

**ATTORNEYS GENERAL OF NEW YORK, CONNECTICUT, DELAWARE,
ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA,
NEW JERSEY, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT,
AND WASHINGTON**

January 12, 2022

Dr. Steven Cliff, Deputy Administrator
National Highway Traffic Safety Administration
1200 New Jersey Avenue, SE
Washington, D.C. 20590

Re: 2022 Cost-of-Living Adjustment to the CAFE Civil Penalty

Dear Dr. Cliff:

The undersigned Attorneys General write to urge the National Highway Traffic Safety Administration (NHTSA) to adopt the requisite cost-of-living adjustment to the 2022 Corporate Average Fuel Economy (CAFE) civil penalty.

As you know, the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Improvements Act), 28 U.S.C. § 2461 note, requires federal agencies to adjust annually the civil penalties under their jurisdiction for inflation. *Id.* § 4(a). As discussed below, the Office of Management and Budget (OMB)'s December 15, 2021 guidance on implementing 2022 inflation adjustments requires NHTSA's CAFE penalty to be adjusted to \$15. As with all cost-of-living adjustments, this increase is required to take place by January 15, 2022.

The cost-of-living adjustment is crucial to maintaining the deterrent effect of the CAFE penalty, especially this year given the high inflation rate that has meaningfully reduced the penalty's real value. Automobile manufacturers' compliance with CAFE standards is critical to ensuring that the nation's light duty fleet conserves energy, reduces consumers' fuel costs, and lowers the emission of harmful pollutants, including carbon dioxide—one of the main drivers of climate change. Moreover, noncompliance with CAFE standards results in the emission of high levels of dangerous air pollutants, harming our environment and natural resources and threatening the health and safety of our residents, especially in our most vulnerable communities. We therefore request that NHTSA increase the 2022 CAFE penalty to \$15 for each tenth of a mile per gallon (mpg) that a manufacturer's fleet is not in compliance with the applicable CAFE standard, and we urge NHTSA to make this adjustment in a timely manner.

Congress Has Taken Increasingly Strong Measures to Ensure that Civil Penalties Do Not Lose Their Deterrent Effect.

For over thirty years, Congress has taken steps to counter the erosive effects of inflation on the federal government's civil monetary penalties. Beginning in 1990 with the Federal Civil Penalties Inflation Adjustment Act (Inflation Adjustment Act), Congress required the Executive Branch to submit a report to Congress identifying each civil monetary penalty as defined under the Act, and the amount each penalty would need to be adjusted to account for inflation. Pub. L. 101-410, § 4. Congress followed up in 1996 by amending the Inflation Adjustment Act to require agencies to adjust their civil monetary penalties for inflation, subject to a cap of 10% of the penalty's amount. Debt Collection Improvement Act of 1996, Pub. L. 104-134, § 31001, 110 Stat. 1321, 1321-373 (1996). As required by the 1996 amendment, NHTSA increased the CAFE penalty from \$5 per tenth of an mpg—the original penalty set by Congress in 1975—to \$5.50. 62 Fed. Reg. 5,167, 5,168 (Feb. 4, 1997).

In response to several government reports which found that many civil penalties, including NHTSA's CAFE penalty, had lost much of their deterrent effect due to inflation, Congress amended the Inflation Adjustment Act again by passing the Improvements Act in 2015. 28 U.S.C. § 2461 note. The Improvements Act directed federal agencies to make a one-time "catch up" adjustment intended to restore much of the original value of eroded federal civil penalties. *Id.* §§ 4(b)(1), 5(b)(2). In contrast to the 1996 amendments, the catch-up adjustment was capped at 150% of the existing penalty amount, *id.* § 5(b)(2)(C), and was to take place no later than August 1, 2016. *Id.* § 4(b)(1)(B).

After the initial catch up amount, the Improvements Act requires federal agencies to adjust the civil monetary penalties within the agency's jurisdiction on an annual basis no later than January 15th of each year. *Id.* § 4(a)(1). The annual adjustments are based on the percent change between the October consumer price index (CPI) preceding the date of the adjustment and the prior year's October CPI, with any changes to the penalty amounts rounded to the nearest dollar. *Id.* § 5(a), (b)(1)(A),(B). The Act directs OMB to issue guidance every December 15th on how to implement the required inflation adjustments.

As discussed above, applying the OMB mandated 1.06222 multiplier to the currently applicable \$14 CAFE civil penalty results in \$14.87, which, in accordance with the Improvements Act note § 5(a), rounds to a \$15 CAFE penalty for 2022.

Our Coalition Is Committed to Ensuring that Congress' Inflation Adjustment Requirements Are Implemented.

To comply with the 2015 Improvements Act's direction that agencies make catch-up adjustments to civil penalties within their jurisdiction, NHTSA originally issued an interim final rule adjusting for inflation the various civil penalties it administers. 81 Fed. Reg. 43,524 (July 5, 2016). In December 2016, NHTSA issued a final rule affirming the catch-up increase for the CAFE penalty and agreeing, in response to a petition by two automaker associations, to apply the increased penalty beginning with model year 2019 rather than 2016. 81 Fed. Reg. 95,489 (Dec. 28, 2016).

Soon after the Trump Administration took office, however, NHTSA took action to forestall the \$14 penalty rate it originally adopted. On July 12, 2017, NHTSA published a final rule purporting to indefinitely suspend the effective date of the 2016 rule while it reconsidered the penalty rate. 82 Fed. Reg. 32,139, 32,139–40 (July 12, 2017). It also claimed to reinstate the \$5.50 penalty rate during the pendency of its reconsideration process. *Id.* at 32,140, 32,143.

New York, together with California, Maryland, and Vermont, the Commonwealth of Pennsylvania, and three environmental public interest organizations, challenged NHTSA's indefinite suspension of the \$14 penalty in the Second Circuit. After taking the unusual first step of vacating the indefinite suspension rule, the Second Circuit issued an opinion holding that NHTSA had violated the Improvement Act's "highly circumscribed schedule" and its "clear and mandatory" deadlines, which allow "no discretion to the agencies regarding the timing of the adjustments." *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 109, 113 n.12 (2d Cir. 2018) (*NRDC*).

Despite the Second Circuit's holding in *NRDC*, in 2019, NHTSA issued a new rule purporting to eliminate the 2016 inflation adjustment and reinstate the previous \$5.50 penalty amount. 84 Fed. Reg. 36,007 (July 26, 2019). In support of its action, NHTSA argued that the CAFE civil penalty rate was not a "civil monetary penalty" under the Act because the penalty rate was just one component "of a complicated market-based enforcement mechanism" used to determine the ultimate penalty paid by a non-complying manufacturer. *Id.* at 36,008.

New York, together with California, Connecticut, Delaware, Illinois, Maine, Maryland, New Jersey, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and two environmental public interest organizations, challenged NHTSA's 2019 rule. On August 31, 2020, a different Second Circuit panel vacated the rule in *New York v. Nat'l Highway*

Traffic Safety Admin., 974 F.3d 87 (2d Cir. 2020). After closely reviewing the text of the Act and considering the agency’s 1997 inflation adjustment of the CAFE penalty rate, the Court rejected NHTSA’s new claim that the CAFE civil penalty was not subject to the Improvement Act’s mandate. *Id.* at 99–100. The Second Circuit again held that the agency had “acted in excess of its statutory authority” when it invoked the negative economic impact exception to rescind the catch-up adjustment years after the “limited window of time” had closed for agencies to apply that exception. *Id.* at 101. Once again, the Court affirmed that the \$14 penalty was “now in force.” *Id.*

In January 2021, seeking once more to suspend the full application of the \$14 penalty amount, NHTSA issued an interim final rule purporting to repeal the \$14 civil penalty for model years 2019–2021. 86 Fed. Reg. 3016 (Jan. 14, 2021). New York and the states of California, Connecticut, Delaware, Illinois, Maine, Maryland, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, and Washington, and the Commonwealths of Massachusetts and Pennsylvania challenged that rule in the Second Circuit. *New York, et al. v. Nat’l Highway Traffic Safety Admin.*, No. 21-339 (2d Cir.). That appeal is currently being held in abeyance pending NHTSA’s review of the challenged rule pursuant to President Biden’s January 20, 2021 Executive Order. The States also commented in support of NHTSA’s August 17, 2021 supplemental notice of proposed rulemaking, 86 Fed. Reg. 46,811 (Aug. 20, 2021), that proposes to withdraw the interim final rule and restore the \$14 penalty for model years 2019–2021. Given the importance of the CAFE civil penalty in ensuring compliance with the CAFE standards, we urge NHTSA to take immediate action to finalize this rulemaking.

Our Coalition Urges NHTSA to Implement the Cost-of-Living Adjustment to the 2022 CAFE Civil Penalty by January 15, 2022.

As our coalition’s participation in the administrative processes and litigation reflects, we have a keen interest in ensuring that the CAFE civil penalty amounts are lawful and provide a meaningful deterrent. Noncompliance with the CAFE standards results in higher emissions of air pollutants in our states, which harms the environment, our natural resources, and our residents including, in particular, some of our most vulnerable communities. Failure to account for the inflation of the last year would leave in place an eroded CAFE penalty that will not deter noncompliance with CAFE standards, resulting in these harms. The inflation adjustment mandated by Congress requires NHTSA to increase the CAFE penalty to \$15 for 2022, and to do so by January 15, 2022. We support NHTSA taking this action in a timely manner.

Respectfully submitted,



LETITIA JAMES
Attorney General
STATE OF NEW YORK



WILLIAM TONG
Attorney General
STATE OF CONNECTICUT



KATHLEEN JENNINGS
Attorney General
STATE OF DELAWARE



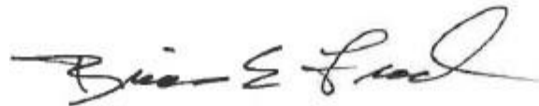
KWAME RAOUL
Attorney General
STATE OF ILLINOIS



TOM MILLER
Attorney General
STATE OF IOWA



AARON M. FREY
Attorney General
STATE OF MAINE



BRIAN E. FROSH
Attorney General
STATE OF MARYLAND



MAURA HEALEY
Attorney General
COMMONWEALTH OF MASSACHUSETTS



KEITH ELLISON
Attorney General
STATE OF MINNESOTA



ANDREW J. BRUCK
Acting Attorney General
STATE OF NEW JERSEY



ELLEN F. ROSENBLUM
Attorney General
STATE OF OREGON



JOSH SHAPIRO
Attorney General
COMMONWEALTH OF PENNSYLVANIA



PETER F. NERONHA
Attorney General
STATE OF RHODE ISLAND



THOMAS J. DONOVAN, JR.
Attorney General
STATE OF VERMONT



BOB FERGUSON
Attorney General
STATE OF WASHINGTON