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Docket Management Facility, M–30,
U.S. Department of Transportation
West Building, Ground Floor, Room W12–140
1200 New Jersey Avenue SE,
Washington, DC 20590
Docket No. NHTSA–2021–0001

RE: *Department of Transportation, National Highway Traffic Safety Administration, 49 CFR Part 578, Docket No. NHTSA–2021–0001, 86 Fed. Reg. 3016 (Jan. 14, 2021)*

To Whom It May Concern:

Pursuant to the National Highway Traffic Safety Administration (NHTSA)'s Interim Final Rule (IFR), Civil Penalties, Docket No. NHTSA-2021-0001, 86 Fed. Reg. (Jan. 14, 2021), Tesla, Inc. (Tesla) submits the following comments in opposition to the Interim Final Rule (IFR). Tesla incorporates by reference its letter sent to NHTSA on December 23, 2020.[1] For the reasons given below, the IFR is procedurally and substantively invalid, flouting two binding Second Circuit decisions, a clear statutory directive, and the basic procedural safeguards of the Administrative Procedure Act (APA), and thus should be immediately withdrawn.

Background

Tesla's mission is to accelerate the world's transition to sustainable energy. Moreover, Tesla believes the world will not be able to solve the climate change crisis without directly reducing air pollutant emissions—including carbon dioxide and other greenhouse gases—from the transportation and power sectors.

To accomplish its mission, Tesla designs, develops, manufactures, and sells high-performance fully electric vehicles and energy generation and storage systems, installs and maintains such systems, and sells solar electricity. Tesla currently produces and sells four fully electric vehicles: the Model S sedan, the Model X sport utility vehicle, the Model 3 sedan, and the Model Y mid-sized SUV. Less than four years after its first delivery to customers, the Tesla Model 3 is now one of the top ten best selling cars in America and, based on registration data, in the first quarter of 2020 became the best-selling cross all passenger segments in California.[2] By market capitalization, Tesla is the most valuable automaker in world.[3]

Tesla has made significant investments to establish, and continues to grow, a large network of retail stores, vehicle service centers, and electric vehicle charging stations to accelerate and support the widespread adoption of its vehicle products.

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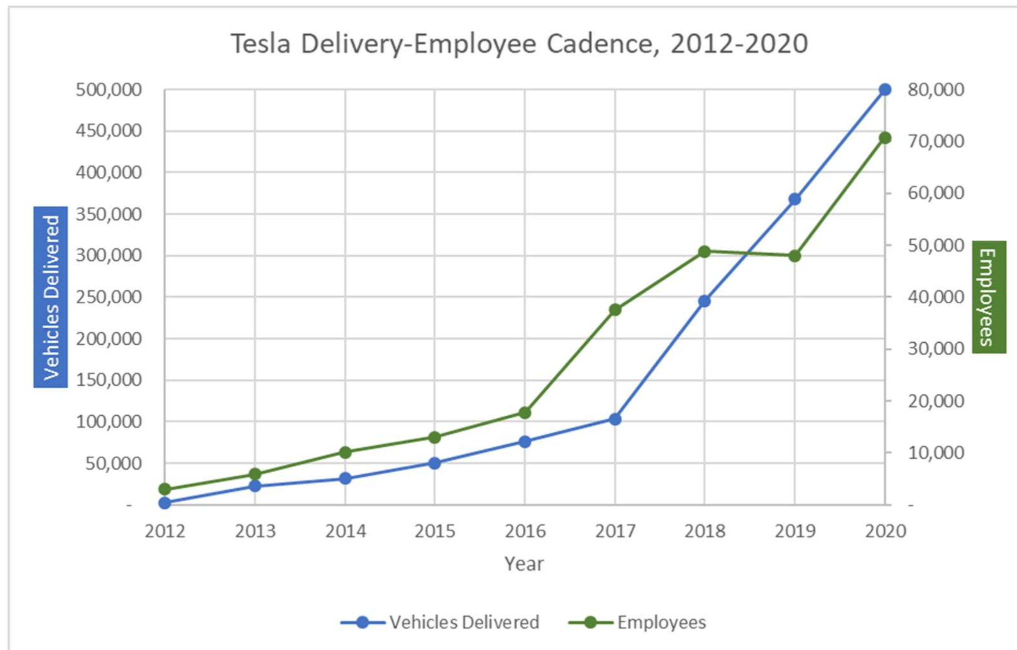
[1] On December 23, 2020, Tesla sent a letter to NHTSA opposing the lack of process and secrecy of the agency's actions in the development of this IFR. Although NHTSA did not address the concerns raised by Tesla in its letter, NHTSA acknowledges receipt of the letter prior to the January 6, 2021, completion of the IFR's Executive Order (E.O.) 12866 Regulatory Review process. *See,* 86 Fed. Reg. at 3023, fn. 74 (acknowledging receipt of the letter); *See also*, OIRA, Conclusion of E.O. 12866 Regulatory Review at https://www.reginfo.gov/public/do/eoDetails?rrid=131487

[2] *See, e.g.*, Sean Szymkowski, *Tesla Model 3 was California's best-selling car through first quarter: The electric sedan found more buyers than any rivaling luxury car, and even mass-market sedans and crossovers*, CNET: Roadshow (June 1, 2020), https://www.cnet.com/roadshow/news/tesla-model-3-california-best-selling-car/#:~:text=Tesla%20Model%203%20was%20California's%20best%20selling%20car%20through%20first,mass%2Dmarket%20sedans%20and%20crossovers (citing data from the California New Car Dealers Association).

[3] *See, e.g.*, The Drive, *at $631B, Tesla Is Now Worth More Than the Next Top 6 Car Companies Combined* (Dec. 30, 2020), https://www.thedrive.com/news/38485/at-631b-tesla-is-now-worth-more-than-the-next-top-6-car-companies-combined



In the United States, Tesla conducts vehicle manufacturing and assembly operations at its factory in Fremont, CA, and produces electric drive trains and manufactures advanced battery packs, as well as Tesla's energy storage products, at its Gigafactory Nevada in Sparks, NV. It also builds and services highly automated, high-volume manufacturing machinery at its facility in Brooklyn Park, MN, and operates a tool and die facility in Grand Rapids, MI. Tesla produces solar energy and vehicle charging products at its Gigafactory New York in Buffalo, NY. Tesla's U.S. supply chain spans across more than 40 states. Tesla's American-manufactured electric vehicles are sold nation-wide and Tesla is subject to regulation under NHTSA's Corporate Average Fuel Economy (CAFE) standards and the Environmental Protection Administration's (EPA) light-duty vehicle greenhouse gas (GHG) emission standards.

All Tesla vehicles sold in the U.S. are built in the U.S. by over 50,000 U.S. workers. Tesla has significantly increased its vehicle sales and grown its workforce in recent years. In 2012, the first year of EPA and NHTSA's Final Rule for Model Year 2012 - 2016 Light-Duty Vehicle GHG Standards and CAFE Standards,[4] Tesla delivered 2,636 vehicles to customers[5] and had just under 3,000 employees. In 2020, Tesla delivered almost 500,000 vehicles to customers, including over 180,000 vehicles in the fourth quarter of 2020 alone— during the ongoing COVID-19 pandemic, its highest sales quarter to date[6] and employed over 70,000 people worldwide. In sum, from 2012 to 2020, under the current EPA and NHTSA performance standards, Tesla's vehicle deliveries have grown by nearly 19,000% and its American manufacturing footprint and workforce have expanded rapidly. At the same time, according to the latest Consumers Reports Owner Satisfaction Survey, Tesla has received the highest owner satisfaction rating of any car brand in 2020 – recognition which we have achieved seven times since 2013.[7]

Tesla manufactures all electric vehicles that are highly efficient and do not emit carbon dioxide or other air pollutants. As EPA recognized in its 2019 Automotive Trends Report, Tesla had by far the lowest carbon dioxide

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[4] *See*, 75 Fed. Reg. 25,324 (May 7, 2010).

[5] Tesla Motors Inc. Form 10-K for the Fiscal Year Ended December 31, 2014 at 53 (Feb. 26, 2015), https://ir.tesla.com/static-files/60fd27ca-c925-4420-83d1-fd39ac8a7d67.

[6] Press Release, Tesla, *Tesla Q4 2020 Vehicle Production & Deliveries* (Jan 2, 2021), https://ir.tesla.com/press-release/tesla-q4-2020-vehicle-production-deliveries; Bloomberg, *Tesla Poised for Expansion After Just Missing 2020 Target* (Jan. 2, 2021), https://www.bloomberg.com/news/articles/2021-01-02/tesla-delivers-499-550-electric-cars-in-2020-just-shy-of-target.

[7] Consumer Reports, *Most and Least Satisfying Car Brands* (Mar. 5, 2020), https://www.consumerreports.org/car-reliability-owner-satisfaction/car-brands-ranked-by-owner-satisfaction/

emissions (0 grams/mile) and highest fuel economy (113.7 miles per gallon equivalent) of all large manufacturers in Model Year 2018.[8] Under the CAFE program, manufacturers of electric vehicles receive an incentive through a petroleum equivalency factor (PEF) used to calculate fuel economy.[9] Tesla has accordingly earned a significant volume of compliance credits because its vehicles far exceed the requirements of the CAFE standards each year.

In short, Tesla is an American success story about innovation, environmental protection, and job creation that continued to build even through the adversity of 2020.

Use of the IFR Process Is Not Supported by Good Cause

Recently, in lauding its accomplishments, NHTSA stated, "NHTSA's rulemaking process is a transparent one; the Agency does not write rules without significant public input. NHTSA receives comments from a diverse audience, including the public, local law enforcement, industry, safety advocates, and cities and States."[10] In this instance, nothing could be further from the truth. The agency received a petition for rulemaking on October 2, 2020, and, despite significant impacts on manufacturers such as Tesla and on the public, granted the petition in just over a month, on November 6, 2020, without any public notice whatsoever or any solicitation of input.[11] After the non-public granting of the Alliance for Automotive Innovation's (Alliance) petition, NHTSA acknowledges in the IFR it received two unsolicited letters requesting the agency conduct a transparent process. Despite these letters, including one from Tesla, the agency continued with the E.O.12866 interagency review and publication of the IFR. Indeed, the agency also acknowledges it did not even consider the substance of the two letters received before publication and dismisses the letters as post-publication comments.

NHTSA's process and action in publishing an IFR is not supported by good cause and the IFR should be withdrawn. The agency's own regulations specifically caution that, "issuing substantive DOT rules without completing notice and comment, including as interim final rules (IFRs) and direct final rules (DFRs), must be the exception. IFRs and DFRs are not favored."[12] Moreover, NHTSA is owed "no particular deference" on its determination of good cause and the exception is to be narrowly construed and not to be used as an "escape clause."[13] Indeed, the IFR is a brazen and clear attempt to circumvent the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Improvements Act), 28 U.S.C. §2461 (note), escape from the Second Circuit's rulings in *New York v. Nat'l Highway Traffic Safety Admin.*, 974 F. 3d 87 (2d Cir. 2020) and *NRDC v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95 (2d Cir. 2018), and fit rulemaking within the term of the recently completed Presidential Administration. Further, the Second Circuit has already found that NHTSA's past attempts to alter the civil penalty rate did "not meet these exacting standards" for invoking good cause found at 5 U.S.C. §553(b)(3)(B).[14]

1. Providing Notice and Public Comment Was Not Impracticable[15]

NHTSA asserts that it would be "impractical to delay publication" but provides no justification for its bare conclusion that following notice and comment procedures is impractical.[16] The agency only notes that manufacturers need ample notice and even suggests not going through notice and comment is an issue of

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[8] EPA, EPA-HQ-OAR-2018-0283-7670, *The 2019 EPA Automotive Trends Report, Greenhouse Gas Emissions, Fuel Economy, and Technology Since 1975* at 8 & Table 2.2 (Mar. 2020).

[9] See 49 U.S.C. §32904(a)(2)(B)

[10] James C. Owens, NHTSA Deputy Administrator," NHTSA and the Future of Automotive Technology: Building a safety foundation through cooperation and oversight," (Jan. 2021), https://www.nhtsa.gov/nhtsa-and-future-automotive-technology. Tesla notes the author of this blog is also the signatory on this IFR.

[11] Letter from James C. Owens, Deputy Administrator, NHTSA, to Julia M. Rege, Vice President, Energy and Environment Alliance for Automotive Innovation (Nov. 6. 2020), https://beta.regulations.gov/document/NHTSA-2021-0001-0006

[12] 49 C.F.R. §5.13(j)(2).

[13] *See, Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012).

[14] NRDC, 897 F.3d at 114.

[15] 5 U.S.C. § 553(b)(3)(B).

[16] 86 Fed. Reg. at 3023.

"fairness."[17] This, of course, ignores the fact that the CAFE penalties were increased years before, pursuant to a clear statutory directive, and multiple court decisions since then have confirmed the increase over that time, stating twice that the 2016 penalty increase "is now in force."[18] In light of this procedural history, there is no basis for arguing that there is any retroactivity concern. NHTSA's conclusion further ignores that the long-term planning cycles claimed by other manufacturers surely must have recognized and planned for the increases. It also ignores that the need for ample notice equally applies to manufacturers that rightfully relied upon and invested in vehicles that complied with the standards and would be at a competitive disadvantage resulting from NHTSA's IFR change.

NHTSA's logic is also internally inconsistent. NHTSA argues that manufacturers must have "ample advance notice of an increase to the CAFE civil penalty rate in order to modify their design, development, and production plans accordingly" as a basis for finding good cause, yet then asserts that the rule will "have a limited effect, i[f] any, on the composition of the fleet, as model years 2019 and 2020 are complete." Because model years 2019 and 2020 are complete, there is no need for an *immediate* regulation, and NHTSA does not even attempt to explain why it would have been impracticable to take notice and comment and complete this rulemaking before assessment of 2019 penalties. Likewise, NHTSA provides no justification as to why an immediate effective date is required in this context: it's only purported rationale in that regard is that "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." But NHTSA does not identify any manufacturers who would be required to pay an increased penalty during that 30-day period.

In any event, as Tesla's December 23, 2020 letter noted to the agency, a secretive granting of a rulemaking petition with immediate effectiveness is anything but fair to regulated parties. Further, to the extent NHTSA claims the need to expedite this rulemaking such need only arises because of the agency's repeated actions to undermine the civil penalty rate adjustment and the creation of an artificial deadline six days before the prior Administration departed office. As the Second Circuit has ruled in this matter:

> The Improvements Act permitted reconsideration of the catch-up increase following its publication of an interim final rule, 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. As in *NRDC v. NHTSA,* we cannot here "read the Improvements Act to permit the very kind of indefinite delay that it was enacted to end.[19]

Accordingly, the courts "cannot agree that an emergency of the agency's own making can constitute good cause."[20]

Moreover, NHTSA does not provide any recognizable justification or support for finding the impracticality element of "good cause." The IFR does not stave off any imminent threat to the environment or safety or national security.[21] To the contrary, by repeatedly circumventing the Improvements Act NHTSA has negatively impacted the environment through reduced deterrence and enforcement.

2. Providing Notice and Public Comment Was Not Unnecessary[22]

The "unnecessary" prong of the good cause inquiry is "confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public."[23] This is not the case here. NHTSA acknowledges in IFR that the regulated industry considers this issue to be of "significant impact."[24] The IFR also notes:

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17 Id.
18 *NRDC*, 894 F.3d at 116; *New York*, 974 F.3d at 101.
19 974 F.3d at 101.
20 *NRDC*, 894 F.3d at 115.
21 *See,* 49 C.F.R. §5.13(i)(1)(ii).
22 5 U.S.C. § 553(b)(3)(B).
23 *Util. Solid Waste Activities Grp. V. Env't Protection Agency,* 236 F.3d 749,755 (D.C. Cir. 2001).
24 86 Fed. Reg. at 3018.

> 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.[25]

The Improvements Act dictates that the first inflation adjustment to the civil monetary penalty was to be done by interim final rule to take effect not later than August 1, 2016.[26] As noted *supra*, the Second Circuit recognized this strictly limited the time frame under which NHTSA could adjust the civil penalty and such a timeframe has now passed. Despite NHTSA's assertions about the "parameters of the first adjustment" while answering the Alliance petition, the agency's action is a subsequent rulemaking under the Improvements Act subject to 5 U.S.C. § 553 rulemaking and it can find no such safe harbor in semantic claims of "parameters."

3. Providing Notice and Comment Was in the Public Interest.[27]

Contrary to NHTSA's framing, the justification for an IFR is not based upon whether *dispensing* with notice and comment would be contrary to the public interest, but rather whether *providing* notice and comment would be contrary to the public interest. The public interest prong of the good cause exception is met only in the rare circumstance when ordinary procedures—generally presumed to serve the public interest with due process—would in fact harm that interest.[28] Here, "the only purpose of the IFR is . . . "to rescue . . . manufacturer[s] from the folly of [their]. . own choices."[29]

Ironically, NHTSA has used an entirely secretive process to determine that "[t]he public interest also counsels towards NHTSA's issuance of an interim final rule."[30] Nothing NHTSA can assert "counsels" this way. Indeed, the long road to the issuance of this IFR starts with two legal challenges from multiple state Attorneys General and NGOs who are concerned about the reduction of deterrence, caused by the lack of inflation adjustments, on meeting the environment standards, protecting the public health and welfare, and realizing the statutory purpose of EPCA "to provide for improved energy efficiency of motor vehicles."[31] Moreover, the agency was well aware and on notice that not all in the automotive industry viewed the civil penalty in the same manner.[32]

Nor does the COVID-19 pandemic justify good cause here. To start, NHTSA cites *no* specific facts or evidence as to why the pandemic requires dispensing with notice and comment here, only generalized economic concerns. Instead, the agency "relies more on speculation than on evidence to establish that the COVID-19 pandemic has created an emergency . . . sufficient to justify dispensing with valuable notice and comment procedures."[33] Finally, as is explained below, the agency has ignored evidence that COVID-19 does not require this action to stave off purported economic consequences.

4. NHTSA's 11-Day Comment Period Further Compounds These Harms

NHTSA provides no basis for only providing an 11-day public comment period. Case law holds that "[a]lthough the APA has not prescribed a minimum number of days necessary to allow for adequate comment, based on the important interests underlying these requirements . . . the instances actually warranting a 10–day comment period will be rare. Such instances are generally characterized by the presence of exigent

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[25] 86 Fed. Reg. at 3023.

[26] 28 U.S.C. §2461, note §4(b)(1)(B).

[27] 5 U.S.C. § 553(b)(3)(B).

[28] *See*, *Mack Trucks, Inc. v. EPA*, 682 F.3d 87 (D.C. Cir. 2012).

[29] Id. at 93.

[30] 86 Fed. Reg. at 3023.

[31] 42 U.S.C. § 6201(5). Although EPCA has been amended, its energy conservation goal has remained intact, and NHTSA is required to consider it in its rulemaking.[31] *Center for Biological Diversity v. NHTSA,* 538 F.3d 1172, 1205 (9th Cir. 2008) ("[E]nergy conservation is the fundamental purpose of [EPCA] and an explicit statutory factor that NHTSA 'shall' consider.").

[32] *See,* Tesla Letter to NHTSA (Dec. 23, 2020); *See also*, *New York v. Nat'l Highway Traffic Safety Admin.*, 974 F. 3d 87 (2d Cir. 2020), Docket 19-2395, Doc. 169 (Tesla Amici Brief)

[33] *Ass'n of Cmty. Cancer Centers v. Azar*, 2020 WL 7640818, at *7 (D. Md. Dec. 23, 2020).

circumstances in which agency action was required in a mere matter of days."[34] A short comment period is particularly inappropriate given that the rule was made immediately effective. NHTSA appears to have adopted this truncated comment period in an effort to preclude NHTSA from extending the period under the new administration, because NHTSA's rules require extension requests to be filed "not later than 15 days before expiration of the time stated in the notice."[35] In short, this truncated period has deprived interested parties of a "meaningful opportunity to comment," providing an independent procedural basis to invalidate the rule.[36]

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At bottom, NHTSA's rule is procedurally indefensible. As a court recently noted regarding another Trump Administration midnight interim final rule, "it seems obvious—based on both common sense and the way the interim final rule is written—that the reasons the government offers for dispensing with the notice and comment requirements are contrived. The real reason is that the current presidential administration is in its waning days and would not have time to enact the policy if it adhered to these requirements. While there's nothing unlawful per se about rushing to enact policy in the final days of a presidential administration (indeed, it's a time-honored tradition), executive branch officials may not circumvent clear legal requirements in the eleventh hour to achieve goals they couldn't accomplish in the normal course."[37]

NHTSA's Granting of the Alliance Petition is Arbitrary and Capricious

As a result of this truncated and secret review, NHTSA's assessment was inequitably skewed toward the Alliance's members, acceptance of the petition's assertions, and the agency's decision making was completed in arbitrary and capricious manner.

NHTSA asserts that the agency "stands by the reasoning set forth in its July 2019 rule."[38] As a basis for the IFR NHTSA later describes the economic consequences of complying with the $14 adjustment by relying on assertions made in the 2019 rule.[39] Use of the 2019 reasoning highlights the arbitrary and capricious nature of NHTSA as the Second Circuit has unanimously overturned the agency's actions in the 2019 rule finding its reasoning wanting. NHTSA is attempting to accomplish by delay what it could not justify when it sought to reach the same results on the merits in 2019.

Moreover, NHTSA cannot hang its hat on potential vacatur by the Supreme Court because as of the date of publication the agency has not even filed a petition for a writ of certiorari.

1. NHTSA's Inequitable Treatment of Regulated Auto Industry Interest

Tesla supports strong vehicle GHG and CAFE performance standards for light-duty vehicles. These standards have helped drive investment in electric vehicle manufacturing and technology because the performance standards incentivize manufacturing vehicles that reduce fuel consumption, lower carbon emissions, and help transition the world to sustainable energy. These standards also incentivize vehicle manufacturers that deploy innovative technologies and out-perform requirements in a given model year by providing tradeable compliance credits. Credit banking and trading are an essential part of NHTSA's CAFE regulatory regime; they provide flexibility for manufacturers to choose compliance pathways that minimize cost and maximize efficiency and reward the production of vehicles that outperform the minimum standards.[40]

The CAFE standards have helped drive investment in electric vehicle manufacturing and technology because these performance standards encourage manufacturing vehicles with lower carbon emissions and provide a mechanism by which vehicle manufacturers that deploy innovative technologies and out-perform the

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[34] *N.C. Growers' Ass'n v. United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012).
[35] 49 C.F.R. § 553.19.
[36] *N.C. Growers, 702 F.3d at 770.*
[37] *CLSA v. CMS*, 2020 WL 7696050, at *2 (N.D. Cal. Dec. 28, 2020).
[38] 86 Fed. Reg. at 3019.
[39] *See,* 86 Fed Reg at 3022 (footnotes 63-65 citing the 2019 rule).
[40] *See.* 49 U.S.C. § 32903; 77 Fed. Reg. 62,624, 62,648-49 (Oct. 15, 2012).

standards are rewarded. Tesla's public U.S. Securities and Exchange Commission filings regularly report quarterly revenue derived from automotive regulatory credit transactions, including those taking place under NHTSA CAFE compliance program.[41]

Contrary to the one-sided manufacturer complaints that arbitrarily and capriciously form the basis of the IFR, the regulatory certainty provided by robust CAFE standards and the statutorily-compelled assurance that the appropriate inflation adjustments to the civil penalty will take place contribute to market conditions supporting billions of dollars in research, development, and manufacturing investments by Tesla. Tesla has expanded direct investment in its cutting-edge auto manufacturing and new electric vehicle charging and support infrastructure throughout the U.S. Additionally, in the summer of 2020, Tesla began construction of its newest vehicle and advanced battery manufacturing facility in Austin, TX. The project will invest over $1 billion in new construction and create at least 5,000 new jobs.[42] Upon completion, the Gigafactory Texas will produce Tesla's new Cybertruck and the Model Y crossover. Additionally, Tesla's investment in its North American charging network has grown to include over 2,000 Supercharger Stations with over 20,000 individual charging stalls.[43]

Through the IFR, the agency provides zero evidence that it seeks to understand or even contemplate the positive impact the inflation adjustment will have on some regulated parties in the auto industry or the bi-lateral nature of credit transactions and, conversely, the degree to which this action rewards intransigence and non-compliance.[44] For example, NHTSA highlights FCA's burden from the inflation adjustment and "additional amounts owed under certain agreements for the purchase of regulatory emissions credits,"[45] However, the agency completely ignores that for every credit transaction that has a cost there is a counterparty who earned such credits from the production and sale of advanced, cleaner, and more fuel-efficient vehicles. The financial gains realized from these agreements bolster reinvestment in the industry and the innovation that keeps the American automotive industry internationally competitive. Indeed, the choice to have a secretive IFR development further ensured that NHTSA could not appropriately consider these vital facts prior to the immediate effective date of its action.

a. Unsupported Action Based on Cost Analysis & COVID

NHTSA also relies, in part, on Executive Order (E.O.) 13924 to justify its interim final rule.[46] The agency's action run counter to directives under the E.O. that direct any implementing "procedure . . . be *public*, clear, and effective"[47] and that any application of "[p]enalties . . . be proportionate**,** *transparent, and imposed in adherence to consistent standards and only as authorized by law.*"[48] Granting of the Alliance petition was not done in public, was not transparent, and, as the Second Circuit has established, not authorized under the Improvements Act. Indeed, the E.O. creates no authority to disobey a Congressional statute.

Further, while E.O. 13924 makes not direct mention of application to the auto industry, NHTSA assessment of the financial state of the auto industry was limited to accepting assertions of some manufacturers that are members of the Alliance without any attempt to analyze the entire industry. Indeed, the Alliance does not represent the entire industry and its consistent attacks on the environment are contrary to the mission of other manufacturers.[49] As noted above, throughout 2020 Tesla manufacturing and sale performance has excelled and

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[41] Tesla Inc., Form 10-Q for the Quarterly Period Ended September 30, 2020 at 11 (Oct. 26, 2020), https://www.sec.gov/Archives/edgar/data//1318605/000156459020047486/tsla-10q_20200930.htm

[42] *See*, *e.g*., Press Release, Office of the Texas Governor: Greg Abbott, *Governor Abbott Welcomes Tesla to Texas* (July 22, 2020), https://gov.texas.gov/news/post/governor-abbott-welcomes-tesla-to-texas.

[43] *See* Tesla*, On the Road*, https://www.tesla.com/supercharger (last visited January 11, 2021).

[44] *See,* EPA, *The 2020 EPA Automotive Trends Report: Greenhouse Gas Emissions, Fuel Economy, Technology since 1975* (Jan. 2021) at 110-11 ("Credit trading among manufacturers has been an important part of the program for many manufacturers. An active credit market is enabling manufacturers to purchase credits to demonstrate compliance, with eight manufacturers selling credits, ten manufacturers purchasing credits, and 70 credit transactions occurring since the inception of the program.")

[45] 86 Fed. Reg. at 3021.

[46] *See generally*, 85 Fed Reg. 31353 (May 22, 2020) (publishing E.O. 13924).

[47] E.O. 13924 at Sec 6, (e) (emphasis added).

[48] E.O. 13924 at Sec. 6(f) (emphasis added).

[49] *See e.g.*, Zero Emission Transportation Association (ZETA), https://www.zeta2030.org/

the company has posted profits for the past five quarters. This success has been widely reported in the media. NHTSA, however, made no attempt to recognize this development even after receiving a letter from Tesla prior to publication of the IFR.

Moreover, the agency appears to have ignored more recent and independent assessments that the auto industry is rapidly recovering from the impacts of COVID. Indeed, some manufacturers, including some mentioned in the IFR, have outperformed past metrics. For example, GM has stated that its average transaction price in the fourth quarter of 2020 was a record $41,886 and that the full-year 2020 average was $39,229 also set a record.[50] Toyota reported U.S. sales in December 2020 increased by 20.4 percent on a volume basis compared to the previous year.[51] Similarly, Ford reported only a "small decline" in sales from over a year ago and that December 2020 sales were up 5.2% from over a year ago.[52] Even FCA reported a rise in Q4 2020 sales, the "best month of retail sales ever in December" for its RAM brand, and touted that "a resilient dealer network offset much of the decline in fleet sales caused by the COVID-19 pandemic."[53]

Finally, NHTSA repeatedly asserts that application of $14 adjustment and enforcement of the penalties for MY 2019 and 2020 would be detrimental to the auto industry's economic ability to recover from COVID impacts. NHTSA's arguments reek of selective enforcement and the agency's recent other enforcement actions contradict its rationale. Consistent with the critical need to deter non-compliance with safety and environmental standards, NHTSA just recently enforced a $210M penalty on Hyundai/Kia for safety recall violations related to prior model years.[54] Similarly, the agency has also played a significant role in enforcing against widespread non-compliance of emissions standards and the administration has penalized Toyota $180M for misreporting emissions data[55] and Daimler over $ 1.5B for cheating on emissions compliance over a number of years.[56] Clearly, these NHTSA actions recognize that enforcement and application of civil penalties for prior model year non-compliance is both an important deterrent and does not present an existential threat to the industry's COVID recovery.

Finally, NHTSA does not even attempt to analyze what economic harm, if any, would purportedly be caused by a $14 penalty amount. Instead, NHTSA provides vague statements that the penalty would "aggravate . . . financial hardships during this economic emergency," "may inhibit economic recovery," or "could very well inhibit economic recovery." These vague statements fall far short of the agency's obligation to engage in reasoned, evidence-based decisionmaking under the APA. NHTSA does note that it "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," but does not provide any specific analysis nor does it analyze whether that figure would cause material harm to any automotive industry participants.

2. Industry Reliance Arguments Are Misplaced and Invalid

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[50] CNN, *Americans are buying cars again* (Jan. 5, 2021), https://www.cnn.com/2021/01/05/business/us-car-sales-recover/index.html

[51] Toyota, *Toyota Motor North America Reports December 2020, Year-End Sales* (Jan. 5, 2021), https://pressroom.toyota.com/toyota-motor-north-america-reports-december-2020-year-end-sales/

[52] Ford, *Fourth Quarter 2020 Sales* (Jan. 6, 2021), https://media.ford.com/content/dam/fordmedia/North%20America/US/2021/01/06/ford-sales-release-dec2020.pdf

[53] FCA, *FCA US Reports Fourth-quarter and Full-year 2020 Sales Results* (Jan. 5, 2021), https://www.prnewswire.com/news-releases/fca-us-reports-fourth-quarter-and-full-year-2020-sales-results-301201374.html#:~:text=FCA%20US%20LLC%20sold%20499%2C431,Ram%20and%20Alfa%20Romeo%20brands.

[54] Insurance Journal, *Hyundai, Kia To Pay $210 Million U.S. Penalty for Failure to Recall Autos* (Dec. 1, 2020), https://www.insurancejournal.com/news/national/2020/12/01/592190.htm

[55] E& E News, *Toyota to pay $180M over emissions reporting* (Jan. 14, 2021), https://www.eenews.net/eenewspm/2021/01/14/stories/1063722611?utm_campaign=edition&utm_medium=email&utm_source=eenews%3Aeenewspm; See also, Bloomberg, *Why Much of the Car Industry Is Under Scrutiny for Cheating* (Jan. 10, 2018), https://www.bloomberg.com/news/articles/2017-08-02/why-it-seems-like-open-season-on-car-companies-quicktake-q-a

[56] Associated Press, *Daimler AG to pay $1.5B to settle emissions cheating probes* (Sept. 15, 2020), https://apnews.com/article/environment-california-germany-archive-stuttgart-563a0e48922787c1881da2430a8b514f

NHTSA attempts to support the IFR by agreeing that the Alliance had a reasonable reliance interest on the illegal 2019 civil penalty rule.[57] Such an assertion of reliance interest is fundamentally misplaced as the Alliance's membership, along with the rest of the regulated industry, state regulators, and the public, has been aware of the civil penalty adjustment since at least 2016. Indeed, the Alliance members even requested that the civil penalty adjustment be delayed until the beginning with model Year 2019. In August 2016, the Alliance asked NHTSA to "confirm that it will not apply the new penalties before Model Year 2019."[58] Similarly, JLR asserted "it would not be appropriate for any penalty increases to be imposed before Model Year 2019."[59]

In requesting MY 2019 as the beginning of the adjustment, the rule itself and the Alliance put its members on notice to use the CAFE statutory 18-month lead time to prepare and plan for meeting the MY 2019 fuel economy standards and address compliance flexibility based upon the civil penalty rate of $14.[60] To the extent some manufacturers now face a compliance burden under the $14 rate it is a product of their choice not to avail themselves of the original planning for compliance with the standards and instead to embark on a risky and illegal path of relying on obtaining further regulatory relief. While an inherently risky choice, the petitioners were further on notice of the limits of NHTSA's ability to provide relief when the Second Circuit struck down NHTSA's suspension rule in 2018. In sum, since the 2016 the regulatory landscape only varied as a result of petitioners' request for each illegal NHTSA action. Neither the Alliance nor NHTSA can assert a justifiable claim of reliance based upon ill-conceived risky business choices and an illegal 2019 rule, and such claims ring even more hollow when both parties bear responsibility for initiating the agency's ongoing illegal efforts to further delay adjustment of the penalty.[61]

If any "reasonable reliance" emerges from the regulatory history of civil penalty adjustment rules it is firmly rooted in the 2016 rule and attaches to the manufacturers that planned and operated consistent with EPCA's statutory goal to improve the fuel efficiency of vehicles and the regulatory environment created by Congress with the Improvements Act. Yet, in the IFR NHTSA wholly ignores the reliance interests of those manufacturers who properly planned and invested around outperforming the CAFE standards (and the 2016 civil penalty rule) so that their continued performance would be rewarded and create an ability for future investment in their businesses. There are two sides to every credit transaction and NHTSA intentionally has considered only the side of the nonperforming manufacturers.

Indeed, as the Alliance's assertion of reliance is fundamentally misplaced, NHTSA and the petitioners cannot complain about the Second Circuit decision to reinstate the $14 rate applied to MY 2019 and 2020. The Supreme Court cases support retroactivity of court decisions as the norm, but that retroactive application might be avoided if a party can show a reliance interest and some special circumstance or policy consideration that would make retroactivity unfair.[62] Here the only "unfairness" that accrues is to those manufacturers that adhered to the legal 2016 rule and continued to operate in a manner consistent with the efficiency objectives of EPCA. Petitioners essentially argue that instead of trying to meet the mandated fuel economy standard, they decided to plan to simply pay the penalty instead. Yet, again they have offered no evidence of their product plans before or after to demonstrate such reliance nor what changes they will have to make through MY 2021.

3. NHTSA's Illegal Actions Created Any Perceived Retroactivity and Those in the Industry Seeking Relief Already Acknowledged that MY 2019 Falls within the Rule

a. NHTSA's Illegal Activity Harms Deterrence

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[57] 86 Fed. Reg. at 3021.

[58] Auto Alliance, Petition for Partial Reconsideration of the Interim Final Rule on Civil Penalties, NHTSA Docket 2016-0075, 81 Fed. Reg. 43524, July 5, 2016 (Aug. 1, 2016) at 4.

[59] Jaguar Land Rover, Letter to Mark Rosekind, Ph.D., Administrator, National Highway Traffic Safety Administration (Aug. 3, 2016) (supporting Auto Alliance petition) at 3.

[60] 81 Fed. Reg. 95489 (Dec. 28, 2016) (responding to the Alliance's 2016 petition for relief).

[61] *See, e.g.*, *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 710 (D.C. Cir. 2016) (finding no reasonable reliance interests where "shifting regulatory treatment" prevented settled expectations).

[62] *See, Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 549 (1995).

NHTSA acknowledges that the goal of the Improvements Act is to ‘‘maintain the deterrent effect of civil monetary penalties and promote compliance with the law’’ but the agency claims implementing the Second Circuit ruling putting the 2016 rule into effect would have no deterrence effect and promote no additional compliance with the law.[63] It is NHTSA's actions, not the Second Circuit, that have undermined the deterrent nature of the civil penalty rate the agency now claims it cannot impact.

To the contrary of NHTSA's reasoning, deterrence occurs when an agency enforces the law and regulated parties recognize the imminent nature of the enforcement. Applying the 2016 increase to MY 2019 and 2020 creates this deterrent. EPCA's statutory purpose originates in manufacturers making production decisions based upon the enforceable standards. Recognizing the Second Circuit's decision on NHTSA's legal obligations and ensuring the civil penalty remains applicable to MY 2019 and 2020 will prevent more repetitive efforts, like the Alliance's petition, to undermine the Improvements Act through willful resistance to the performance standards and subsequent pleas for regulatory relief. Indeed, application of the $14 rate to MY 2019 and 2020 will deter the Petitioners from making continual and future bets on underperformance on standards and illegal agency actions. In short, NHTSA's IFR fully ignores the strong public interest in promoting compliance with the law.

b. NHTSA Illegal Action Created Any Supposed Retroactive Situation

NHTSA assertions about retroactive application of the civil penalty increase are misplaced. The IFR seeks to retroactively apply relief to MY 2019 and 2020 when legal regulatory action to increase the civil penalty has been found by the Second Circuit to have been correctly in place since 2016. EPCA itself does not allow for NHTSA to make a retroactive adjustment of the compliance levels or civil penalty rate. The statute requires NHTSA to "prescribe by regulation average fuel economy standards for automobiles" "[a]t least 18 months before the beginning of each model year."[64] The statute allows regulations to be amended so long as any amendment "that makes an average fuel economy standard more stringent" is made at least 18 months before the model year begins.[65] No provision of the statute expressly authorizes a regulation to be amended retroactively, to apply to a model year that has begun in the past, let alone a model year that has been completed in the past. Accordingly, NHTSA's attempt at retroactive alteration of the civil penalty rate through the IFR is not only disfavored, it is not allowed to occur under the Improvements Act.

4. Regulatory Language Illegally Eliminates MY 2019 and 2020 Civil Penalty

Exemplifying NHTSA's rush to grant the Alliance petition, the agency has now proposed an amended regulation that eliminates even the $5.50 civil penalty rate.[66] As provided at 49 C.F.R. §578.6(h)(2) prior to the IFR, the civil penalty rate was directly contained in the regulation at a rate of $5.50.[67]

NHTSA's new proposed regulations now amends §578.6(h)(2) to adjust to the $14 level beginning in MY 2022, but the amended regulation eliminates any reference to the civil penalty amount of $5.50 in the model years preceding MY 2022. Accordingly, the IFR should be withdrawn to ensure, as required by statute, a civil penalty rate is established and exists for MY 2019 and 2020.

Conclusion

As provided above, NHTSA's IFR is not supported by good cause and the grant of the Alliance's petition for rulemaking and the agency's subsequent rulemaking are arbitrary and capricious.

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[63] 86 Fed. Reg, at 3020.

[64] 49 U.S.C. § 32902(a).

[65] 49 U.S.C. § 32902(g)(2).

[66] 86 Fed. Reg. at 3026.

[67] Tesla notes that, pursuant to the Second Circuit's decision in *New York v. Nat'l Highway Traffic Safety Admin.*, 974 F. 3d 87 (2d Cir. 2020) , the Office of Federal Register should be directed to immediately provide a note to the online version of 49 C.F.R. 578.6(h)(2) indicating that, as currently published, the fine amount of $5.50 per .1 of a mile does not reflect the 2016 final rule (adjusting penalty to $14 per .1 of a mile) and the 2nd Circuit's decision.

Consistent with President Biden's "Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," Tesla requests NHTSA immediately review the IFR, vacate the IFR, and amend 49 C.F.R. §578.6(h)(2) to implement the 2016 final rule establishing a civil penalty rate of $14 beginning in MY 2019 as found at 81 Fed. Reg. 95489 (Dec. 28, 2016).[68]

Respectfully submitted,

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[68] *See,* White House, Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis (Jan. 20, 2021) at §§ 1-2, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/