December 18, 2020

Via Email

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Re: Corporate Average Fuel Economy (CAFE) Civil Penalties, RIN 2127-AM32

Dear Mr. Kuppersmith,

We were surprised to see, in the Fall 2020 Unified Agenda last week, that NHTSA appears to be preparing to issue an interim final rule regarding the effective date of the $14 inflation adjustment to the corporate average fuel economy (CAFE) civil penalty.[1] As you know, NHTSA finalized this $14 adjustment in 2016 pursuant to a congressional mandate that all federal agencies adjust their civil penalties for inflation. The CAFE penalty adjustment was then the subject of two rounds of litigation between us and NHTSA in the U.S. Court of Appeals for the Second Circuit. Each time, the court held that NHTSA exceeded its statutory authority when it tried to delay or avoid the mandatory adjustment.[2] In opinions issued in June 2018 and August 2020, the court *twice* affirmed that the $14 adjustment for model years 2019-and-after "is now in force."[3] As a result, we find it difficult to see what authority NHTSA could possibly have under the 2015 Inflation Adjustment Act Improvements Act or any other statute for the action it appears to be contemplating now.

Regardless, even assuming NHTSA had some statutory authority to act, we see no lawful basis by which NHTSA could do so without first providing the public notice and an opportunity to comment on any proposed action. The Second Circuit explained in *NRDC v. NHTSA* that the Administrative Procedure Act's notice-and-comment requirements "apply with the same force" when an agency seeks to delay or

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[1] *See* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202010&RIN=2127-AM32.
[2] *See New York v. NHTSA*, 974 F.3d 87, 100-01 (2d Cir. 2020); *NRDC v. NHTSA*, 894 F.3d 95, 108-13 (2d Cir. 2018).
[3] *New York*, 974 F.3d at 101; *see NRDC*, 894 F.3d at 116.

amend a previously promulgated final rule, including by altering its effective date.[4] The court further described the "exacting standards" of the good-cause exception to those requirements, none of which are met here given the lack of any "emergency or other extraordinary circumstance that would justify forgoing notice and comment."[5]

Particularly given the litigation history in this matter, we believe it would be a clear breach of law for the agency to (again) alter the effective date of the $14 penalty adjustment without first affording interested parties an opportunity to comment. Indeed, the Alliance for Automotive Innovation petition that NHTSA cites as the basis for its contemplated action has not been made public, despite our request of agency counsel for a copy. The Second Circuit chastised NHTSA before: "Notice and comment are not mere formalities. They are basic to our system of administrative law."[6] We implore the agency, and its counsel, to not violate those basic tenets of administrative law again.

Finally, we respectfully request that you include this letter in any rulemaking docket and/or administrative record prepared on this matter.

Respectfully submitted,

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[4] *NRDC*, 894 F.3d at 113.
[5] *Id.* at 114-16.
[6] *Id.* at 115.