

**Alliance for Automotive Innovation**

**Comments on National Highway Traffic Safety Administration  
Interim Final Rule, Request for Comments, Response to Petition for Rulemaking  
Civil Penalties**

**Docket ID No. NHTSA-2021-0001**

**January 25, 2021**

Attention

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Office of Chief Counsel, NHTSA

Comment

The Alliance for Automotive Innovation (“Auto Innovators”)<sup>1</sup> thanks the National Highway Traffic Safety Administration (“NHTSA”) for granting our petition for rulemaking<sup>2</sup> and for promulgating an Interim Final Rule<sup>3</sup> (the “IFR”) that establishes model year (“MY”) 2022 as the first year to which the increased civil penalty rate for violations of light-duty vehicle fuel economy standards will apply. As discussed in depth in our petition,<sup>4</sup> this action is consistent with previous actions taken by NHTSA in 2016. It also respects that design and production decisions set in motion years ago for MY 2019–2021 vehicles cannot be altered at this point to account for such increased penalties, and is a fair and logical implementation of the United States Court of Appeals for the Second Circuit decision on August 31, 2020. The IFR also takes into consideration the unforeseen challenges of the COVID-19 pandemic on the auto sector, which are resulting in economic impacts, disruptions throughout the supply chain, and stressing the broader economy.

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<sup>1</sup> Formed in 2020, the Alliance for Automotive Innovation is the singular, authoritative and respected voice of the automotive industry. Focused on creating a safe and transformative path for sustainable industry growth, the Alliance for Automotive Innovation represents the manufacturers producing nearly 99 percent of cars and light trucks sold in the U.S. The organization, a combination of the Association of Global Automakers and the Alliance of Automobile Manufacturers, is directly involved in regulatory and policy matters impacting the light-duty vehicle market across the country. Members include motor vehicle manufacturers, original equipment suppliers, technology and other automotive-related companies and trade associations. The Alliance for Automotive Innovation is headquartered in Washington, DC, with offices in Detroit, MI and Sacramento, CA. For more information, visit our website <http://www.autosinnovate.org>.

<sup>2</sup> Alliance for Automotive Innovation, RE: Petition for Rulemaking – 49 C.F.R. Part 578 (Oct. 2, 2020), *available at* Docket No. NHTSA-2021-0001-0002 (hereinafter “Petition”).

<sup>3</sup> National Highway Traffic Safety Administration, Civil Penalties, 86 *Fed. Reg.* 3016 (Jan. 14, 2021).

<sup>4</sup> Petition, *supra* note 2, at 3 *et seq.* (“Request and Basis for Petition”).

In 2016, NHTSA first sought to adjust the civil penalty rate for violations of light-duty vehicle corporate average fuel economy (“CAFE”) standards to \$14 for penalties assessed on or after August 4, 2016,<sup>5</sup> beginning with penalties applicable to MY 2015.<sup>6</sup> In response to a petition from Auto Innovators’ predecessor organizations,<sup>7</sup> NHTSA revisited that decision in late 2016<sup>8</sup> and made the adjusted penalty rate applicable to MY 2019 and later vehicles based on the conclusion that manufacturers could not realistically adjust their fleets prior to MY 2019 in order to avoid higher penalty rates for non-compliance.

As was then, the same reasoning applies now. Following NHTSA’s 2016 actions, in 2017 the agency held implementation of the penalty rate increase in abeyance, and then took comment on and finalized a new rule in 2019 finding that the Inflation Adjustment Act Improvement Act of 2015 (which had driven the earlier decision to adjust the penalty rate to \$14) did not apply to the CAFE civil penalty rate and reestablished a penalty rate of \$5.50.<sup>9</sup> The Second Circuit then in 2020 invalidated that rule, and reinstated the agency’s December 28, 2016 rule, effectively mandating that the civil penalty rate be raised to \$14. It is noteworthy that the Second Circuit reinstated the same rule in which NHTSA had extended the effective date to ensure application to model years that could have been adjusted at that time.<sup>10</sup>

CAFE compliance planning is complex, often subject to external factors impacting the market, and frequently relies on an array of tools including both technological advances, as part of the vehicle design and engineering phases, and careful credit planning. Applying the near-tripling of the civil penalty rate increase to essentially past and current model years unduly disrupts that complicated planning process—and further, can detract ongoing investment from future model years to cover any deficits or to pay for credits from model years that manufacturers can no longer affect with design or production choices. In fact, the retroactive nature of this rate increase is even greater than that of the rate increase that was initially proposed in 2016 because MY 2019 and 2020 vehicles have already been built, and MY 2021 vehicles are already in production. MY 2022 vehicles can start production as early as January 2, 2021.<sup>11</sup> Despite this, Auto Innovators believed that, in the present circumstances, it was reasonable for NHTSA to make the adjustment applicable to MY 2022 and continues in that belief.

The IFR issued by NHTSA is a fair and logical implementation of the Second Circuit’s decision. As we noted in our petition,

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<sup>5</sup> 81 *Fed. Reg.* 43,524 (July 5, 2016).

<sup>6</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>7</sup> Effective January 1, 2020, the Alliance of Automobile Manufacturers and the Association of Global Automakers combined to form the Alliance for Automotive Innovation.

<sup>8</sup> 81 *Fed. Reg.* 95,489 (Dec. 28, 2016).

<sup>9</sup> 84 *Fed. Reg.* 36007 (July 26, 2019).

<sup>10</sup> *N.Y. v. NHTSA*, Case No. 19-2395 (2<sup>nd</sup>. Cir. Aug. 31, 2020).

<sup>11</sup> See 40 C.F.R. § 85.2304(a).

[The] Second Circuit made clear [that] 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.<sup>12</sup>

By establishing the applicability of the increase in civil penalty rate as MY 2022, NHTSA avoids the retroactive application of increased penalties and encourages investment in prospective model years that can further improve the overall fuel economy of the fleet. A retroactive application of the increased penalty rate to model years prior to 2022 cannot at this point in time result in any additional fuel savings or environmental benefits, and instead of encouraging desired conduct, would redirect funds to the U.S. General Fund<sup>13</sup> that could instead be invested to further improve fuel economy for upcoming model years.

In conclusion, Auto Innovators remains in support of applying inflationary adjustments to the CAFE civil penalty rate to the extent required by the Inflation Adjustment Act Improvements Act of 2015 starting with MY 2022. This approach is consistent with that taken by NHTSA in 2016, avoids retroactive application of an increased penalty rate, and appropriately implements the Second Circuit's 2020 decision.

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<sup>12</sup> Petition, *supra* note 2.

<sup>13</sup> We further note that the Energy Independence and Security Act of 2007 stipulates that subject to the availability of appropriations, 50 percent of CAFE civil penalties collected after FY2008 be transferred to the Secretary of Transportation to “carry out a program to make grants to manufacturers for retooling, reequipping, or expanding existing manufacturing facilities in the United States to produce advanced technology vehicles and components.” 49 U.S.C. 32912(e)(2). However, no such amounts have been appropriated by Congress for the Secretary of Transportation to carry out this authorized purpose.