefits.¹¹ In either instance, the agency must publish a notice, take and consider comments on this finding, and receive concurrence on this determination from the Director of OMB prior to finalizing a lower civil penalty amount.

D. NHTSA's Actions to Date Regarding CAFE Civil Penalties

1. Interim Final Rule

On July 5, 2016, NHTSA published an interim final rule, adopting inflation adjustments for civil penalties under its administration, following the procedure and the formula in the 2015 Act. NHTSA did not analyze at that time whether the 2015 Act applied to all of its civil penalties, instead applying the inflation multiplier to increase all amounts found in its penalty schemes as a rote matter. One of the adjustments NHTSA made at the time was raising the civil

¹⁰ Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of the 2017 Annual Adjustment Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 16, 2016), available online at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/m-17-11_0.pdf; Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of Penalty Inflation Adjustments for 2018, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 15, 2017), available online at <https://www.whitehouse.gov/wp-content/uploads/2017/11/M-18-03.pdf>; Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of Penalty Inflation Adjustments for 2019, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 14, 2018), available online at https://www.whitehouse.gov/wp-content/uploads/2017/11/m_19_04.pdf; Memorandum from the Acting Director of OMB to Heads of Executive Departments and Agencies, Implementation of Penalty Inflation Adjustments for 2020, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 16, 2019), available online at <https://www.whitehouse.gov/wp-content/uploads/2019/12/M-20-05.pdf>; Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of Penalty Inflation Adjustments for 2021, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 23, 2020), available online at <https://www.whitehouse.gov/wp-content/uploads/2020/12/M-21-10.pdf>.

¹¹ Pub. L. 114-74, sec. 701(c).

penalty rate for CAFE non-compliance from \$5.50 to \$14 starting with model year 2015.¹²

NHTSA also indicated in that interim final rule that the maximum penalty rate that the Secretary is permitted to establish for such violations would increase from \$10 to \$25, but did not codify this change in the regulatory text. NHTSA also raised the maximum civil penalty for other violations of EPCA, as amended, to \$40,000.¹³

2. Initial Petition for Reconsideration and Response

The then-Alliance of Automobile Manufacturers and the Association of Global Automakers (since combined to form the Alliance for Automotive Innovation) jointly petitioned NHTSA for reconsideration of the CAFE penalty provisions issued in the interim final rule.¹⁴ This petition raised concerns with the significant impact that the increased penalty rate would have on CAFE compliance costs, which they estimated to be at least \$1 billion annually. Specifically, this petition identified the issue of retroactivity (applying the penalty increase associated with model years that have already been completed or for which a company's compliance plan had already been "set"); which "base year" (*i.e.*, the year the penalty was established or last adjusted) NHTSA should use for calculating the adjusted penalty rate; and whether an increase in the penalty rate to \$14 would cause a "negative economic impact."

In response to the joint petition, NHTSA issued a final rule on December 28, 2016.¹⁵ In that rule, NHTSA agreed that raising the penalty rate for model years already fully complete would be inappropriate, given how courts generally disfavor the retroactive application of statutes and that doing so could not deter non-compliance, incentivize compliance, or lead to any improvements in fuel economy. NHTSA also agreed that raising the rate for model years for

¹² 81 FR 43524 (July 5, 2016). This interim final rule also updated the maximum civil penalty amounts for violations of all statutes and regulations administered by NHTSA and was not limited solely to penalties administered for CAFE violations.

¹³ 81 FR 43524 (July 5, 2016).

¹⁴ Jaguar Land Rover North America, LLC also filed a petition for reconsideration in response to the July 5, 2016, interim final rule raising the same concerns as those raised in the joint petition. Both petitions, along with a supplement to the joint petition, can be found in Docket ID NHTSA-2016-0075 at www.regulations.gov.

¹⁵ 81 FR 95489 (December 28, 2016).

which product changes were infeasible due to lack of lead time did not seem consistent with Congress' intent that the CAFE program be responsive to consumer demand. Accordingly, NHTSA stated that it would not apply the inflation-adjusted penalty rate of \$14 until model year 2019, as the Agency believed that would be the first year in which product changes could reasonably be made in response to the higher penalty rate.

3. NHTSA Reconsideration

Beginning in January 2017, NHTSA took a series of actions to delay the effective date of the December 2016 final rule as it, for the first time, assessed whether the CAFE civil penalty rate was subject to the 2015 Act.¹⁶ As a result of a subsequent decision of the United States Court of Appeals for the Second Circuit, however, that December 2016 final rule was considered to be in force.¹⁷ That decision by the Second Circuit did not affect NHTSA's authority to reconsider the applicability of the 2015 Act to the EPCA CAFE civil penalty provision through notice-and-comment rulemaking. Absent any further action, the rate would have increased beginning with model year 2019.¹⁸

In July 2019, NHTSA finalized a rule determining that the 2015 Act did not apply to the CAFE civil penalty rate. In line with its statutory role and pursuant to its previous guidance to all Federal Agencies, OMB provided guidance to NHTSA agreeing with this statutory interpretation.¹⁹ The July 2019 rule also stated that, in the alternative, even if the 2015 Act applied, increasing the CAFE civil penalty rate would have a negative economic impact. As discussed in the July 2019 rule, OMB concurred with this negative economic impact

¹⁶ 82 FR 8694 (January 30, 2017); 82 FR 15302 (March 28, 2017); 82 FR 29009 (June 27, 2017); 82 FR 32139 (July 12, 2017).

¹⁷ Order, ECF No. 196, *NRDC v. NHTSA*, Case No. 17-2780 (2d Cir., Apr. 24, 2018); Opinion, ECF No. 205, *NRDC v. NHTSA*, Case No. 17-2780, at 44 (2d Cir., June 29, 2018) ("The Civil Penalties Rule, 81 FR 95,489, 95,489-92 (December 28, 2016), no longer suspended, is now in force.").

¹⁸ See 81 FR 95489, 95492 (Dec. 28, 2016). Civil penalties are determined after the end of a model year, following NHTSA's receipt of final reports from the Environmental Protection Agency (EPA), *i.e.*, no earlier than April for the previous model year's non-compliance. See 77 FR 62624, 63126 (Oct. 15, 2012).

¹⁹ July 12, 2019 Letter from Russell T. Vought, Acting Director of the Office of Management and Budget, to Elaine L. Chao, Secretary of the United States Department of Transportation, available at Docket No. NHTSA-2018-0017-0018 (OMB Non-Applicability Letter).

determination, as required by the 2015 Act.²⁰ In either case, NHTSA concluded that the current CAFE civil penalty rate of \$5.50 should be retained, instead of increasing to \$14 beginning with model year 2019.

On August 31, 2020, the United States Court of Appeals for the Second Circuit issued a ruling vacating the July 2019 rule and announcing that the December 2016 rule is back in force. The Second Circuit denied panel rehearing on November 2, 2020. NHTSA stands by the reasoning set forth in its July 2019 rule, but recognizes that the Second Circuit's decision is currently binding and remains in effect absent a Supreme Court decision to the contrary.

E. IPI Petition for Reconsideration

On September 9, 2019, the Institute for Policy Integrity at New York University School of Law (IPI) submitted a petition for reconsideration of NHTSA's July 2019 final rule. IPI argued that the rule was unreasonable and not in the public interest for ignoring and improperly weighing the costs and benefits.²¹ IPI also alleged that the OMB letters NHTSA relied on were not presented for public comment, contained factual misstatements, and contradicted NHTSA's reasoning. Lastly, IPI challenged NHTSA's statutory interpretations.

F. The Alliance Petition for Rulemaking

On October 2, 2020, the Alliance for Automotive Innovation (the Alliance) submitted a petition for rulemaking (Alliance Petition) to delay the applicability of the increased \$14 CAFE civil penalty rate until model year 2022 for largely the same reasons NHTSA relied on in the December 2016 rule.²² According to the Alliance Petition, "Model Years 2019 and 2020 are effectively lapsed now," and "[m]anufacturers are unable to change MY 2021 plans at this point."²³ The Alliance argued that applying the increased penalty to any non-compliances that

²⁰ July 12, 2019 Letter from Russell T. Vought, Acting Director of the Office of Management and Budget, to Elaine L. Chao, Secretary of the United States Department of Transportation, available at Docket No. NHTSA-2018-0017-0019 (OMB Negative Economic Impact Letter).

²¹ IPI Petition, at 1-2.

²² The Alliance also submitted a supplement to its petition on October 22, 2020 (Alliance Supplement).

²³ Alliance Petition, at 4.

are temporally impossible to avoid or cannot practically be remedied does not serve the statutory purposes of deterring prohibited conduct or incentivizing favored conduct. Doing so would effectively be punishing violators retroactively.

In addition to relying on the reasoning of the December 2016 rule, the Alliance Petition notes the significant economic impact suffered by the industry due to COVID-19. Accordingly, the Alliance Petition also cites Executive Order 13924, requiring Federal Agencies to take appropriate action, consistent with applicable law, to combat the economic emergency caused by COVID-19.²⁴ Several individual vehicle manufacturers submitted supplemental information to NHTSA further articulating the negative economic position they are in due to COVID-19 and the potential and significant adverse economic consequences of the increased civil penalty rate, particularly during this time of stress on the industry.

G. NHTSA Response to Petitions

NHTSA granted the Alliance Petition and commenced this rulemaking action. Having carefully considered the issues raised by the petitioner and other available information, NHTSA issues this interim final rule and requests comment. If the August 31, 2020 decision of the United States Court of Appeals for the Second Circuit in Case No. 19-2395 is vacated, NHTSA's July 2019 rule keeping the CAFE civil penalty rate at \$5.50 will be reinstated. If that decision is not vacated, however, the CAFE civil penalty rate will increase to \$14 beginning with model year 2022, pursuant to the 2015 Act. NHTSA will make any subsequent annual adjustments as necessary and appropriate.²⁵

Prior to granting the petition, NHTSA had to determine whether it had authority to issue the requested rule as a threshold matter. NHTSA notes first that it has authority to administer the

²⁴ "Executive Order on Regulatory Relief to Support Economic Recovery," E.O. 13924 (May 19, 2020).

²⁵ None of the annual inflation adjustment multipliers since the initial catch-up adjustment has been high enough to require a subsequent adjustment of the CAFE civil penalty rate. That is, if the catch-up adjustment to \$14 had applied beginning in 2016, the rate would still be \$14 through at least 2021.

CAFE program.²⁶ It is common practice for agencies—including NHTSA—to exercise their authority to administer programs they oversee.²⁷ NHTSA also has specific statutory authority to administer the program²⁸ and possesses the general authority—beyond its inherent authority—to do so efficiently and in the public interest.²⁹ NHTSA’s obligation to administer the CAFE program consistent with law includes the statutory requirement to establish maximum feasible fuel economy standards through a balancing of competing factors, including economic

²⁶ See *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (“The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”); see also *Friends of Boundary Waters Wilderness v. Bosworth*, 437 F.3d 815, 823-24 (8th Cir. 2006) (“Agencies given the authority to promulgate a quota are presumed to have the authority to adjust that quota.”); *S. California Edison Co. v. F.E.R.C.*, 415 F.3d 17, 22-23 (D.C. Cir. 2005) (“[O]f course, agencies may alter regulations. Agencies may even alter their own regulations *sua sponte*, in the absence of complaints, provided they have sufficient reason to do so and follow applicable procedures.”); *Ober v. Whitman*, 243 F.3d 1190, 1194-95 (9th Cir. 2001) (indicating that agencies have the inherent authority to exempt *de minimis* violations from regulation if not prohibited by statute); *Tate & Lyle, Inc. v. C.I.R.*, 87 F.3d 99, 104 (3d Cir. 1996) (“Inherent in the powers of an administrative agency is the authority to formulate policies and to promulgate rules to fill any gaps left, either implicitly or explicitly, by Congress.”) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)); *Fla. Cellular Mobil Commc’ns Corp. v. F.C.C.*, 28 F.3d 191, 196 (D.C. Cir. 1994) (“If an agency is to function effectively, however, it must have some opportunity to amend its rules and regulations in light of its experience.”); *Rainbow Broad. Co. v. F.C.C.*, 949 F.2d 405, 409 (D.C. Cir. 1991) (“Agencies enjoy wide latitude when using rulemaking to change their own policies and the manner by which their policies are implemented.”); *Nat. Res. Def. Council, Inc. v. Sec. & Exch. Comm’n*, 606 F.2d 1031, 1056 (D.C. Cir. 1979) (“An agency is allowed to be master of its own house, lest effective agency decisionmaking not occur in [a]ny proceeding.”).

²⁷ 76 FR 22565, 22578 (Apr. 21, 2011) (“[A]n agency may reconsider its methodologies and application of its statutory requirements and may even completely reverse course, regardless of whether a court has determined that its original regulation is flawed, so long as the agency explains its bases for doing so.”) (citations omitted); 75 FR 6883, 6884 (Feb. 12, 2010) (“The Department [of Labor] has inherent authority to change its regulations in accordance with the Administrative Procedure Act (APA).”); 64 FR 60556, 60580 (Nov. 5, 1999) (NHTSA “believe[s] that nothing in [the statute] derogates our inherent authority to make temporary adjustments in the requirements we adopt if, in our judgment, such adjustments are necessary or prudent to promote the smooth and effective achievement of the goals of the amendments.”).

²⁸ See, e.g., 49 U.S.C. 32902, 32912. The Secretary’s authority under EPCA is delegated to NHTSA. 49 CFR 1.95(a), (j) (delegating authority to NHTSA to exercise the authority vested in the Secretary under chapter 329 of title 49 of the U.S. Code and certain sections of the Energy Independence and Security Act of 2007, Pub. L. 110-140); see also 49 CFR 1.94(c). Moreover, NHTSA’s regulations provide that “[t]he Administrator may initiate any further rulemaking proceedings that he finds necessary or desirable.” 49 CFR 553.25.

²⁹ See 49 U.S.C. 302(a) (stating the Secretary of Transportation is governed by the transportation policy described in part in 49 U.S.C. 13101(b), which provides that oversight of the modes of transportation “shall be administered and enforced to carry out the policy of this section and to promote the public interest”); 49 U.S.C. 322(a) (“The Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary. An officer of the Department of Transportation may prescribe regulations to carry out the duties and powers of the officer.”); 49 U.S.C. 105(c)(2) (directing the NHTSA Administrator to “carry out . . . additional duties and powers prescribed by the Secretary”); 49 CFR 1.81(a)(3) (“Except as prescribed by the Secretary of Transportation, each Administrator is authorized to . . . [e]xercise the authority vested in the Secretary to prescribe regulations under 49 U.S.C. 322(a) with respect to statutory provisions for which authority is delegated by other sections in this part.”).

practicability, and to do so at least eighteen months in advance for more stringent standards.³⁰

CAFE civil penalties are merely one component of this overall program.

Moreover, EPCA expressly details a procedure for NHTSA, as delegated by the Secretary, to increase the CAFE civil penalty rate.³¹ EPCA's delegation necessarily implies that NHTSA also has authority to oversee the administration and enforcement of the rate more generally.³² Indeed, NHTSA already promulgated a similar rule in December 2016 establishing the first model years to which the increased CAFE civil penalty rate would apply, which was not challenged and has been held to be operative twice by the Second Circuit. The 2015 Act also applies only to penalties that are "assessed or enforced by an Agency pursuant to Federal law."³³ For the CAFE civil penalty rate to be covered under the 2015 Act, NHTSA must have authority to assess or enforce it, and thus inevitably the authority to oversee and administer it as appropriate. To the extent there is any statutory ambiguity, NHTSA is the expert agency on its CAFE program, has been given authority to administer the Federal fuel economy program, and has expert authority to interpret and apply the requirements of EPCA and EISA, including the civil penalty provisions.

If the August 31, 2020 decision of the United States Court of Appeals for the Second Circuit in Case No. 19-2395 is vacated, NHTSA's July 2019 rule will be reinstated, keeping the CAFE civil penalty rate at \$5.50. But turning to the merits of the Alliance Petition, NHTSA will assume *arguendo* that the July 2019 rule remains vacated. Under those circumstances, NHTSA agrees with the petitioner that the reasoning of the Agency's December 2016 rule applies here. As NHTSA said then, "[i]f all the vehicles for a model year have already been produced, then there is no way for their manufacturers to raise the fuel economy level of those vehicles in order

³⁰ 49 U.S.C. 32902(a), (f), (g)(2).

³¹ See 49 U.S.C. 32912(c).

³² See Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 876 (2001) ("All administrative agencies have certain powers inherent in their status as units of the executive branch; all executive officers have inherent authority to interpret the law." (footnote omitted)).

³³ 28 U.S.C. 2461 note, sec. 3(2)(B).

to avoid higher penalty rates for non-compliance.”³⁴ At the time, NHTSA noted that by November 2015, “nearly all manufacturers subject to the CAFE standards had completed both model years 2014 and 2015, and no further vehicles in those model years were being produced in significant numbers.” Likewise now, vehicles for model years 2019 and 2020 have largely if not entirely been produced already, many manufacturers are already selling model year 2021 vehicles, and since some manufacturers launch subsequent model year vehicles as early as the spring, it is reasonable to assume that model year 2022 vehicles will be launched in the coming months. Applying the increased civil penalty rate to violations in these model years “would not result in additional fuel savings, and thus would seem to impose retroactive punishment without accomplishing Congress’ specific intent in establishing the civil penalty provision of the Energy Policy and Conservation Act (‘EPCA’).”³⁵

As NHTSA explained previously, “the purpose of civil penalties for non-compliance is to encourage manufacturers to comply with the CAFE standards.”³⁶ And more generally, one of the stated purposes of the 2015 Act is to “maintain the deterrent effect of civil monetary penalties and promote compliance with the law.”³⁷ NHTSA agrees with the petitioner that it would be inappropriate to apply the adjustment to model years that could have no deterrence effect and promote no additional compliance with the law.³⁸

In addition to failing to serve the purpose of the statutory framework and the regulatory scheme, applying the increased civil penalty rate to completed or largely completed model years would raise serious retroactivity concerns. As NHTSA explained in the December 2016 rule, and

³⁴ 81 FR 95489, 95490 (Dec. 28, 2016).

³⁵ 81 FR 95489, 95490 (Dec. 28, 2016).

³⁶ 81 FR 95489, 95490 (Dec. 28, 2016) (citing 49 CFR 578.2) (section addressing penalties states that a “purpose of this part is to effectuate the remedial impact of civil penalties and to foster compliance with the law”); see generally, 49 U.S.C. 32911-32912; *United States v. General Motors*, 385 F. Supp. 598, 604 (D.D.C. 1974), vacated on other grounds, 527 F.2d 853 (D.C. Cir. 1975) (“The policy of the Act with regard to civil penalties is clearly to discourage noncompliance”).

³⁷ 28 U.S.C. 2461 note, sec. 2(b)(2).

³⁸ NHTSA’s proposal to retain the \$5.50 rate was published weeks before the Second Circuit’s decision vacating the indefinite delay of the December 2016 rule. Accordingly, manufacturers were aware of NHTSA’s tentative reconsideration decision and could begin planning accordingly, despite the December 2016 rule being in force.

in various other contexts, “[r]etroactivity is not favored in the law.”³⁹ NHTSA does not believe that it is appropriate to impose a higher civil penalty rate for model years when doing so would not have incentivized improvements to fuel economy—one of the core purposes of EPCA.⁴⁰ Moreover, as NHTSA noted in the December 2016 rule, “[t]he decision not to apply the increased penalties retroactively is similar to the approach taken by various other [F]ederal [a]gencies in implementing the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.”⁴¹ For instance, a fellow DOT agency concluded that applying an inflation adjustment when a penalty had been proposed but not finalized “would not induce further compliance” and would thus be contrary to the goals of its specific enforcement statute.⁴² Accordingly, the agency announced it would not retroactively adjust the proposed penalty amounts for violations that predated the inflation adjustments.

For similar reasons—and applying the same reasoning as in the December 2016 rule—NHTSA concludes that it would be inappropriate to apply the increased civil penalty rate to model year 2021 as well. In the December 2016 rule, NHTSA recognized the reality of the timeline for the design, development, and production of new vehicles: “because of industry design, development, and production cycles, vehicle designs (including drivetrains, which are where many fuel economy improvements are made) are often fixed years in advance, making adjustments to fleet fuel economy difficult without a lead time of multiple years.”⁴³ At the time of the recent judicial decision indicating that the increase would go into effect, the industry plans

³⁹ 81 FR 95489, 95490 n.8 (Dec. 28, 2016). The Supreme Court has stated that “congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result.” *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994) (citing *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988)).

⁴⁰ The 2015 Act provides that any increases to civil monetary penalties only apply to penalties that “are assessed after the date the increase takes effect.” 28 U.S.C. 2461 note, sec. 6. Therefore, at a minimum, any adjustment to the CAFE civil penalty rate would not apply to any penalties that have already been assessed.

⁴¹ *See, e.g.*, Department of Justice, interim final rule with request for comments: Civil Monetary Penalties Inflation Adjustment, 81 FR 42491 (June 30, 2016) (applying increased penalties only to violations after November 2, 2015, the date of the Act’s enactment); Federal Aviation Administration, interim final rule: Revisions to Civil Penalty Inflation Adjustment Tables, 81 FR 43463 (July 5, 2016) (applying increased penalties only to violations after August 1, 2016).

⁴² 81 FR 41453, 41454 (June 27, 2016) (Federal Motor Carrier Safety Administration).

⁴³ 81 FR 95489, 95490 (Dec. 28, 2016).

for what remains of model year 2020 and model year 2021 were “fixed and inalterable.”⁴⁴

Accordingly, “it is too late at this juncture to make significant changes to those plans and avoid non-compliances.”⁴⁵

NHTSA’s decision here also takes account of the industry’s serious reliance interests, having made design, development, and production plans based on the \$5.50 rate. And reliance upon that rate was reasonable, as NHTSA reconsidered application of the 2015 Act by proposing in 2018 that the 2015 Act did not apply and finalizing the proposal in 2019.⁴⁶ The Director of the Office of Management and Budget—the Agency charged with overseeing implementation of the 2015 Act—also issued guidance concurring with NHTSA that the 2015 Act did not apply to the CAFE penalty rate with the final rule, further increasing the reasonableness of such reliance.

The Alliance Petition observes that “[m]anufacturers long ago made their technology choices, locked in suppliers and production requirements, developed credit purchase/sales strategies, and have largely begun to implement their planned production runs for Model Year 2021”—all with the \$5.50 rate in effect.⁴⁷ The issue of credits is particularly noteworthy as manufacturers can apply credits well beyond one or two model years. Manufacturers can choose to carry back credits to apply to any of three model years before they are earned or carry them forward to apply to any of the five model years after they are earned. With such a long window of potential applicability, it is likely that manufacturers make long-term plans in determining how to acquire and apply credits. Increasing the rate is likely to lead to an increase in the price of credits, many of which have already been planned around and negotiated and contracted for. For example, in a recent securities filing, Fiat Chrysler Automobiles N.V. stated that it “has accrued estimated amounts for any probable CAFE penalty based on the \$5.50 rate,” but if the rate was applied to model year 2019, “FCA may need to accrue additional amounts due to increased

⁴⁴ 81 FR 95489, 95490 (Dec. 28, 2016).

⁴⁵ 81 FR 95489, 95490 (Dec. 28, 2016).

⁴⁶ 83 FR 13904 (Apr. 2, 2018); 84 FR 36007 (July 26, 2019).

⁴⁷ Alliance Petition, at 4.

CAFE penalties and additional amounts owed under certain agreements for the purchase of regulatory emissions credits” and “[t]he amounts accrued could be up to €500 million [nearly \$600 million].”⁴⁸ To disregard the industry’s serious reliance interests would be unfair and improper.⁴⁹

Accounting for the timeline of vehicle development comports with NHTSA’s broader approach to establishing fuel economy standards. As NHTSA explained in the December 2016 rule, NHTSA “includes product cadence in its assessment of CAFE standards, by limiting application of technology in its analytical model to years in which vehicles are refreshed or redesigned.”⁵⁰ Not only does this consideration function within the industry’s long-established development cycle, “NHTSA believes that this approach facilitates continued fuel economy improvements over the longer term by accounting for the fact that manufacturers will seek to make improvements when and where they are most cost-effective.”⁵¹

In the December 2016 rule, NHTSA also analogized the need to provide appropriate lead time for an increase in the civil penalty rate to the EPCA provision requiring that when NHTSA amends a fuel economy standard to make it more stringent, NHTSA must promulgate the standard “at least 18 months before the beginning of the model year to which the amendment applies.”⁵² As NHTSA explained:

The 18 months’ notice requirement for increases in fuel economy standards represents a congressional acknowledgement of the importance of advance notice to vehicle manufacturers to allow them the lead time necessary to adjust their product plans, designs, and compliance plans to address changes in fuel economy standards. Similarly here, affording manufacturers lead time to adjust their products

⁴⁸ FCA N.V. Interim Report, 6-K (Current report) EX-99.1, at 41 (Sept. 30, 2020).

⁴⁹ See, e.g., *Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009).

⁵⁰ 81 FR 95489, 95491 (Dec. 28, 2016).

⁵¹ 81 FR 95489, 95491 (Dec. 28, 2016).

⁵² 49 U.S.C. 32902(a)(2).

and compliance plans helps them to account for such an increase in the civil penalty amount. In this unique case, the 18-month lead time for increases in the stringency of fuel economy standards provides a reasonable proxy for appropriate advance notice of the application of substantially increased—here nearly tripled—civil penalties.⁵³

Similarly, EPCA provides that an increase in the CAFE civil penalty rate prescribed through the statutory process can also only take effect “for the model year beginning at least 18 months after the regulation stating the higher amount becomes final.”⁵⁴

As in the December 2016 rule, NHTSA acknowledges that—while none of the individual manufacturers that submitted supplemental information indicated this to be the case—it is conceivable that some manufacturers might be able to change production volumes of certain lower- or higher-fuel-economy models for model years that have not happened yet, which could help them to reduce or avoid CAFE non-compliance penalties. However, NHTSA noted then and reiterates here that compelling such a change by immediately adjusting the civil penalty rate to apply to design decisions that are already locked in would contravene a fundamental purpose of the CAFE program—namely, the statutory requirement that fuel economy standards be attribute-based and thus responsive to consumer demand.⁵⁵ Affording some lead time to manufacturers mitigates the concern that manufacturers will be forced to disregard consumer demand, for example by having to restrict the availability of vehicles that consumers want.

The Alliance Petition was submitted on October 2, 2020, and requested that the adjustment apply beginning in model year 2022. While NHTSA accepts that the petitioner believes that timeline provides a sufficient and reasonable lead time under the circumstances for its industry members to adjust reasonably to the increased penalty rate and, in this interim final

⁵³ 81 FR 95489, 95491 (Dec. 28, 2016).

⁵⁴ See 49 U.S.C. 32912(c)(1)(D).

⁵⁵ See 49 U.S.C. 32902(b)(3).

rule, postpones the increased rate until that model year, NHTSA also seeks comment on whether it should provide 18 months of lead time before the increase becomes effective. Since NHTSA treats model years as commencing in October of the calendar year prior to the model year, an 18-month lead time would have the \$14 penalty rate apply to the 2023 model year under this approach. Such an approach would be consistent with the December 2016 rule's application of the adjustment beginning in model year 2019.

NHTSA also recognizes the significant negative economic consequences caused by the global outbreak of COVID-19. On May 19, 2020, President Trump issued Executive Order (E.O.) 13924, "Regulatory Relief to Support Economic Recovery," ordering agencies to address the economic emergency caused by the pandemic "by rescinding, modifying, waiving, or providing exemptions from regulations and other requirements that may inhibit economic recovery, consistent with applicable law and with protection of the public health and safety, with national and homeland security, and with budgetary priorities and operational feasibility."⁵⁶ Where such measures are made temporarily, agencies must evaluate whether those measures would "promote economic recovery if made permanent."

The Alliance Petition provided information about the significant negative economic impact on the automotive sector caused by COVID-19. All domestic auto factories were closed by April 2020, for the first time since World War II, for approximately eight weeks.⁵⁷ One analyst described the second quarter of 2020 as "likely to be the toughest in modern history" for the automotive sector, as companies "grappled with close to a zero revenue environment for a few months."⁵⁸ Market projections as of September 2020 indicate that domestic vehicle sales for

⁵⁶ 85 FR 31353, 31354 (May 22, 2020).

⁵⁷ Alliance Petition, at 5 (citing ALLIANCE FOR AUTOMOTIVE INNOVATION, READING THE METER: SEPTEMBER 30, 2020, <https://www.autosinnovate.org/wp-content/uploads/2020/10/Meter-State-of-the-Industry-9-30-2020.pdf> at page 16).

⁵⁸ Alliance Petition, at 5 (citing Michael Wayland, Five Things Investors are Watching as GM and Ford Report Coronavirus-Ravaged Earnings, CNBC (July 28, 2020 8:27 AM), <https://www.cnbc.com/2020/07/28/what-to-watch-for-as-gm-and-ford-report-coronavirus-ravaged-earnings.html>).

all of 2020 will be down by as much as 26 percent from 2019.⁵⁹ And beyond the immediate economic hit, this negative economic impact is expected to have effects beyond 2020. One market analyst predicts that the auto sector recovery will take several years and that the market will not reach the sales that were previously projected for 2020 until at least 2025.⁶⁰ The analyst also notes that because of the COVID-19 effects on sales and revenue, manufacturers have been forced to delay capital-intensive product actions to conserve resources, with the greatest impact to showrooms in calendar years 2023 and 2024.⁶¹

NHTSA also received information from five individual vehicle manufacturers supplementing the Alliance Petition: Mercedes-Benz AG, Jaguar Land Rover North America, LLC, FCA US LLC, Ford Motor Company, and Ferrari North America, Inc.⁶² Each cited the ongoing pandemic in concluding that applying the increased CAFE civil penalty rate prior to model year 2022 would present a substantial hardship.

Mercedes-Benz indicated that since March of this year, it has experienced pandemic-related disruption of supply chains, production, and work force, which has caused unforeseen financial loss for the company and has created a tenuous financial climate. Jaguar Land Rover indicated that due to the pandemic, it had to close showrooms and manufacturing plants, and pause engineering work for months, resulting in reduced sale revenue and the prevention of investment in future fuel-efficient technology product programs. FCA and Ford detailed similar negative economic impacts to their companies. Each company argued that a decision to apply the civil penalty of \$14 vehicles prior to MY 2022 would only aggravate their financial hardships

⁵⁹ Alliance Petition, at 5 (citing ALLIANCE FOR AUTOMOTIVE INNOVATION, READING THE METER: SEPTEMBER 23, 2020, <https://www.autosinnovate.org/wp-content/uploads/2020/09/Meter-State-of-the-Industry-9-23-2020.pdf> at pages 2–3).

⁶⁰ Alliance Petition, at 5 (citing IHS MARKIT, IHS MARKIT MONTHLY AUTOMOTIVE UPDATE - AUGUST 2020 (Aug. 14, 2020)).

⁶¹ Alliance Petition, at 5 (citing IHS MARKIT, AUTOMOTIVE COVID-19 RECOVERY SERIES: THE OEM LANDSCAPE – FOCUS ON US (Sept. 8, 2020)).

⁶² The companies have requested confidential treatment for some of the business information included in each of their individual submissions, pursuant to 49 CFR part 512. The publicly available portions of their submissions can be found in the docket for this action at www.regulations.gov.

during this economic emergency. These economic consequences are on top of those NHTSA already projected for the increase from \$5.50 to \$14, including the significant increase in costs to manufacturers, increased unemployment, adverse effects on competition, and increases in automobile imports.⁶³ And these impacts come at a time where NHTSA data shows that the number of fleets with credit shortfalls has substantially increased, while the number of fleets generating credit surpluses has decreased, indicating that more manufacturers—particularly domestic manufacturers—are expected to need to pay penalties going forward.⁶⁴ The financial burden on domestic manufacturers is exacerbated by the statutory prohibition against the use of credits acquired by another automaker or transferred from another fleet to offset any non-compliance with the domestic passenger car minimum standard.⁶⁵ Manufacturers have already begun to realize this impact: one manufacturer paid over \$77 million in civil penalties for failing to meet the minimum domestic passenger car standard for model year 2016 and over \$79 million in model year 2017, the highest civil penalties assessed in the history of the CAFE program. Ferrari stated that applying the \$14 rate before model year 2022 would save no fuel, instead serving only as a wealth transfer to the manufacturers that have surplus CAFE credits. Other facets of the CAFE program, such as credit transfer caps, credit adjustment factors, availability and price of tradeable credits, and credit banking, are causing similar economic pressures.⁶⁶

Based on the available information, NHTSA believes that applying the adjustment to the CAFE civil penalty rate beginning in model year 2019 “may inhibit economic recovery,” while applying the adjustment beginning in model year 2022 is an appropriate action to take “for the purpose of promoting job creation and economic growth.”⁶⁷

⁶³ 84 FR 36007, 36023-36029 (July 26, 2019).

⁶⁴ 84 FR 36007, 36029 (July 26, 2019); *see also* Alliance Supplement, at 1-2.

⁶⁵ 84 FR 36007, 36029 (July 26, 2019); 49 U.S.C. 32903(f)(2), (g)(4); 49 CFR 536.9.

⁶⁶ *See* Alliance Supplement, at 2-4.

⁶⁷ 85 FR 31353, 31354 (May 22, 2020).

If the August 31, 2020 decision of the United States Court of Appeals for the Second Circuit in Case No. 19-2395 is vacated, NHTSA's July 2019 rule will be reinstated, keeping the CAFE civil penalty rate at \$5.50. Regardless, NHTSA will continue to apply the \$5.50 civil penalty rate for violations that occur prior to model year 2022. If the July 2019 rule remains vacated, per the Second Circuit's ruling, the rate will be adjusted to \$14 beginning in model year 2022 under this interim final rule for all of the foregoing reasons. And if NHTSA's determination in the July 2019 rule that the CAFE civil penalty rate is not a "civil monetary penalty" under the 2015 Act is not restored, NHTSA expects to make subsequent annual adjustments to the rate as appropriate, pursuant to the 2015 Act and in accordance with EPCA and EISA.⁶⁸ As it did in the December 2016 rule, "NHTSA believes this approach appropriately harmonizes the two congressional directives of adjusting civil penalties to account for inflation and maintaining attribute-based, consumer-demand-focused standards, applied in the context of the presumption against retroactive application of statutes" and particularly "in the unique context of multi-year vehicle product cycles."⁶⁹

Either the Second Circuit's vacatur of the July 2019 final rule or the promulgation of this interim final rule is sufficient to render IPI's petition for reconsideration of the July 2019 final rule moot, since NHTSA's July 2019 final rule is no longer operative. To the extent that the petition is not moot, it is denied. As IPI noted, many of the arguments raised in its petition were already presented to NHTSA in its comments to the April 2018 NPRM.⁷⁰ NHTSA adequately responded to these comments in the July 2019 final rule and reaffirms those points here.⁷¹ In accord with OMB's government-wide guidance on implementing the statute, NHTSA sought clarifying guidance from OMB and, as required by the 2015 Act, NHTSA requested OMB's

⁶⁸ See Pub. L. 114-74, Sec. 701(b)(2).

⁶⁹ 81 FR 95489, 95491 (Dec. 28, 2016).

⁷⁰ IPI Petition, at 2.

⁷¹ See, e.g., 84 FR 36007, 36016, 36023, 36030 (July 26, 2019); see also 49 CFR 553.35(c) ("The Administrator does not consider repetitious petitions.").

concurrence in its “negative economic impact” determination. OMB’s interpretations were consistent with those presented in NHTSA’s NPRM, on which IPI commented. And OMB’s guidance did not contain any material misstatements that undercut NHTSA’s determinations in the July 2019 final rule.

H. Interim Final Rule and Public Comment

Pursuant to the 2015 Act and 5 U.S.C. 553(b)(3)(B), NHTSA finds that good cause exists for immediate implementation of this interim final rule without prior notice and comment because it would be impracticable to delay publication of this rule for notice and comment, public comment is unnecessary, and doing so is in the public interest. As explained above, manufacturers have a compelling need for ample advance notice of an increase to the CAFE civil penalty rate in order to modify their design, development, and production plans accordingly, in order for the inflation adjustment to have its statutorily-intended effect, and as a matter of fairness. It would be impracticable to follow notice-and-comment procedures, further delaying a decision on when the rate should be adjusted. That would leave in place an increased rate applicable to model years 2019 and 2020, which are complete, as well as model year 2021, which is underway. To the extent any manufacturers would have been able to adjust their production volumes in response to an increased penalty rate, NHTSA cannot effectively compel them to do so because it would disregard consumer demand, in contravention of NHTSA’s statutory duties. Thus, there is good cause for an immediate effective date to avoid any retroactive application of an increased rate to model years for which manufacturers could not plan to accommodate.

Public comment is also unnecessary. The 2015 Act provides that the first adjustment shall be made through an interim final rulemaking. Because this action is establishing the parameters of NHTSA’s first adjustment of the CAFE civil penalty rate, NHTSA is utilizing the process provided by the 2015 Act. NHTSA also notes that pursuant to the 2015 Act, its initial catch-up adjustment was promulgated through an interim final rule without public comment and, more

significantly, the December 2016 rule on which this action is largely based was also promulgated without public comment.

The public interest also counsels towards NHTSA's issuance of an interim final rule. As discussed above, the automotive industry has faced unprecedented economic challenges arising from the COVID-19 national emergency situation.⁷² The entire manufacturing base was effectively shut down mere months ago, and the industry still faces severe supply chain constraints that have reduced automobile production. Similarly, the general economic difficulties facing the nation have significantly reduced vehicle sales, reducing revenue for manufacturers. Applying the adjustment to the CAFE civil penalty rate beginning in model year 2019 will result in serious harm, including increased penalties for manufacturers with no corresponding societal gain and could very well inhibit economic recovery by reducing the capital manufacturers would have to invest in their product. Applying the adjustment beginning in model year 2022 is an appropriate action to take to avoid serious harm and "for the purpose of promoting job creation and economic growth."⁷³

Issuing an interim final rule now while the COVID-19 emergency is ongoing is particularly in the public interest, and consistent with the Executive order to promote the economic recovery. For these reasons, NHTSA finds that notice-and-comment before the interim final rule is promulgated would be impracticable, is unnecessary in this situation, and is contrary to the public interest. NHTSA is nonetheless providing an opportunity for interested parties to comment on the interim final rule.⁷⁴

⁷² See "Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak," Presidential Proclamation 9994 (Mar. 13, 2020), available online at <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

⁷³ 85 FR 31353, 31354 (May 22, 2020).

⁷⁴ Shortly prior to publication of this interim final rule, NHTSA received two letters regarding this rulemaking. Both letters are included in the docket for this matter and will be treated as comments for appropriate consideration.

For these reasons, the Agency has also determined that it has good cause under 5 U.S.C. 553(d)(3) and 5 U.S.C. 808(2) to issue this rule with an immediate effective date. In addition, a delayed effective in not required under 5 U.S.C 553(d)(2) because it “relieves a restriction” by allowing additional time before the higher penalty rate begins to apply.

I. Rulemaking Analyses and Notices

1. 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 has been considered a “significant regulatory action” under Executive Order 12866. NHTSA also believes that this rulemaking is “economically significant,” as the Agency believes that the difference in the amount of penalties received by the government as a result of this rule, classified as “transfers,” are likely to exceed \$100 million in at least one of the years affected by this rulemaking. As noted above, the Agency believes this rule will have a limited effect, in any, on the composition of the fleet, as model years 2019 and 2020 are complete and model year 2021 is already well under way.⁷⁵ If the August 31, 2020 decision of the United States Court of Appeals for the Second Circuit in Case No. 19-2395 is not vacated, NHTSA would have no discretion in whether to make the adjustment to \$14 and thus no regulatory impact analysis is required. If the August 31, 2020 decision of the United States Court of Appeals for the Second Circuit in Case No. 19-2395 is vacated, NHTSA’s July 2019 rule keeping the CAFE civil penalty rate at \$5.50 will be reinstated, and as noted in that rule, it has no economic impact because it merely maintains the existing penalty rate.

2. Regulatory Flexibility Act

⁷⁵ NHTSA reaffirms the position on economic analysis taken its July 2019 rule. 84 FR 36007, 36030 (July 26, 2019).

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of proposed rulemaking or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions). Because this is an interim final rule, no regulatory flexibility analysis is required. In any event, no regulatory flexibility analysis is required if the head of an agency certifies the proposal will not have a significant economic impact on a substantial number of small entities.

Even though this is an interim final rule for which no regulatory flexibility analysis is required, NHTSA has considered the impacts of this notice under the Regulatory Flexibility Act and does not believe that this rule would have a significant economic impact on a substantial number of small entities. NHTSA requests comment on the economic impact of this interim final rule on small entities.

The Small Business Administration's (SBA) regulations define a small business in part as a "business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor." 13 CFR 121.105(a). SBA's size standards were previously organized according to Standard Industrial Classification ("SIC") Codes. SIC Code 336211 "Motor Vehicle Body Manufacturing" applied a small business size standard of 1,000 employees or fewer. SBA now uses size standards based on the North American Industry Classification System ("NAICS"), Subsector 336—Transportation Equipment Manufacturing. This action is expected to affect manufacturers of motor vehicles. Specifically, this action affects manufacturers from NAICS codes 336111 – Automobile Manufacturing, and 336112 – Light Truck and Utility Vehicle Manufacturing, which both have a small business size standard threshold of 1,500 employees.

Though civil penalties collected under 49 CFR 578.6(h)(1) and (2) apply to some small manufacturers, low volume manufacturers can petition for an exemption from the Corporate Average Fuel Economy standards under 49 CFR part 525. This would lessen the impacts of this rulemaking on small business by allowing them to avoid liability for penalties under 49 CFR 578.6(h)(2). Small organizations and governmental jurisdictions will not be significantly affected as the price of motor vehicles and equipment ought not change as the result of this rule.

3. 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 [N]ational [G]overnment 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 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 rule will 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.

The reason is that this rule will generally apply to motor vehicle manufacturers. Thus, the requirements of Section 6 of the Executive order do not apply.

4. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, Pub. L. 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 rule is not expected to include a Federal mandate, no unfunded mandate assessment will be prepared.

5. National Environmental Policy Act

The National Environmental Policy Act of 1969 (NEPA)⁷⁶ directs that Federal agencies proposing “major Federal actions significantly affecting the quality of the human environment” must, “to the fullest extent possible,” prepare “a detailed statement” on the environmental impacts of the proposed action (including alternatives to the proposed action).⁷⁷ However, as a threshold question, Federal agencies must assess whether NEPA applies to a particular proposed activity or decision.⁷⁸ If an agency determines that NEPA is inapplicable, no further analysis is required pursuant to NEPA or the Council on Environmental Quality’s (CEQ) NEPA implementing regulations.⁷⁹

In assessing whether NEPA applies, NHTSA has considered “[w]hether compliance with NEPA would be inconsistent with Congressional intent expressed in another statute.”⁸⁰ In particular, NHTSA has considered the Congressional intent with regard to both EPCA (as amended by EISA) and the 2015 Act. As quoted above from the December 2016 rule, “the purpose of civil penalties for non-compliance is to encourage manufacturers to comply with the CAFE standards.”⁸¹ And more generally, one of the stated purposes of the 2015 Act is to “maintain the deterrent effect of civil monetary penalties and promote compliance with the law.”⁸² Further, as part of the statutory scheme established by EPCA and the 2015 Act, Congress

⁷⁶ 42 U.S.C. 4321-4347.

⁷⁷ 42 U.S.C. 4332.

⁷⁸ 40 CFR 1501.1(a).

⁷⁹ 40 CFR parts 1500-1508. NHTSA has not yet revised its own NEPA implementing regulations (49 CFR part 520) to conform with CEQ’s recently revised regulations. *See* 40 CFR 1507.3. However, where an agency’s existing NEPA procedures are inconsistent with the CEQ’s regulations, the CEQ regulations control. 40 CFR 1507.3(a). If NEPA is inapplicable under 40 CFR 1501.1(a), then NHTSA’s own NEPA implementing regulations, promulgated pursuant to NEPA and CEQ guidelines, similarly do not apply.

⁸⁰ 40 CFR 1501.1(a)(3).

⁸¹ 81 FR at 95490.

⁸² 28 U.S.C. 2461 note, sec. 2(b)(2).

requires NHTSA to account for such issues as lead time, consumer demand, and negative economic impacts of its actions (especially in light of COVID-19 and the Executive order to combat the economic emergency caused by it). Assuming *arguendo* that NHTSA is obligated to raise the civil penalty rate to \$14, the aforementioned factors, as well as legal doctrines of retroactivity and fairness, all point to the necessity of delaying effectiveness until at least model year 2022. Consideration of environmental impacts is inconsistent with these obligations and Congressional intent, and no further analysis pursuant to NEPA is required.

Still, NHTSA “may prepare an environmental assessment on any action in order to assist agency planning and decision making.”⁸³ When a Federal agency prepares an environmental assessment, the CEQ NEPA implementing regulations require it to (1) “[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact” and (2) “[b]riefly discuss the purpose and need for the proposed action, alternatives . . . , and the environmental impacts of the proposed action and alternatives, and include a listing of [a]gencies and persons consulted.”⁸⁴ Generally, based on the environmental assessment, the agency must make a determination to prepare an environmental impact statement or “prepare a finding of no significant impact if the [a]gency determines, based on the environmental assessment, not to prepare an environmental impact statement because the proposed action will not have significant effects.”⁸⁵ Although NHTSA concludes that a NEPA analysis is not required, this section may serve as the Agency’s Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) for this interim final rule.

I. Purpose and Need

⁸³ 40 CFR 1501.5(b).

⁸⁴ 40 CFR 1501.5(c).

⁸⁵ 40 CFR 1501.6(a).

This interim final rule sets forth the purpose of and need for this action. In response to the Alliance Petition, NHTSA considered whether it is appropriate, pursuant to the Inflation Adjustment Act and EPCA (as amended by EISA), to increase the CAFE civil penalty rate beginning in model year 2022. The Alliance Petition cited cost, retroactivity, and lead time as reasons why a delay in effectiveness until model year 2022 is required. NHTSA considered the findings of this EA prior to deciding that the adjusted rate will go into effect beginning in model year 2022.

II. Alternatives

NHTSA considered a range of alternatives for this action, including the No Action Alternative of adjusting the CAFE civil penalty rate from \$5.50 to \$14 beginning in model year 2019 (as originally established by the December 2016 final rule), and the alternatives of applying the adjustment beginning in model years 2020, 2021, 2022, and 2023. This EA describes the potential environmental impacts associated with the various model years in comparison with each other.

Upon consideration of the information presented in this EA, NHTSA is deciding to apply the adjustment beginning in model year 2022 in this interim final rule. NHTSA is seeking comment on whether to instead apply the increase beginning in model year 2023, and commenters should consider NEPA in their discussions of such an approach.

III. Environmental Impacts of the Action and Alternatives

NHTSA considered a range of alternatives for when to apply the inflation adjustment in the CAFE civil penalty rate from \$5.50 to \$14. For the reasons explained in the preamble, NHTSA anticipates no differences in environmental impacts associated with the alternatives of applying the adjustment beginning in model years 2019, 2020, 2021, or 2022. Vehicles for model years 2019 and 2020 have largely if not entirely been produced already, and many manufacturers are already selling model year 2021 vehicles. Since some manufacturers launch subsequent model year vehicles as early as the spring, it is reasonable to assume that model year 2022

vehicles will be launched in the coming months. It is impossible for manufacturers to change the design and manufacture of vehicles that are already on the market, and the logistical realities of the industry make it infeasible for manufacturers to change course in the middle of a model year that is already underway or just prior to the start of a model year. Imposing a higher penalty on manufacturers for vehicles that, at this point, cannot be manufactured with improved fuel economy and for which adjustment in production volumes costs manufacturers significantly more compared to the higher civil penalty rate would have no environmental benefit—only incurring costs to those manufacturers (which are likely to be passed on to consumers). In fact, imposing those costs on manufacturers now may make it even harder financially for those manufacturers to make further gains in fuel economy in the future, with less capital to invest in fuel-saving technology, design, marketing of the benefits, and production.

While this interim final rule adjusts the CAFE civil penalty rate beginning no earlier than model year 2022, NHTSA is seeking comment on whether to apply the adjustment beginning in model year 2023. Based on the information included in NHTSA's Final EA in its July 2019 rule, NHTSA tentatively expects that applying the adjustment beginning in model year 2023 would have a minimal environmental impact. NHTSA seeks comments on the environmental impacts of applying the adjustment beginning in model year 2023.

IV. Agencies and Persons Consulted

NHTSA and DOT have consulted with OMB and the U.S. Department of Justice and provided other Federal agencies with the opportunity to review and provide feedback on this rulemaking.

V. Conclusion

NHTSA has reviewed the information presented in this EA and concludes that the alternatives to adjust the CAFE civil penalty rate beginning in model years 2019, 2020, 2021, or 2022 all would have the same environmental impacts on the quality of the human environment (or the differences among alternatives would be *de minimis*). Given the practical realities of the

design and production process, the environmental impact of adjusting the CAFE civil penalty rate in model year 2022 is expected to be negligible as compared to the No Action Alternative. NHTSA has not made a final decision on whether to apply the adjustment beginning in model year 2023 and seeks comments on the environmental impacts of that alternative.

VI. Finding of No Significant Impact

I have reviewed this EA. Based on the EA, I conclude that implementation of any of the action alternatives through model year 2022 (including the interim final rule) will not have a significant effect on the human environment and that a “finding of no significant impact” is appropriate. This statement constitutes the Agency’s “finding of no significant impact,” and an environmental impact statement will not be prepared.⁸⁶ NHTSA will review comments regarding applying the adjustment beginning in model year 2023 as appropriate.

6. Executive Order 12778 (Civil Justice Reform)

This rule does not have a preemptive or retroactive effect—specifically, it modifies a regulation to avoid having a retroactive effect. Judicial review of a rule based on this interim final rule may be obtained pursuant to 5 U.S.C. 702.

7. Paperwork Reduction Act

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

8. Privacy Act

Please note that anyone is able to search the electronic form of all comments received into any of DOT’s 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), or you may visit <http://dms.dot.gov>.

⁸⁶ 40 CFR 1501.6(a).

9. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this action as a “major rule,” as defined by 5 U.S.C. 804(2). For the reasons explained above, NHTSA finds that notice and public comment are impracticable, unnecessary, and contrary to the public interest. NHTSA will submit a rule report to each House of the Congress and to the Comptroller General of the United States.

List of Subjects in 49 CFR Part 578

Imports, Motor vehicle safety, Motor vehicles, Penalties, Rubber and rubber products, Tires.

In consideration of the foregoing, 49 CFR part 578 is amended as set forth below.

PART 578—CIVIL AND CRIMINAL PENALTIES

1. The authority citation for 49 CFR part 578 continues to read as follows:

Authority: Pub. L. 101-410, 104 Stat. 890; Pub. L. 104-134, 110 Stat. 1321; Pub. L. 109-59, 119 Stat. 1144; Pub. L. 114-74, 129 Stat. 584; Pub. L. 114-94, 129 Stat. 1312; 49 U.S.C. 30165, 30170, 30505, 32308, 32309, 32507, 32709, 32710, 32902, 32912, and 33115; delegation of authority at 49 CFR 1.81, 1.95.

2. Amend § 578.6 by revising paragraph (h) to read as follows:

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

* * * * *

(h) *Automobile fuel economy.* (1) A person that violates 49 U.S.C. 32911(a) is liable to the United States Government for a civil penalty of not more than \$43,280 for each violation. A separate violation occurs for each day the violation continues.

(2) Except as provided in 49 U.S.C. 32912(c), beginning with model year 2022, a manufacturer that violates a standard prescribed for a model year under 49 U.S.C. 32902 is liable to the United States Government for a civil penalty of \$14, plus any adjustments for inflation that

occurred or may occur (for model years before model year 2022), multiplied by each .1 of a mile a gallon by which the applicable average fuel economy standard under that section exceeds the average fuel economy—

(i) Calculated under 49 U.S.C. 32904(a)(1)(A) or (B) for automobiles to which the standard applies manufactured by the manufacturer during the model year;

(ii) Multiplied by the number of those automobiles; and

(iii) Reduced by the credits available to the manufacturer under 49 U.S.C. 32903 for the model year.

Note 1 to paragraph (h)(2): If the August 31, 2020 decision of the United States Court of Appeals for the Second Circuit in Case No. 19-2395 is vacated, 49 CFR 578.6(h)(2), revised October 1, 2019, would apply to all model years, instead of paragraph (h)(2) of this section. In such instance, NHTSA would amend this section in accordance with such vacatur.

Issued in Washington, D.C., under authority delegated in 49 CFR 1.95, and 501.5.

James Clayton Owens,

Deputy Administrator.

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