



Institute *for*
Policy Integrity

NEW YORK UNIVERSITY SCHOOL OF LAW

January 25, 2021

To: National Highway Traffic Safety Administration

Subject: Comments on “Civil Penalties,” 86 Fed. Reg. 3016 (Jan. 14, 2021) (Docket No. NHTSA-2021-0001-0010)

The Institute for Policy Integrity at New York University School of Law (“Policy Integrity”)¹ respectfully submits the following comments on the National Highway Traffic Safety Administration’s (“NHTSA”) interim final rule, Civil Penalties (“Interim Final Rule”).² In the Interim Final Rule, NHTSA delays the application of its 2016 inflation adjustment (“2016 Adjustment”) of the penalty for violating the corporate average fuel-economy (“CAFE”) standards.³ NHTSA proposes the 2016 Adjustment to go into effect beginning in model year 2022 and not in model year 2019, as would follow from the prevailing regulations,⁴ but also requests comment on whether to further delay enforcement of the 2016 Adjustment until model year 2023.

Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Harnessing this expertise, in recent years we have submitted comments and legal briefs detailing the economic and environmental impacts of NHTSA’s numerous attempts to delay and rescind the 2016 Adjustment—none of which have survived judicial review. Just like in those prior actions, NHTSA once again disregards the plain meaning of the Federal Civil Penalties Inflation Adjustment Act (“Inflation Adjustment Act”) and fails to meaningfully consider adverse impacts on the environment and fuel consumption in promulgating the Interim Final Rule. NHTSA’s determination to reconsider the 2016 Adjustment blatantly violates a recent decision of the U.S. Court of Appeals for the Second Circuit holding that the window for any such reconsideration has long passed.

¹ This document does not purport to represent the views, if any, of New York University School of Law.

² 86 Fed. Reg. 3016 (Jan. 14, 2021) (Docket No. NHTSA-2021-0001-0010).

³ Civil Penalties, 81 Fed. Reg. 43,524 (July 5, 2016), *modified by* 81 Fed. Reg. 95,489 (Dec. 28, 2016).

⁴ See 81 Fed. Reg. at 95,490.

Specifically, as detailed herein, the Interim Final Rule is untimely under the Inflation Adjustment Act, whose deadlines to amend the initial catch-up inflation adjustment expired years ago. And even if NHTSA does somehow have discretion to now delay the 2016 Adjustment, the Interim Final Rule is arbitrary and capricious and violates the National Environmental Policy Act. This is because NHTSA entirely disregards critical impacts following from the rule including excess fuel consumption and environmental harm. Moreover, NHTSA's reliance on its prior unlawful delays and rescission to justify further delay of the 2016 Adjustment ignores the will of Congress and is not a reasonable basis for regulation.

For these reasons, NHTSA should rescind the Interim Final Rule.

The Interim Final Rule Is Severely Untimely

The Interim Final Rule is plainly untimely under the Inflation Adjustment Act, as confirmed by a recent ruling of the U.S. Court of Appeals for the Second Circuit vacating NHTSA's recent attempt to rescind the 2016 Adjustment.

The Inflation Adjustment Act provides what the Second Circuit characterized as a "highly circumscribed schedule for penalty increases."⁵ Specifically, the statute required agencies to implement the initial or "catch-up" inflation adjustments to all civil monetary penalties by August 1, 2016,⁶ unless an agency determined through notice-and-comment rulemaking that an enumerated exception applied.⁷ After making the catch-up adjustment, agencies were then required to adjust their civil penalties for inflation annually by January 15.⁸ Subsequent annual adjustments are nondiscretionary and not subject to the enumerated statutory exceptions, which applied only to the initial catch-up adjustment.

Putting these requirements together, the Second Circuit held that even if an agency had some leeway to reconsider its initial catch-up adjustment, "the window for that reconsideration was narrow and limited to the year 2016 — or more precisely, two weeks into the next year, before the next required increase due by January 15, 2017."⁹ Accordingly, the Second Circuit held, NHTSA's attempt in 2019 to invoke the "negative economic impact" statutory exception and rescind the 2016 Adjustment was untimely and thus unlawful, since it occurred long after the January 2017 deadline.¹⁰ The Interim Final Rule, published more than a year after the stricken 2019 rescission rule, is untimely for the same reason.

Indeed, one of the bases that NHTSA now provides to further delay the 2016 Adjustment, namely its alleged adverse impacts on the automotive sector, closely resembles the "negative economic impact" exception provided in the Inflation Adjustment Act. The Interim Final Rule in

⁵ *New York v. Nat'l Highway Traffic Safety Admin.*, 974 F.3d 87, 100 (2d Cir. 2020).

⁶ 28 U.S.C. § 2461, note Sec. 4(b)(1)(B).

⁷ 28 U.S.C. § 2461, note Sec. 4(c)(1). These exceptions apply if "(A) increasing the civil monetary penalty by the otherwise required amount will have a negative economic impact; or (B) the social costs of increasing the civil monetary penalty by the otherwise required amount outweigh the benefits."

⁸ 28 U.S.C. § 2461, note Sec. 4(a).

⁹ *New York*, 974 F.3d at 101.

¹⁰ *Id.*

fact sometimes alleges that the 2016 Adjustment, if timely enforced, would exacerbate “negative economic impacts” being faced by the automotive industry.¹¹ But the deadline for NHTSA to invoke the “negative economic impact” exception passed at least four years ago, as the Second Circuit explained, so such considerations are plainly untimely and no longer applicable to NHTSA’s enforcement of the 2016 Adjustment.

Unable to locate any support for its delay in the Inflation Adjustment Act, NHTSA points to the Energy Policy and Conservation Act’s (“EPCA”) requirement that any increase in the civil penalty pursuant to that statute not take effect until “the model year beginning at least eighteen months after the regulation.”¹² But as the Second Circuit has held, discretionary penalty increases under EPCA are distinct from and “capable of co-existence” with the mandatory penalty inflation adjustments under the Inflation Adjustment Act, with each process subject to the different requirements of each statute.¹³ Thus, the eighteen-month delay period required for EPCA discretionary penalty increases is not applicable to penalty adjustments under the Inflation Adjustment Act. In any event, even if EPCA somehow did apply, the 2016 Adjustment was already effective for more than eighteen months during which automakers were developing their fleets for the relevant model years, meaning that ample statutory notice was provided.¹⁴

For all of these reasons, the Interim Final Rule is untimely under the Inflation Adjustment Act and without lawful basis.

The Interim Final Rule Arbitrarily Overlooks Adverse Fuel Conservation, Consumer Fuel Expenditure, and Environmental Effects

NHTSA points to potential adverse impacts on the automotive sector as a basis for the Interim Final Rule, but there are several problems with its argument.¹⁵ As an initial matter, it is unclear how and why NHTSA believes such economic considerations are relevant, since as noted above, the window to invoke the Inflation Adjustment Act’s “negative economic impact” exception closed years ago and NHTSA does not invoke it here. In any event, even if NHTSA does have discretion to belatedly consider economic impacts in assessing the catch-up inflation

¹¹ See, e.g., 86 Fed. Reg. at 3022 (explaining “that a decision to apply the civil penalty of \$14 vehicles prior to [model year] 2022 would only aggravate [the industry’s] financial hardships”).

¹² *Id.* at 3021 (quoting 49 U.S.C. 32912(c)(1)(D)).

¹³ *New York*, 974 F.3d at 100 (internal quotation marks omitted).

¹⁴ In total, the 2016 Adjustment was in effect for the affected model years for at least 739 days (more than two years), spanning three separate time periods. First, the 2016 Adjustment was effective for 209 days from its promulgation on July 5, 2015, 81 Fed. Reg. 43,524, until NHTSA’s first delay on January 30, 2017, 82 Fed. Reg. 8,694 (Jan. 30, 2017). Next, the 2016 Adjustment was effective for 393 days from the Second Circuit’s decision on June 29, 2018, vacating its suspension, *Nat. Res. Def. Council v. Nat’l Highway Traffic Safety Admin.*, 894 F.3d 95 (2d Cir. 2018), until NHTSA’s final rule on July 26, 2019 rescinding the adjustment, 84 Fed. Reg. 36,007 (July 26, 2019). Finally, the 2016 Adjustment was effective for the affected model years from Second Circuit’s decision of Aug. 31, 2020 vacating the rescission, *New York*, 974 F.3d 87, until the promulgation of this Interim Final Rule on January 14, 2021.

¹⁵ See 86 Fed. Reg. at 3,022 (“NHTSA believes that applying the adjustment to the CAFE civil penalty rate beginning in model year 2019 ‘may inhibit economic recovery.’”).

adjustment, its one-sided treatment of regulatory effects is unreasonable as it overlooks substantial economic and environmental costs to delaying the 2016 Adjustment.

Under the Administrative Procedure Act, an agency must conduct a “balanced consideration of the environmental, economic, and social impact[s]” of any rulemaking.¹⁶ An agency violates this requirement if it “put[s] a thumb on the scale” by bolstering or diminishing one side of the equation in its regulatory analysis¹⁷—an extreme version being if the agency gives “cost no thought *at all*.”¹⁸ Under EPCA, the statute that NHTSA claims governs this rulemaking,¹⁹ “the need . . . to conserve energy” is a crucial consideration in administering the CAFE program.²⁰ Pollution prevention is another key consideration when administering energy-efficiency programs under EPCA.²¹

In the Interim Final Rule, however, NHTSA gives no attention to the fuel-conservation and environmental harms that can naturally and predictably be expected to result from the rule. Specifically, NHTSA claims that because automakers have already sold or designed their fleets for the model years to which this rule applies, lowering the penalty for those model years by delaying the 2016 Adjustment would not affect those fleets and therefore have no impact on fuel usage or the environment.²² But even assuming NHTSA’s premise that it is too late for automakers to revise their fleets through model year 2022,²³ the agency’s logic omits a critical consideration: the effect of this rule on automakers’ compliance with applicable fuel-economy standards after model year 2022.

Once those effects are considered, basic economics demonstrates that the Interim Final Rule will likely reduce automaker compliance for those years and thereby increase fuel usage, consumer fuel expenditure, and tailpipe pollution. This is because, by vastly reducing the noncompliance penalty for model years 2019–2022, the Interim Final Rule incentivizes automakers to pay the noncompliance penalty rather than use available credits, so that automakers will have more credits in the future than they would without the delay. The additional credits will be used in the future for CAFE compliance, thus reducing the effective stringency of the standards that manufacturers face and allowing them to implement lower fuel-economy.²⁴ In other words, as automakers will have these additional credits stored up, they will

¹⁶ *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1221 (5th Cir. 1991) (internal quotation marks omitted).

¹⁷ *Ctr. for Biol. Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008).

¹⁸ *Michigan v. E.P.A.*, 576 U.S. 743, 751 (2015). As the Supreme Court explained in *Michigan*, “cost” in this context refers to “any disadvantage . . . including, for instance, harms that regulation might do to human health or the environment.” *Id.* at 752.

¹⁹ See 86 Fed. Reg. at 3021 (applying EPCA’s eighteen-month delay requirement for penalty increases). As detailed above, Policy Integrity disputes EPCA’s applicability.

²⁰ See 49 U.S.C. § 32902(f).

²¹ *Zero Zone, Inc. v. United States Dep’t of Energy*, 832 F.3d 654, 677 (7th Cir. 2016).

²² See 86 Fed. Reg. at 3025 (“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.”).

²³ Policy Integrity takes no position on the accuracy of this premise.

²⁴ Under the CAFE program, automakers receive credits for overcompliance that they can apply to any of the three years before or five years after the credit is earned. 49 U.S.C. § 32902(a). Automakers whose fleets fail to meet

have to meet lower fuel-economy targets in those future years (after model year 2022) because they will have more credits to make up for their shortfalls from the targets prescribed by law. This lower fuel-economy will not only result in higher emissions but also deprive consumers of highly valuable fuel savings.²⁵

By making noncompliance cheaper and credits more available, the Interim Final Rule will also reduce the market price of credits that manufacturers purchase from one another—a fact that NHTSA acknowledges in the rule itself.²⁶ As a result, automakers that have invested heavily in fuel-economy (such as hybrid leaders including Toyota and Honda) will be less incentivized to over-comply with the CAFE standards in future years because doing so will earn them credits that are now worth less on the market. At the same time, automakers on the other end of the fuel-economy spectrum will have less incentive to invest in efficiency because they will be able to more cheaply comply with the CAFE standards through the purchase of credits. Accordingly, fuel-economy for future fleets will decline across the board.

The loss of value of compliance credits will not only cause competitive harms to companies that have heavily invested in efficiency under the expectation that the 2016 Adjustment would be timely enforced—making them companies that, to borrow one of NHTSA’s justifications for this rulemaking, have “serious reliance interests” that it “would be unfair and improper” to disregard.²⁷ By affecting the credit market, the Interim Final Rule will also lead to lower fuel-economy in the years to come, causing the very increases in fuel usage, consumer fuel expenditure, and pollution that EPCA (and, in seeking to “maintain the deterrent effect” of existing regulatory programs, the Inflation Adjustment Act²⁸) was designed to avoid.

These impacts will likely be substantial. As Policy Integrity explained in its attached regulatory comments in response to NHTSA’s then-proposed rule to rescind the 2016 Adjustment, NHTSA’s own publicly-available model (which Policy Integrity ran) confirmed that reducing the CAFE penalty would greatly weaken program compliance. Specifically, the model found that the 2019 rescission would produce an additional 54 billion gallons of fuel consumed domestically through model year 2032 while reducing fleetwide fuel-efficiency by nearly five miles per gallon.²⁹ That additional fuel consumption would not only cost consumers at the pump (potentially over \$120 billion), but also result in nearly 480 million metric tons of carbon dioxide

the target standard in a given year have the option between paying the noncompliance penalty or using available credits to make up the shortfall. 49 C.F.R. § 536.5(d)(2). Manufacturers may purchase credits from one another. 49 U.S.C. § 32902(f).

²⁵ While there may be some beneficial economic effects of lower fuel-economy from reduced purchase prices for new vehicles, NHTA has consistently determined that fuel-economy standards create private benefits on the whole—meaning that long-term consumer fuel savings exceed upfront-cost increases. *See, e.g.*, 85 Fed. Reg. 24,174, 24,180–81 tbls.I-5 & I-6 (Apr. 30, 2020) (concluding that higher fuel-economy standards increase average purchase price by \$977–\$1,083 while lowering fuel costs by \$1,110–\$1,461 per vehicle).

²⁶ 86 Fed. Reg. at 3021 (“Increasing the [penalty] rate [through the 2016 Adjustment] is likely to lead to an increase in the price of credits.”).

²⁷ *Id.*

²⁸ 28 U.S.C. § 2461, note Sec. 2(b)(2).

²⁹ Inst. for Pol’y Integrity, Comments on the Notice of Proposed Rulemaking 7–8 (May 2, 2018), *available at* <https://www.regulations.gov/document?D=NHTSA-2018-0017-0017>.

emissions causing over \$25 billion in climate damage.³⁰ While the effects of the Interim Final Rule will admittedly be smaller because it delays the 2016 Adjustment rather than rescinds it permanently—and because the technological choices for some affected model years have already been made—the magnitude of the vacated rescission’s impacts provides a basic sense of the scale of this rule’s adverse effects.

Moreover, in addition to violating the Administrative Procedure Act’s standards of rationality, NHTSA’s failure to recognize the adverse environmental impacts of the Interim Final Rule also violates the National Environmental Policy Act. Under that statute, agencies must take a “hard look at the environmental consequences before taking a major action.”³¹ By claiming that the Interim Final Rule will have no environmental impact despite economic principles compelling the opposite conclusion, NHTSA violates that standard.

NHTSA’s Retroactivity Concerns Do Not Compel the Interim Final Rule, But Rather Upset Congress’s Mandate in the Inflation Adjustment Act

NHTSA additionally argues that the Interim Final Rule is justified because enforcing the 2016 Adjustment after its rescission was judicially vacated would “raise serious retroactivity concerns.”³² But the agency musters virtually no support for this theory. Factually, the agency fails to acknowledge that any retroactivity concerns are severely diminished here because the 2016 Adjustment was put into effect more than four years ago and has been effective for nearly half the time since.³³ And legally, while NHTSA posits that generally “retroactivity is not favored in the law,”³⁴ it acknowledges Supreme Court precedent stating that retroactivity is mandated when “congressional enactments . . . require[] this result.”³⁵ And here, for the reasons detailed above, the Inflation Adjustment Act requires application of the 2016 Adjustment, and does not permit its delay years after the fact.

By ignoring the plain language of the Inflation Adjustment Act and delaying the 2016 Adjustment based on alleged automaker reliance on a prior delay that was vacated for violating that same statute, the Interim Final Rule sets a dangerous precedent of allowing agencies to avoid enforcing statutory mandates through unlawful regulatory action. But Congress explicitly directed agencies including NHTSA to begin immediately enforcing the Inflation Adjustment Act back in 2016 in order to “maintain the deterrent effect of civil monetary penalties,” “promote compliance with the law,” and “improve the collection by the Federal Government of civil monetary penalties.”³⁶ Those critical goals should not be further delayed as a result of NHTSA’s

³⁰ Amicus Brief of the Institute for Policy Integrity at 20–22, *New York v. Nat’l Highway Traffic Safety Admin.*, 974 F.3d 87 (2d Cir. 2020).

³¹ *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (internal quotation marks omitted).

³² 86 Fed. Reg. at 3020.

³³ *See supra* note 14 (cataloging how 2016 Rule was in effect for over two years).

³⁴ 86 Fed. Reg. at 3020 (quoting 81 Fed. Reg. 95,489, 95,490 n.8 (Dec. 28, 2016) (alterations omitted)).

³⁵ *Id.* (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994) (alterations made)).

³⁶ 28 U.S.C. § 2461, note Sec. 2(b)(2)–(3).

repeated unlawful action.³⁷ Indeed, the Supreme Court has held that estoppel does not strictly apply against federal agencies, as “the conditions defined by Congress” prevail over any “serious hardship” that may be caused by an agency’s subsequent erroneous legal interpretation of those conditions.³⁸ Applying these principles, the clear mandates and deadlines of the Inflation Adjustment Act prevail over any reliance interests that automakers may face.

For this reason, as well, NHTSA should rescind the Interim Final Rule.

Respectfully,

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Attached: Inst. for Pol’y Integrity, Comments on the Notice of Proposed Rulemaking (May 2, 2018) (Docket No. NHTSA–2018–0017)

³⁷ NHTSA’s attempts to suspend and then rescind the 2016 Adjustment were both vacated by the Second Circuit. See *Nat. Res. Def. Council*, 894 F.3d 95; *New York*, 974 F.3d 87.

³⁸ *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 420 (1990) (internal quotation marks omitted).