



October 2, 2020

James Owens. Esq.  
Deputy Administrator  
National Highway Traffic Safety Administration  
1200 New Jersey Avenue, S.E.  
Washington, D.C. 20590

RE: Petition for Rulemaking – 49 C.F.R. Part 578

Dear Mr. Owens:

The Alliance for Automotive Innovation (Auto Innovators) respectfully petitions for rulemaking to amend 49 C.F.R. Part 578 to clarify and establish that the first model year to which a civil penalty rate<sup>1</sup> of \$14 will apply to automobile manufacturers for violations of a fuel economy standard prescribed under 49 U.S.C. 32902 is Model Year 2022.<sup>2</sup>

**Background.** Despite a complicated history of rulemaking and judicial review, the premise that a civil penalty rate should not be applied retroactively remains intact and is the subject of this Petition. In late 2015, Congress adopted the Federal Civil Penalties Inflation Adjustment Act Improvements Act (Improvements Act).<sup>3</sup> Under this statute, federal agencies were directed to issue interim final rules to adjust each of the civil monetary penalties they administer, in order to “catch up” for inflation that occurred since the last time the penalties were adjusted for inflation or otherwise amended by Congress.

The Improvements Act did not provide for the customary notice and opportunity for comment for these adjustment rules. Rather, Congress directed that the agencies proceed to issue initial interim final “catch up” rules by no later than the end of July 2016, with annual adjustments to follow each year. Congress did, however, provide that an agency head may initially adjust a civil penalty by less than the prescribed amount if the head of the agency, after publishing a notice of proposed rulemaking and opportunity for public comment, determined that increasing the civil monetary penalty by the otherwise required amount will have a negative economic impact, or that the social costs of increasing the civil monetary penalty by the otherwise required amount outweigh the benefits. The Director of OMB was required to concur in the agency head’s finding.

On July 5, 2016, NHTSA published its initial “catch up” rule for the civil monetary penalties it administers. 81 Fed. Reg. 43524. This interim final rule (IFR) amended Part 578 to provide higher

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<sup>1</sup> The use of the term “civil penalty” in this petition, which mirrors the wording used in the Energy Policy & Conservation Act (EPCA), 49 U.S.C. § 32912, should not be read as an admission that penalties under EPCA qualify as “civil monetary penalties” under the Federal Civil Penalties Inflation Adjustment Act Improvements Act, which is a defined term of art in that Act.

<sup>2</sup> Auto Innovators is still evaluating its options for further judicial review of the Second Circuit decision. This petition is filed without any prejudice to, or waiver of, the rights of Auto Innovators to seek subsequent judicial review.

<sup>3</sup> Pub. L. No. 114-74, 28 U.S.C. 2461 note (Nov. 2, 2015).

penalties for violations of statutes and regulations administered by NHTSA. Among the amendments announced in that rule was one increasing the civil penalty rate for violations of Corporate Average Fuel Economy (CAFE) standards from \$5.50 per 0.1 mpg by which the applicable CAFE standard exceeds the manufacturer's fleet average fuel economy to \$14.00 per 0.1 mpg. Notwithstanding the opportunity offered by the Improvements Act, NHTSA did not seek public comment on the potential negative economic impact of the increase.

In implementation guidance issued following the IFR, NHTSA stated that the Agency intended to apply the \$14 rate to any penalties assessed on and after August 4, 2016, beginning with penalties applicable to violations for model year (MY) 2015, and also potentially applying to any violations from prior model years that resulted from recalculation of a manufacturer's previous CAFE levels.<sup>4</sup>

A few weeks later, the Alliance of Automobile Manufacturers and the Association of Global Automakers<sup>5</sup> jointly petitioned NHTSA for reconsideration of the July 5, 2016 interim final rule. The petition argued, among other things, that, due to the unique nature of the civil penalties under the CAFE program, especially the statutory requirement to provide a minimum of eighteen months lead time before making a CAFE standard more stringent, it would not be appropriate to apply such increases retroactively to penalties applicable to model years that have already been completed or for which a company's compliance plan has already been set. As noted above, the July 2016 compliance guidance issued by NHTSA stated that the agency intended to apply the new \$14 civil penalty rate to Model Years 2015 and forward, with some potential to apply the penalty to earlier model years if those years had not been closed as to a given manufacturer by August 4, 2016. After the petition was filed, NHTSA placed a freeze on any civil penalty assessments being made during the consideration of the filing.

The 2016 petition also pointed out that NHTSA's estimates of the economic impact of the \$14 civil penalty rate were seriously flawed. NHTSA incorrectly estimated that the \$14 civil penalty rate would result in only \$50 million in additional civil penalties being collected for the CAFE program, based on a review of historic civil penalties paid by manufacturers. In fact, the 2016 petition showed that the \$14 civil penalty rate would actually increase the estimated cost of compliance with the CAFE program **by at least \$1 billion annually** based on NHTSA's own modeling tools, and those tools did not explicitly include the impact on the CAFE credit trading market.

In December 2016, NHTSA responded, in part, to the petition with a new final rule (81 Fed. Reg. 95489; December 28, 2016). In the new final rule, NHTSA agreed with the petitioners that the \$14 civil penalty rate should not apply to model years earlier than MY 2019. NHTSA based this conclusion on the fact that manufacturers could not realistically adjust their fleets prior to MY 2019. As noted by NHTSA:

*If 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 to avoid higher penalty rates for non-compliance. 81 Fed. Reg. at 95490.*

However, this final rule did not respond to the petitioners' request for reconsideration of the failure of the agency to invoke the "negative economic impact" lever contemplated by the Improvements Act. Instead, the agency responded as follows:

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<sup>4</sup> Memorandum, "Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015 for the Corporate Average Fuel Economy (CAFE) Program," July 18, 2016.

<sup>5</sup> Effective January 1, 2020, these two trade associations combined to form the Alliance for Automotive Innovation.

*Because the Agency is granting the Industry Petition's request to apply inflation-adjusted penalties only to MY 2019 and after, the Agency need not address the Industry Petition's alternative requests. 81 Fed. Reg. at 95490, n. 7.*

In early 2017, NHTSA deferred the effective date of the 2016 Final Rule, an action that was continued several times. In 2018, the United States Court of Appeals for the Second Circuit held that NHTSA's indefinite deferral of the effective date of the 2016 Final Rule, which had been promulgated on July 12, 2017, was unlawful. Because petitioners in the Second Circuit case did not challenge NHTSA's December 2016 decision to apply the \$14 adjusted CAFE civil penalty rate to MY 2019 vehicles, the 2018 Second Circuit decision did not address NHTSA's authority to determine the model years to which the adjusted rate would first apply.

**Subsequent NHTSA Rulemaking.** In 2019, following various solicitations of public comment, NHTSA issued a final rule deciding that the Improvements Act did not apply to the CAFE civil penalty, because the CAFE civil penalty was not a "civil monetary penalty" as defined in the Improvements Act. NHTSA also found that, even if the CAFE civil penalty rate were a "civil monetary penalty," the Improvements Act should not result in an increase in the CAFE civil penalty rate because of the significant economic harm that would result from the imposition of the \$14 civil monetary penalty rate to the CAFE program, "with the added burden exceeding \$1 billion for some model years." 84 Fed. Reg. 36007 (July 26, 2019).

**Subsequent Judicial Review.** This petition for rulemaking follows a decision from the United States Court of Appeals for the Second Circuit on August 31, 2020. There, in response to a petition for review of the July 2019 NHTSA Final Rule, the Second Circuit decided that NHTSA was wrong to conclude that the Improvements Act did not apply to the CAFE civil penalty rate. The Second Circuit went on to conclude that the agency did not have the authority to modify the CAFE civil penalty rate after January 17, 2017, because that was the date on which the next civil penalty inflation adjustment was ostensibly due. Once again, because petitioners did not challenge NHTSA's December 2016 decision to apply the \$14 adjusted CAFE civil penalty rate to MY 2019 vehicles, the 2020 Second Circuit decision did not address NHTSA's underlying statutory authority to determine the model years to which the adjusted civil penalty rate might first apply. This point is especially important due to the very real economic harm that will result from such a significant increase in the civil penalties being assessed on manufacturers for vehicles that have already been produced or cannot otherwise be modified.

**Request and Basis for Petition.** Auto Innovators observes that further rulemaking is required to implement the Second Circuit decision, because Part 578 currently reflects the civil penalty rate established in the 2019 rulemaking. Auto Innovators petition NHTSA to establish that the first model year in which the \$14 civil monetary penalty rate applies will be Model Year 2022, for the same reasons that NHTSA established in December 2016 that the first model year in which the revised civil penalty rate might apply would be Model Year 2019.

As the Second Circuit made clear, the underlying purpose of the Improvements Act was to assure that the ability of federal civil penalties to deter prohibited conduct, or to incentivize desired conduct, is not eroded by inflation. The deterrent and incentivizing purposes of the Act, however, are by their nature prospective, i.e. *future-oriented*. A retroactively assessed penalty cannot by its very nature deter past acts, nor can any incentive change past behavior. NHTSA recognized these basic principles when it decided in December 2016 that retroactive application of an adjusted CAFE civil penalty would not serve the purposes of the Improvements Act or the purposes of the CAFE statute. NHTSA said in December 2016:

*Assuming that higher civil penalty rates are intended, in the particular context of CAFE, to provide greater incentives for manufacturers to comply with applicable standards, then raising penalty rates for model years already completed and thus unchangeable would be not only retroactive, but incapable of serving the purpose of causing greater compliance with CAFE standards. Based on the governing statutory framework and the specific CAFE regulatory scheme, NHTSA believes that Congress would not have intended retroactive application of an inflation adjustment to overcome this core substantive purpose and intent of EPCA. 81 Fed. Reg. at 95490.*

NHTSA also decided in December 2016 not only to decline to apply the higher civil penalty rate to model years already completed, but also to decline to apply the higher civil penalty rate to the immediately future model years (which at that time were Model Years 2017 and 2018), because those product plans were already fixed. NHTSA said:

*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. 81 Fed. Reg. at 95491.*

Neither the petitioners in the Second Circuit nor the court itself has questioned any of this reasoning, which applies with equal force here.

Model Years 2019 and 2020 are effectively lapsed now. Manufacturers 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 of those plans were made under the assumption of a \$5.50 civil penalty rate. If manufacturers had known that they would have faced a \$14 civil penalty rate, those decisions and plans would have been affected. Manufacturers are unable to change MY 2021 plans at this point to respond to a retroactively increased rate, particularly in light of the operational disruptions caused by the unanticipated COVID-19 pandemic.

Manufacturers developed and implemented their Model Year 2019, 2020 and 2021 product and compliance plans and CAFE compliance programs based upon the CAFE civil penalty rate of \$5.50 as published by NHTSA for those years. NHTSA's 2019 final rule was well-reasoned and justified, as it accounted for the economic harm the civil penalty rate increase would likely impose. Auto Innovators' members were justified in relying on the rule notwithstanding the litigation, and were reasonable in assuming that the courts would uphold a rule that took into account economic information that had admittedly been overlooked previously. This petition seeks to ensure that the economic harm that will be caused by application of the higher \$14 civil penalty rate is not exacerbated by applying it to model years that have been completed or that can no longer be affected by the higher rate. More fundamentally, it is patently unreasonable to expect automakers to design and market vehicles and otherwise plan for regulatory compliance based on a civil penalty rate that was not in effect during the relevant period.

Moreover, the unique nature of the CAFE program, in which paying a civil penalty is a lawful compliance strategy within the fuel economy regulations and in which NHTSA has no authority to alter the statutory penalty formula, makes it particularly unfair to apply a higher penalty to a manufacturer with respect to its Model Years 2019, 2020 and 2021 fleet performance. As Congress and NHTSA have acknowledged, designing, manufacturing, and selling vehicles to comply with CAFE standards is a complicated and long lead-time effort. Retroactive imposition of the \$14 civil penalty rate to those model years will not in any way improve fuel economy in the real world or result in environmental benefits. Rather, it will result only in a massive transfer of funds (exceeding \$1 billion in some years)

either to the federal government or to other manufacturers that have credit surpluses for sale, or both. It will also significantly change the market value of the credits themselves, potentially disrupting credit transactions and company-specific compliance plans.

Individual vehicle manufacturers will supplement this petition with confidential information about the economic effects of the \$14 civil penalty rate, as well as the profound effect of COVID-19 on them and their market plans for 2020 and beyond. At an industrywide level, the auto sector has been upended by COVID-19 with multiyear consequences:

- In February 2020, the U.S. light vehicle sales forecasts for 2020 were projecting sales of nearly 17 million vehicles.<sup>6</sup>
- By April 2020, all U.S. auto factories were completely closed, for the first time since World War II.<sup>7</sup>
- As of September 23, 2020, market experts are forecasting 2020 sales between 12.6 and 14.3 million vehicles, down between 15% and 26% compared with 2019.<sup>8</sup>
- One market expert, IHS Markit, predicts that the auto sector recovery will take several years, and that the market will not see 17 million new vehicle registrations again until at least 2025.<sup>9</sup>
- Consistent with this observation, IHS Markit also noted that, in response to the COVID-19 effects on sales and revenue, global manufacturers have been forced to delay capital-intensive product actions to conserve resources—with the greatest impact to showrooms in 2023 and 2024 calendar years.<sup>10</sup>
- Consumer demand for new cars and light trucks is projected to flatten in the last four months of 2020,<sup>11</sup> confounding CAFE mix projections for MY 2021 for many manufacturers.
- A Bank of America Merrill Lynch analyst described the second quarter of 2020 as “likely to be the toughest in modern history” for the automotive sector.<sup>12</sup>

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<sup>6</sup> Haig Stoddard, *U.S. Light-Vehicle Sales Rise to 6-Month High in August*, WARDSINTELLIGENCE (Sept. 1, 2020); see also 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 6.

<sup>7</sup> 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; see also Neal E. Boudette, *Autoworkers Are Returning as Carmakers Gradually Crank Up Factories*, N.Y. TIMES (May 17, 2020), <https://www.nytimes.com/2020/05/17/business/coronavirus-auto-manufacturing-restart.html>.

<sup>8</sup> Haig Stoddard, *North America Vehicle Production Expected to Rebound After 6.0% Decline in August*, WARDSINTELLIGENCE (Sept. 21, 2020); IHS MARKIT, *IHS MARKIT MONTHLY AUTOMOTIVE UPDATE - AUGUST 2020* (Aug. 14, 2020); *ALG Provides Third Revision of 2020 New Vehicle Sales Forecast Scenarios Based on Latest Impact of COVID-19*, ALG (Apr. 20, 2020), <https://www.alg.com/newsroom/ALG-Provides-Third-Revision-of-2020-New-Vehicle-Sales-Forecast-Scenarios-Based-on-Latest-Impact-of-COVID-19.html>; see also 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.

<sup>9</sup> IHS MARKIT, *IHS MARKIT MONTHLY AUTOMOTIVE UPDATE - AUGUST 2020* (Aug. 14, 2020).

<sup>10</sup> IHS MARKIT, *AUTOMOTIVE COVID-19 RECOVERY SERIES: THE OEM LANDSCAPE – FOCUS ON US* (Sept. 8, 2020).

<sup>11</sup> Haig Stoddard, *North America Vehicle Production Expected to Rebound After 6.0% Decline in August*, WARDSINTELLIGENCE (Sept. 21, 2020); see also 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 4.

<sup>12</sup> 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>.



These economic consequences were completely unexpected at the beginning of 2020, and are attributable to the global COVID-19 pandemic. On May 19, 2020, the President issued Executive Order 13924, directing agencies to provide regulatory relief consistent with their statutory authorities, in order to combat the economic consequences of COVID-19. The harm of retroactively applying the \$14 rate would be untenable for the auto industry on top of the COVID-19 consequences. NHTSA rulemaking to establish the rate's effective date in MY 2022 is justified and consistent with Executive Order 13924.

**Conclusion and Request for Relief.** For all of the reasons set forth in this petition, and similar to the reasons put forth by NHTSA in December 2016, Auto Innovators requests that NHTSA amend Part 578 to provide that the \$14 civil penalty rate will not apply before Model Year 2022.<sup>13</sup> Suggested regulatory text is included in an Appendix to this petition.

Sincerely,



Julia M. Rege  
Vice President, Energy & Environment  
Alliance for Automotive Innovation

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<sup>13</sup> At least one Auto Innovators member, and additional companies as well, have pending with the agency petitions for alternative standards for small volume manufacturers. (See *CAFE Public Information Center*, NHTSA, [https://one.nhtsa.gov/cafe\\_pic/CAFE\\_PIC\\_Mfr\\_LIVE.html](https://one.nhtsa.gov/cafe_pic/CAFE_PIC_Mfr_LIVE.html)). Those petitions have not yet been resolved, and those companies face unique adverse impacts if the increase is applied beginning with MY 2019. The agency should additionally clarify for these companies that any increase will not apply to them until their pending applications are resolved.

## APPENDIX: SUGGESTED REGULATORY TEXT

Section 578.6 is amended by revising paragraph (h) to read as follows:

### Section 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 \$42,530 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 ~~\$5.50~~ \$14, plus any adjustments for inflation that occurred or may occur (for model years before model year 2022, the civil penalty is \$5.50), 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 produced 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.

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