July 28, 2021), WC Docket No. 12–375, FCC 21–60 (*2021 ICS Order*), in which it continued its reform of the calling services marketplace. In that *Order,* the Commission, among other actions, delegated authority to WCB/OEA to implement a data collection for ICS providers. Pursuant to that delegation, WCB/OEA adopted the *Mandatory Data Collection Order,* including the instructions, reporting template, and certification form for the data collection, on January 18, 2022.

Federal Communications Commission.

Lynne Engledow,

Deputy Chief, Pricing Policy Division, Wireline Competition Bureau.

[FR Doc. 2022–06517 Filed 3–31–22; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 578

[Docket No. NHTSA–2021–0001]

RIN 2127–AM32

Civil Penalties

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: On January 14, 2021, NHTSA published an interim final rule in response to a petition for rulemaking from the Alliance for Automotive Innovation. The interim final rule applied the adjusted civil penalty rate applicable to automobile manufacturers that violate relevant corporate average fuel economy (CAFE) standards beginning with vehicle Model Year (MY) 2022. The interim final rule also requested comment. In light of a subsequent Executive order and the agency's review of comments, NHTSA reviewed and reconsidered that interim final rule, a process that included a supplemental notice of proposed rulemaking (SNPRM) to consider the appropriate path forward and to allow interested parties sufficient time to provide comments. As a result of this review and reconsideration, including a careful consideration of the comments received in response to the SNPRM, NHTSA is repealing the interim final rule and reverting to the December 2016 final rule that would apply the adjustment for the CAFE civil penalty rate beginning with Model Year 2019. In this rule, NHTSA is also applying the statutorily required annual adjustments through 2022. Going forward, NHTSA will continue to make the mandatory adjustments to the CAFE civil penalty rate, as required by law for all civil monetary penalties.

DATES:

Effective date: This rule is effective as May 31, 2022.

Petitions for reconsideration: Petitions for reconsideration of this final rule must be received not later than May 16, 2022.

ADDRESSES: Any petitions for reconsideration should refer to the docket number of this document and be submitted to: Deputy Administrator, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, West Building, Fourth Floor, Washington, DC 20590.

Docket: All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the following location: Docket Management Facility, M–30, U.S. Department of Transportation, West Building, Ground Floor, Rm. W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The telephone number for the docket management facility is (202) 366–9324. The docket management facility is open between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Michael Kuppersmith, Office of Chief Counsel, NHTSA, email *michael.kuppersmith@dot.gov,* telephone (202) 366–2992, facsimile (202) 366–3820, 1200 New Jersey Ave. SE, Washington, DC 20590.

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A. CAFE Statutory and Regulatory Background

NHTSA sets [1] and enforces [2] corporate average fuel economy (CAFE) standards for the United States light-duty automobile fleet, and in doing so, assesses civil penalties against manufacturers that violate applicable standards and are unable to make up the shortfall with credits.[3] The civil penalty amount for CAFE violations was originally set by statute in 1975, and beginning in 1997, included a rate of $5.50 per each tenth of a mile per gallon (0.1) that a manufacturer's CAFE performance falls short of its compliance obligation. This shortfall amount is then multiplied by the number of vehicles in that manufacturer's fleet.[4] The basic equation for calculating a manufacturer's civil penalty amount, before accounting for credits, is as follows:

(penalty rate, in $ per 0.1 mpg per vehicle) × (amount of shortfall, in tenths of an

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[1] 49 U.S.C. 32902. The authorities vested in the Secretary under chapter 329 of Title 49, U.S.C., have been delegated to NHTSA. 49 CFR 1.95(a).

[2] 49 U.S.C. 32911, 32912.

[3] Within statutory constraints, credits may be either *earned* (for over-compliance by a given manufacturer's fleet, in a given model year), *transferred* (from one fleet to another), or *purchased* (in which case, another manufacturer earned the credits by over-complying and chose to sell that surplus). 49 U.S.C. 32903.

[4] A manufacturer may have up to three fleets of vehicles, for CAFE compliance purposes, in any given model year—a domestic passenger car fleet, an imported passenger car fleet, and a light truck fleet. Each fleet belonging to each manufacturer has its own compliance obligation, with the potential for either over-compliance or under-compliance. There is no overarching CAFE requirement for a manufacturer's total production.

mpg) × (# of vehicles in manufacturer's fleet).[5]

Starting with Model Year 2011, the Energy Independence and Security Act of 2007 (EISA) provided for credit transfers among a manufacturer's various fleets.[6] The law also provided for trading between vehicle manufacturers, which has allowed vehicle manufacturers the opportunity to acquire credits from competitors rather than paying civil penalties for violations. Manufacturers can choose to carry back credits to apply to any of three model years before they are earned or carry them forward to apply to any of the five model years after they are earned.

In complement to NHTSA's regulation of fuel economy, the Environmental Protection Agency (EPA) regulates the emissions of light-duty vehicles. These regulations include standards to regulate greenhouse gas emissions from the light-duty fleet. The Clean Air Act requires EPA to set greenhouse gas (GHG) emissions standards from light-duty vehicles since EPA has made an ''endangerment finding'' that greenhouse gases ''cause[s] or contribute[s] to air pollution which may reasonably be anticipated to endanger public health or welfare.'' [7] Although NHTSA and EPA have different roles and independent enforcement and compliance obligations, and operate under different statutory authority, the agencies work together to achieve the goals of their respective statutes, and their light-duty vehicle fuel economy rulemakings are harmonized to the extent possible to work in tandem. However, the CAFE program is subject to various statutory requirements not applicable to the EPA GHG program. One such requirement, for example, requires automakers to meet a separate average fleet requirement for automobiles that are manufactured domestically.[8] The Clean Air Act does not include a similar requirement for EPA's GHG standards.

B. Civil Penalties Inflation Adjustment Act Improvements Act of 2015

On November 2, 2015, the Federal Civil Penalties Inflation Adjustment Act Improvements Act (2015 Act), Public Law 114–74, Section 701, was signed into law. The 2015 Act required Federal agencies to promulgate an interim final rule to make an initial ''catch-up'' adjustment to the civil monetary penalties they administer, and then to make subsequent annual adjustments. The 2015 Act limited the initial adjustment to 150 percent of the then-current penalty.

In a February 24, 2016 memorandum, the Director of the Office of Management and Budget (OMB) provided initial guidance to all Federal agencies on how to calculate the initial adjustment required by the 2015 Act.[9] The initial ''catch-up'' adjustment was based on the change between the Consumer Price Index for all Urban Consumers (CPI–U) for the month of October in the year the penalty amount was established or last adjusted by Congress and the October 2015 CPI–U. The February 24, 2016 memorandum contained a table with a multiplier for the change in CPI–U from the year the penalty was established or last adjusted to 2015. To arrive at the adjusted penalty, the agency multiplied the penalty amount when it was established or last adjusted by Congress, excluding adjustments under a prior adjustment statute, by the multiplier for the increase in CPI–U from the year the penalty was established or adjusted. Ensuing guidance from OMB identifies the appropriate multiplier for agencies to use to calculate the subsequent annual adjustments.[10]

C. NHTSA's Actions to Date Regarding CAFE Civil Penalties

1. Initial Interim Final Rule

On July 5, 2016, NHTSA published an interim final rule, adopting the adjustments required by the statute for all civil penalties under its administration, following the procedure and the formula in the 2015 Act. One of the adjustments NHTSA made at the time was raising the civil penalty rate for CAFE violations from $5.50 to $14.[11] NHTSA also indicated in that interim final rule that the Secretary's statutory authority under the Energy Policy and Conservation Act (EPCA) to establish an additional increase for such violations would similarly need to be adjusted from the statutory cap of $10 to $25, but did not codify this change in the regulatory text. In the preamble discussion, NHTSA provided detailed discussion of the authority granted in Public Law 95–619, 402, 92 Stat. 3255 (Nov. 9, 1978), which allowed the Secretary of Transportation to establish a new civil penalty for each .1 of a mile a gallon by which the applicable average fuel economy standard under EPCA exceeds the average fuel economy for automobiles to which the standard applies manufactured by the manufacturer during the model year. NHTSA explained that these amendments, codified in 49 U.S.C. 32912(c), state that the new civil penalty cannot be more than $10. NHTSA further explained that applying the multiplier for the increase in CPI–U for 1978 in Table A of the February 24, 2016 memorandum (3.54453) to the $10 maximum penalty the Secretary is permitted to establish under 49 U.S.C. 32912(c) results in an adjusted civil penalty of $35. NHTSA then explained that because this calculation would result in an increase of greater than 150 percent, the adjusted maximum civil penalty that the Secretary is permitted to establish under 49 U.S.C. 32912(c) is $25 (current maximum penalty $10 × 2.5). NHTSA concluded that because the new maximum penalty that the Secretary is permitted to establish under

[5] The process of determining civil penalties occurs after the end of a model year, following NHTSA's receipt of final reports from the Environmental Protection Agency (EPA). See 77 FR 62624, 63126 (Oct. 15, 2012). NHTSA uses the penalty rate from the calendar year that is the same as the model year to assess CAFE violations. For example, NHTSA will assess the civil penalties for Model Year 2022 vehicles using the 2022 calendar year rate—even if NHTSA ultimately assesses the penalty in a later calendar year.

[6] Public Law 110–140, 104.

[7] 42 U.S.C. 7521, *see also* 74 FR 66495 (Dec. 15, 2009) (''Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act'').

[8] 49 U.S.C. 32902(b)(4).

[9] Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Feb. 24, 2016), available online at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2016/m-16-06.pdf.*

[10] Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of the 2017 Annual Adjustment Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 16, 2016), available online at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/m-17-11_0.pdf;* Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of Penalty Inflation Adjustments for 2018, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 15, 2017), available online at *https://www.whitehouse.gov/wp-content/uploads/2017/11/M-18-03.pdf;* Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of Penalty Inflation Adjustments for 2019, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 14, 2018), available online at *https://www.whitehouse.gov/wp-content/uploads/2017/11/m_19_04.pdf;* Memorandum from the Acting Director of OMB to Heads of Executive Departments and Agencies, Implementation of Penalty Inflation Adjustments for 2020, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 16, 2019), available online at *https://www.whitehouse.gov/wp-content/uploads/2019/12/M-20-05.pdf;* Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of Penalty Inflation Adjustments for 2021, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 23, 2020), available online at *https://www.whitehouse.gov/wp-content/uploads/2020/12/M-21-10.pdf.*

[11] 81 FR 43524 (July 5, 2016).

49 U.S.C. 32912(c) is $25, the new adjusted civil penalty in 49 CFR 578.6(h)(2) of $14 does not exceed the maximum penalty that the Secretary is permitted to impose. NHTSA addresses the adjustments that occurred to the statutory cap since that time and codifies the adjusted cap in this final rule. That initial interim final rule became effective on August 4, 2016.

2. Initial Petition for Reconsideration and Response

On August 1, 2016, the then-Alliance of Automobile Manufacturers and the Association of Global Automakers (since combined to form the Alliance for Automotive Innovation) jointly petitioned NHTSA for reconsideration of the CAFE penalty provisions issued in the interim final rule.[12] The Alliance and Global joint petition raised concerns with the impact that the increased penalty rate would have on CAFE compliance costs, which they estimated to be at least $1 billion annually. Specifically, the petition identified several issues, including retroactivity. The petitioners were concerned that applying the penalty increase associated with model years that had already been completed or for which a company's compliance plan had already been ''set'' was a retroactive application of the adjustment.

In response to the joint petition, NHTSA issued a final rule on December 28, 2016.[13] In that rule, NHTSA agreed that raising the penalty rate for model years already fully complete at the time the 2015 Act was enacted would be inappropriate, given that courts generally disfavor the retroactive application of statutes, and that applying penalties to model years that were already completed could not deter non-compliance, incentivize compliance, or lead to any improvements in fuel economy. NHTSA also agreed that raising the rate for model years for which product changes were infeasible due to lack of lead time from the enactment of the 2015 Act did not seem consistent with Congress's intent that the CAFE program be responsive to consumer demand. Accordingly, NHTSA stated that it would not apply the adjusted penalty rate of $14 (plus any other required adjustments that occurred or may occur) until Model Year 2019, as the agency believed that 2019 would be the first year after the 2015 Act in which product changes could reasonably be made in response to the higher penalty rate. This final rule had an effective date of January 27, 2017.

3. NHTSA Reconsideration

Beginning in January 2017, NHTSA took a series of actions to delay the effective date of the December 2016 final rule, ultimately leading to a rule announcing that the effective date would be delayed indefinitely.[14] In April 2018, the United States Court of Appeals for the Second Circuit vacated NHTSA's indefinite delay of the rule's effective date, stating that the December 2016 rule was in force.[15]

In July 2019, NHTSA finalized a rule determining, in part, that the 2015 Act did not apply to the CAFE civil penalty rate. On September 9, 2019, the Institute for Policy Integrity at New York University School of Law (IPI) submitted a petition for reconsideration of NHTSA's July 2019 final rule. IPI argued that the rule was unreasonable and not in the public interest because it did not properly account for the associated costs and benefits. Additionally, IPI challenged NHTSA's statutory interpretations.

On August 31, 2020, the United States Court of Appeals for the Second Circuit vacated the July 2019 rule and ruled again that the December 2016 rule was in force.[16] The Second Circuit denied panel rehearing on November 2, 2020. NHTSA did not issue a decision on the IPI petition prior to the Second Circuit's decision vacating the rule.

4. Subsequent Petitions and Interim Final Rule

Following the Second Circuit's decision, on October 2, 2020, NHTSA received a petition for rulemaking from the Alliance for Automotive Innovation (Auto Innovators) requesting that the adjustment to $14 not be applied until Model Year 2022.[17] According to the Auto Innovators' petition, ''Model Years 2019 and 2020 are effectively lapsed now,'' and ''[m]anufacturers are unable to change MY 2021 plans at this point.'' The Auto Innovators argued that, as in the December 2016 rule, applying the increased penalty to any violations that cannot practically be remedied does not serve the statutory purposes of deterring prohibited conduct or incentivizing favored conduct. According to the Auto Innovators, doing so would effectively be punishing violators retroactively.

In addition to relying on the reasoning of the December 2016 rule as it applied to the increase based on the timing of the enactment of the 2015 Act, the Auto Innovators' petition noted, but did not provide detailed evidence of, the significant economic impact suffered by the industry due to COVID–19. Accordingly, the Auto Innovators' petition also cited the now-revoked Executive Order 13924,[18] requiring Federal agencies to take appropriate action—consistent with applicable law—to combat the economic emergency caused by COVID–19. Several individual vehicle manufacturers submitted supplemental information to NHTSA further articulating the negative economic position they were in due to the COVID–19 public health emergency and the potential and significant adverse economic consequences of the increased civil penalty rate.

After considering the issues raised, NHTSA granted the Auto Innovators' petition and promulgated an interim final rule providing that the increase[19] will apply beginning with Model Year 2022. The interim final rule stated that applying the increased civil penalty rate to vehicles in Model Years 2019, 2020, and 2021 would not result in additional fuel savings and would impose higher penalties retroactively because those model years were already completed, or, for Model Year 2021, production plans were set prior to the Second Circuit's decision striking down the 2019 rule. The interim final rule relied in large part on the reasoning in the December 2016 final rule, though it did not discuss the extent to which the four years between the two rules should affect that reasoning. Additionally, the interim final rule addressed the negative economic impact on the automotive sector caused by the global outbreak of COVID–19.[20] That interim final rule

[12] Jaguar Land Rover North America, LLC also filed a petition for reconsideration in response to the July 5, 2016 interim final rule raising the same concerns as those raised in the joint petition. Both petitions, along with a supplement to the joint petition, can be found in Docket No. NHTSA–2016–0075 at *www.regulations.gov.*

[13] 81 FR 95489 (December 28, 2016).

[14] 82 FR 8694 (January 30, 2017); 82 FR 15302 (March 28, 2017); 82 FR 29009 (June 27, 2017); 82 FR 32139 (July 12, 2017).

[15] Order, ECF No. 196, *Natural Res. Def. Council* v. *NHTSA,* Case No. 17–2780 (2d Cir. Apr. 24, 2018); *see also Natural Res. Def. Council* v. *NHTSA* (*NRDC*), 894 F.3d 95, 116 (2d Cir. 2018) (''The Civil Penalties Rule, 81 FR 95,489, 95,489–92 (December 28, 2016), no longer suspended, is now in force.'').

[16] *New York* v. *NHTSA,* 974 F.3d 87 (2d Cir. 2020).

[17] The Auto Innovators also submitted a supplement to its petition on October 22, 2020. The petition, the supplement, and other supporting materials were posted with the interim final rule and can be found in Docket No. NHTSA–2021–0001 at *www.regulations.gov.*

[18] *See* Executive Order 14018, 86 FR 11855, ''Revocation of Certain Presidential Actions'' (Feb. 24, 2021).

[19] The rate is increasing to $14, plus any required adjustments that occurred or may occur. 49 CFR 578.6(h)(2).

[20] The reasoning for the interim final rule is set forth more fully in the January 14, 2021 document published at 86 FR 3016.

amended the relevant regulatory text accordingly—effective immediately and without having afforded prior notice or the ability to comment in advance—and requested comment within ten days. The interim final rule also noted that IPI's petition was moot, and, to the extent it was not moot, NHTSA denied it.

The interim final rule is currently the subject of legal challenges that have been consolidated in the Second Circuit.[21]

5. Supplemental Notice of Proposed Rulemaking

Before NHTSA's interim final rule was published but after the agency had announced, through the publication of the Fall 2020 Unified Agenda of Regulatory and Deregulatory Actions, that it had initiated a rulemaking in response to the Auto Innovators' petition, NHTSA received two letters regarding the rulemaking: One jointly from the State of New York, the Natural Resources Defense Council, and the Sierra Club, and one from Tesla.[22] These letters raised concerns with NHTSA's rulemaking, particularly with the entities' inability to review or comment on the Auto Innovators' petition for rulemaking in advance. NHTSA did not respond to these letters prior to the publication of the interim final rule, but NHTSA included both letters in the docket when the interim final rule was published and noted that they would ''be treated as comments for appropriate consideration.'' [23]

After the interim final rule was published, NHTSA received eight more substantive comments.[24] NHTSA received comments from:

- The Attorneys General of California, New York, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, Oregon, Pennsylvania, Rhode Island, Washington, and Vermont; [25]
- American Council for an Energy-Efficient Economy, Center for Auto Safety, Center for Biological Diversity, Consumer Federation of America, Consumer Reports, The Ecology Center (Michigan), Environmental Law and Policy Center, Interfaith Power & Light, Sierra Club, Union of Concerned Scientists; [26]
- Natural Resources Defense Council and Sierra Club; [27]
- The Institute for Policy Integrity at New York University School of Law; [28]
- Tesla; [29]
- The Alliance for Automotive Innovation; [30]
- The National Automobile Dealers Association (NADA); [31] and
- An anonymous individual.[32]

Most of the comments opposed the interim final rule, raising serious procedural, legal, and substantive concerns. In general, these comments argued that NHTSA did not have the authority to delay the application of the adjusted rate beyond Model Year 2019 and that, regardless, NHTSA would have to do so through notice-and-comment, not by an interim final rule that was effective immediately without prior notice and without the opportunity to comment in advance. In supporting these arguments, the commenters relied, in part, upon the two earlier decisions by the Second Circuit.

Most of these comments also challenged the interim final rule as arbitrary and capricious on multiple grounds. For example, the comments discussed that applying the increased rate before Model Year 2022 would not be retroactive because the increased rate was originally applied in 2016 when it was still prospective—both in the initial interim final rule in July 2016 and in the rule in response to the initial petition for reconsideration in December 2016—and NHTSA's subsequent actions that were invalidated by the Second Circuit did not change that fact. In these commenters' view, manufacturers have been on notice of the increase since well before Model Year 2019, and any reliance to the contrary was undue. These comments argued that this was particularly true given the rulings from the Second Circuit litigation, in which many of these commenters and the Auto Innovators were involved, with the predecessor organizations having intervened and participated in this litigation. The comments further argued that delaying the application of the increased rate would affect future compliance because manufacturers may be incentivized to hold credits for model years when the higher rate will apply. That is, a credit earned at the $5.50 rate is likely to be more valuable—either for the manufacturer's own use or to sell to another manufacturer—in a model year when the rate increases to at least $14 (although credits must be used within a limited number of years before they expire). The comments also argued that the interim final rule improperly analyzed the economic effects of the COVID–19 pandemic, for example, by not accounting for any positive economic data and disregarding that some of the relevant conduct occurred before the pandemic.

These comments also argued that the interim final rule violated the National Environmental Policy Act of 1969 (NEPA), by, for example, not taking a hard look at the environmental consequences of the action and ignoring the environmental harms that may result from delaying the penalty increase. Lastly, in response to NHTSA's request for comment about whether the adjustment should be delayed further until Model Year 2023, these comments opposed any additional delay. Some of these comments also expressed concern with the short ten-day comment period provided by the interim final rule—and only after the rule was already effective without any opportunity to comment beforehand.

Two of the comments supported the interim final rule. The Auto Innovators reiterated the reasoning set forth in its petition, which NHTSA granted in the interim final rule. According to the Auto Innovators, the interim final rule was consistent with NHTSA's December 2016 rule; appropriately accounted for the industry's production and design processes, including the unforeseen challenges of the COVID–19 public health emergency; and fairly implemented the Second Circuit's decision. The Auto Innovators also noted that Model Year 2022 vehicles could have begun being produced as early as January 2, 2021—about two weeks before the interim final rule was published—but it believes NHTSA was reasonable to make the adjustment applicable beginning in Model Year 2022, declining to request a further delay in the adjustment to Model Year 2023. NADA supported the Auto

[21] *Natural Res. Def. Council* v. *NHTSA,* No. 21–139 (2d Cir.) (consolidated with *New York* v. *NHTSA,* No. 21–339 (2d Cir.) and *Tesla, Inc.* v. *NHTSA,* No. 21–593, transferred from No. 21–70367 (9th Cir.)). This litigation is currently being held in abeyance pending NHTSA's reconsideration of the interim final rule.

[22] NHTSA–2021–0001–0001; NHTSA–2021–0001–0009.

[23] 86 FR 3016, 3023 n.74 (Jan. 14, 2021).

[24] NHTSA received a ninth comment that simply said, ''Help.'' NHTSA–2021–0001–0018. Without any additional information, NHTSA cannot reasonably address or respond to this commenter's concern. After the close of the comment period, NHTSA also received a letter from two U.S. Representatives regarding the economic harms of applying the adjustment before Model Year 2022. NHTSA–2021–0001–0046. NHTSA is treating this letter as a comment for this rulemaking and addressing the issue it raises in this final rule. *See* 49 CFR 553.23.

[25] NHTSA–2021–0001–0017.

[26] NHTSA–2021–0001–0015.

[27] NHTSA–2021–0001–0013.

[28] NHTSA–2021–0001–0011.

[29] NHTSA–2021–0001–0012.

[30] NHTSA–2021–0001–0014.

[31] NHTSA–2021–0001–0016.

[32] NHTSA–2021–0001–0019.

Innovators' comment, adding that increased CAFE civil penalties before Model Year 2022 would lead to higher vehicle prices for consumers or manufacturer shifts in available offerings, without any associated environmental or safety benefits.

On January 20, 2021—while the post-promulgation comment period for the interim final rule was still open—the President issued Executive Order 13990, entitled ''Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.'' E.O. 13990 directs the heads of all agencies to immediately review all existing regulations, orders, guidance documents, policies, and any other similar agency actions promulgated, issued, or adopted between January 20, 2017, and January 20, 2021, that are, or may be inconsistent with, or present obstacles to, the policy set forth in E.O. 13990: A policy ''to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.'' [33] The Secretary of Transportation expressly identified the January 14, 2021 CAFE civil penalties interim final rule as subject to E.O. 13990.[34]

In accord with E.O. 13990 and the Secretary's determination, and in light of the significant concerns raised by the commenters after the interim final rule was issued, NHTSA began reviewing and reconsidering the January 14, 2021 interim final rule. Specifically, NHTSA considered repealing the interim final rule and reverting to the December 2016 final rule that would apply the adjusted rate beginning with Model Year 2019—the rule that the Second Circuit has said twice is ''now in force.'' [35]

NHTSA believed that an additional period of public comment would aid the agency in its reexamination of the issues involved in the interim final rule. Considering the importance of this rulemaking and the short comment period—ten days—previously provided to interested parties, NHTSA published a supplemental notice of proposed rulemaking (SNPRM) on August 20, 2021, to provide the public with an appropriate amount of time to comment and to enable NHTSA to more fully review and consider the issues.[36] In doing so, NHTSA expressly requested comment on whether it should proceed to a final rule that repeals the interim final rule and reverts to the December 2016 final rule, restoring the application of the increased CAFE civil penalty rate beginning with Model Year 2019. NHTSA also accepted comments on whether the adjustment should apply beginning with a model year later than Model Year 2019, with commenters arguing for such a position asked to explain how it is consistent with the 2015 Act and the Second Circuit's decisions. NHTSA also noted it would consider comments already submitted in response to the interim final rule as part of its review and the anticipated promulgation of a final rule following the comment period. The comment period for the SNPRM closed on September 20, 2021.

D. Overview of the Comments Received

In addition to the comments received in response to the interim final rule,[37] NHTSA received seventeen substantive comments in response to the SNPRM.[38] NHTSA received comments from:

- The Attorneys General of California, New York, Connecticut, Delaware, Illinois, Iowa, Maryland, Massachusetts, New Jersey, Oregon, Pennsylvania, Washington, and Vermont; [39]
- Natural Resources Defense Council and Sierra Club; [40]
- Tesla; [41]
- The Institute for Policy Integrity at New York University School of Law; [42]
- The Alliance for Automotive Innovation; [43]
- Stellantis (FCA US LLC); [44]
- Jaguar Land Rover North America LLC; [45]
- Ferrari; [46]
- The National Automobile Dealers Association (NADA); [47] and
- Private citizens and anonymous individuals.[48]

The majority of comments submitted in response to the interim final rule and to the supplemental notice of proposed rulemaking support returning to the December 2016 final rule. These comments primarily argue that NHTSA lacked the statutory authority to issue the January 2021 interim final rule. These comments also generally argue that retroactivity was not an issue: Automakers were already aware as of December 2016 that the adjustment would apply in Model Year 2019 and beyond. It was not until Model Year 2019 was already nearly complete that NHTSA issued a final rule changing that, which the Second Circuit subsequently determined was legally invalid. The predecessor organizations of Auto Innovators participated in that litigation as intervenors and were well aware of the possibility that the Second Circuit would restore the applicability of the adjusted rate beginning with Model Year 2019. In fact, the Second Circuit decision expressly stated that the court understood the effect of its decisions to be that the increased penalty amount was in effect. Accordingly, these commenters argue

[33] 86 FR 7037, 7037 (Jan. 25, 2021).

[34] Memorandum from the Acting General Counsel of DOT to the Chief Counsel and Acting Deputy Administrator of NHTSA and Special Advisor, ''Implementation of Executive Order 13990, entitled 'Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis' '' (Feb. 22, 2021). *https://www.transportation.gov/sites/dot.gov/files/2021-02/Memo-to-NHTSA.pdf.*

[35] *Nat. Res. Def. Council* v. *Nat'l Highway Traffic Safety Admin.,* 894 F.3d 95, 116 (2d Cir. 2018); *New York* v. *Nat'l Highway Traffic Safety Admin.,* 974 F.3d 87, 101 (2d Cir. 2020).

[36] 86 FR 46811 (Aug. 20, 2021).

[37] Shortly prior to publication of the interim final rule, NHTSA received two letters regarding the rulemaking. Both letters are included in the docket for this matter and were treated as comments for appropriate consideration.

[38] An eighteenth comment only expressed a desire to have the sides of the freeways in the Los Angeles area cleaned. NHTSA–2021–0001–0030. As NHTSA is required to consider only relevant matter in finalizing a rule, this comment is outside the scope of this rulemaking.

[39] NHTSA 2021–0001–0039. After the close of the comment period, the Attorneys General of New York, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington jointly submitted an additional letter regarding the need to adjust the CAFE civil penalty rate for 2022. NHTSA–2021–0001–0047. NHTSA is treating this letter as a comment for this rulemaking and addressing the issue it raises in this final rule. *See* 49 CFR 553.23.

[40] NHTSA 2021–0001–0037.

[41] NHTSA–2021–0001–0036.

[42] NHTSA 2021–0001–0038.

[43] NHTSA 2021–0001–0043.

[44] NHTSA 2021–0001–0042. Stellantis requested confidential treatment for the business information included in its comment, pursuant to 49 CFR part 512. As with the companies that requested confidential treatment for some of the business information included in each of their individual submissions supplementing the Auto Innovators' petition that resulted in the interim final rule, the public version of Stellantis' submission can be found in the docket for this action at *www.regulations.gov.*

[45] NHTSA 2021–0001–0040.

[46] NHTSA–2021–0001–0044. NHTSA received this comment after the comment period closed, but still considered it in promulgating this final rule. Under NHTSA's regulations, ''[l]ate filed comments will be considered to the extent practicable.'' 49 CFR 553.23.

[47] NHTSA 2021–0001–0041.

[48] NHTSA–2021–0001–0028; NHTSA 2021–0001–0029; NHTSA 2021–0001–0032; NHTSA 2021–0001–0033; NHTSA 2021–0001–0034; NHTSA 2021–0001–0035; NHTSA 2021–0001–0045.

that it would be appropriate for NHTSA to revisit the interim final rule's characterization of the application of the adjustment beginning with Model Year 2019 as ''retroactive.'' Moreover, these commenters raised concerns regarding the procedures that the agency used in issuing the interim final rule, which did not proceed through a more typical notice-and-comment process and which made the rule effective immediately upon publication. In addition, these commenters urged NHTSA to further review and consider the Second Circuit's prior decisions and, in light of the ongoing litigation, assess the legal risk of leaving the interim final rule in place, as the interim final rule was based on an assertion of discretion that is in conflict with the 2015 Act and the Second Circuit's decisions.

The comments in favor of retaining the interim final rule largely re-raised the reasoning of the December 2016 final rule, noting that the affected model years have already lapsed or largely lapsed, and design and production cycles for the affected model years were already locked in based on the unadjusted CAFE civil penalty rate. These comments also described the economic harm that applying the adjusted rate would have on the industry, which is already facing difficult economic conditions due to the effects of COVID–19, microchip shortages, and other supply chain issues.

E. Response to the Comments

1. Agency Reconsideration

As a threshold matter and as NHTSA has explained before, NHTSA, like all agencies, must continually consider a range of possible statutory interpretations and reassess their validity, including in response to changed circumstances or when questions arise regarding the legality of the prior action—particularly when a Federal court already has ruled twice on related issues. Not only is it an agency's responsibility to reevaluate its interpretations to ensure they are legally sound, an agency is allowed to change its interpretations, within reason, based on evolving notions about the appropriate balance of varying policy considerations. NHTSA is permitted to change its views based upon its experience and expertise, provided that the requirements of the Administrative Procedure Act (APA) and other governing statutes are met. To do so, an agency must show that it is aware it is changing its position and must provide a reasoned explanation for the change.[49]

In the SNPRM, NHTSA expressly acknowledged that it was reconsidering the January 2021 interim final rule as a result of E.O. 13990, the Secretary's related determination, the significant concerns raised by commenters in the earlier rulemakings on this issue, further review and consideration of the Second Circuit's prior decisions, and in light of the pending litigation. NHTSA provided a reasoned explanation for its tentative decision in the SNPRM that it does not have discretion over when the required adjustment should begin to take effect, and after careful consideration of the relevant information, finalizes and elaborates on that decision here. In particular, NHTSA concludes that the interim final rule was procedurally flawed and did not appropriately carry out the clear command from the Second Circuit's decision that struck down the 2019 final rule.

As explained further below, NHTSA does not believe that ''its prior policy has engendered serious reliance interests that must be taken into account,'' which may require the agency to ''provide a more detailed justification than what would suffice for a new policy created on a blank slate.'' [50] Nonetheless, NHTSA has provided ''a more detailed justification'' in the following discussion. Moreover, the administrative and public process leading to this rule has been more thorough than the process leading to the interim final rule. NHTSA undertook extensive agency review, issued an SNPRM, gave the public an opportunity to comment in advance, and responded to those comments in detail here. By contrast, NHTSA promulgated the interim final rule without notice, with only a brief window for public comments, and without the opportunity to comment in advance.

2. Procedural Issues

NHTSA promulgated the January 2021 interim final rule without providing notice and without providing the opportunity to comment in advance. NHTSA also made the interim final rule effective immediately and only provided ten days after publication for comments. The interim final rule did not explain why the post-promulgation comment period was so short, even though NHTSA could have provided more time for comments given that the rule was already in effect.

[49] *Encino Motorcars, LLC* v. *Navarro,* 579 U.S. 211, 221 (2016); *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515–16 (2009).

[50] *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009).

Upon review, NHTSA agrees with the commenters that argue that these procedural issues alone merit repeal of the interim final rule. The Second Circuit previously held that changing the effective date of the rule that was in force at the time would generally require notice-and-comment.[51] For the January 2021 interim final rule, NHTSA concluded that good cause existed for immediate implementation of the rule without prior notice and comment on the grounds that it was impracticable to delay publication of the interim final rule for notice and comment, public comment was unnecessary, and the agency's action was in the public interest. However, as many of the affected manufacturers and their trade association have noted for other purposes, the affected model years were either completed or already underway at the time of the interim final rule. There was no pressing emergency that would have made it impracticable to provide notice and request comment in advance.

Public comment was also necessary. While the 2015 Act provides that the first adjustment shall be made through an interim final rulemaking without public comment, NHTSA's first adjustment was made in an interim final rule in July 2016 with a subsequent final rule issued in December 2016. The January 2021 interim final rule was issued years later—after multiple rounds of requests for comments in other notices on this same issue.

Moreover, NHTSA should have sought comment given the public interest. NHTSA was aware of the public interest in this issue, having received multiple rounds of comments from a variety of entities and having proceeded through two rounds of litigation. While the automotive industry argued in its petition that it has faced unprecedented economic challenges arising from the COVID–19 national emergency, NHTSA did not consider any countervailing evidence, discussed further below. Additionally, any economic harm—which would only be caused by manufacturers' failures to comply with the applicable CAFE standards—does not outweigh the public interest in commenting on the change in advance. Indeed, affording the public the opportunity to comment on the petition in advance would have given NHTSA additional insight into the impact of the COVID–19 national emergency on the industry.

Because NHTSA lacked good cause, the interim final rule also should not have gone into effect immediately upon

[51] *Natural Res. Def. Council* v. *NHTSA,* 894 F.3d 95, 113 (2d Cir. 2018).

publication in the **Federal Register** under 5 U.S.C. 553(d)(3) and 5 U.S.C. 808(2).[52]

3. Statutory Authorization

In the interim final rule, NHTSA described its authority to issue the rule as based on its specific statutory authority to administer the CAFE program and its general statutory authority to do so efficiently and in the public interest.[53] NHTSA also explained that the procedure established in the Energy Policy and Conservation Act (EPCA) [54] to increase the CAFE civil penalty rate implies that NHTSA has the broader authority to oversee the administration and enforcement of the rate more generally.[55] NHTSA also noted that for the CAFE civil penalty to be covered by the 2015 Act, NHTSA must have the authority to assess or enforce it, and thus oversee and administer it as appropriate.[56]

For the reasons explained by the Second Circuit and the comments, NHTSA did not have statutory authority to promulgate the interim final rule.[57] As the Second Circuit noted, ''an agency may only act within the authority granted to it by statute.'' [58] Neither the 2015 Act, which applied to all Federal agencies, nor EPCA authorized NHTSA to issue an interim final rule delaying the application of the previously-issued adjustment.[59] To the contrary, the Second Circuit has concluded that the 2015 Act contains a ''highly circumscribed schedule for penalty increases'' that confers ''no discretion to the agencies regarding the timing of the adjustments.'' [60]

Further, as the Second Circuit made clear, the procedure in EPCA that allows NHTSA to increase the CAFE civil penalty rate does not conflict with the agency's duty to comply with the 2015 Act,[61] which includes the timing of when the adjustment will apply. To the contrary, the limited nature of the specific statutory procedure in EPCA for increasing the CAFE penalty rate (apart from the 2015 Act) suggests that Congress was restricting the scope of NHTSA's power, authorizing it to increase the CAFE civil penalty rate only under certain circumstances. Note that, as NHTSA has previously explained, EPCA acts as a ''one-way ratchet'' with no means for lowering the CAFE civil penalty rate [62] or conferring NHTSA any discretion over when penalties ought to be assessed. The 2015 Act and its procedures for adjustments are consistent with EPCA.

To the extent that the 2015 Act affords NHTSA any discretion to act, NHTSA concludes that its discretion would be limited. For example, the 2015 Act provides express procedures and deadlines for agencies to apply the adjustments. It also provides narrow exceptions for the amount of the adjustment and only for the initial ''catch-up'' adjustment. The purposes of the 2015 Act, as Congress stated in the Act itself, include ''allow[ing] for regular adjustment for inflation of civil monetary penalties'' and ''maintain[ing] the deterrent effect of civil monetary penalties and promote compliance with the law.'' [63] NHTSA notes that the CAFE civil penalty rate was established as $5 in 1975 and held constant at $5.50 since 1997 and that making the required adjustment aligns with the legislative purpose of catching up the rate for the lack of adjustments. Accordingly, NHTSA would decline to delay the adjustment further, even if it had the discretion to do so.

4. Retroactivity

In the January 2021 interim final rule being repealed by this action, NHTSA accepted the industry petition's argument that applying the increased civil penalty rate to completed or largely completed model years would raise serious retroactivity concerns.[64] NHTSA acknowledged that retroactivity generally is not favored in the law and concluded that imposing a higher civil penalty rate for model years already completed or nearly so would not have incentivized improvements to fuel economy, given the industry timelines for the design, development, and production of new vehicles.[65]

While retroactivity generally is not favored in the law, there is no rule that Congress cannot legislate retroactively. The 2015 Act expressly recognizes that it may have a partially retroactive effect; that is part of the statute's design and Congress's intent. The statute provides that ''[a]ny increase under this Act in a civil monetary penalty shall apply only to civil monetary penalties, *including those whose associated violation predated such increase,* which are assessed after the date the increase takes effect.'' [66]

Nonetheless, NHTSA now concludes that the effect of the adjustment here applying beginning in Model Year 2019 is not retroactive. As NHTSA mentioned in the SNPRM, automakers were aware, as of December 2016, that the adjustment would apply beginning with Model Year 2019. The Second Circuit confirmed that an immediate adjustment was compelled by the 2015 Act, which long preceded Model Year 2019.[67] Indeed, the Auto Innovators acknowledge that ''manufacturers knew there was a possibility that the $14 civil penalty rate might be applied to MYs 2019 to 2021 vehicles.'' [68] It was not until Model Year 2019 was already nearly complete that the agency issued a final rule changing that—a rule that the Second Circuit subsequently determined was legally invalid. Auto Innovators (through its predecessor entities) participated in that litigation as an intervenor and was well aware of the possibility that the Second Circuit would—and indeed, did—restore the applicability of the adjustment beginning with Model Year 2019. Accordingly, NHTSA has reconsidered and rejected its previous characterization of the application of the adjustment beginning with Model Year 2019 as ''retroactive.''

Any violation of the CAFE standards for Model Years 2019 through 2021 occurred or will occur well after NHTSA confirmed in December 2016 that it would apply penalties beginning with Model Year 2019—in response to a petition from industry to delay the effective application of the penalty increase precisely *to* Model Year 2019. Indeed, industry had reason to believe from the enactment of the 2015 Act and NHTSA's July 2016 adjustments that the adjustments could have applied

[52] The interim final rule also stated that a delayed effective date was not required because, under 5 U.S.C 553(d)(2), it ''relieve[d] a restriction'' by allowing additional time before the higher penalty rate would have begun to apply. Regardless of whether NHTSA continues to believe that delaying the application of a higher penalty rate counts as relieving a restriction, the lack of good issue and other procedural issues would still merit repeal of the interim final rule.

[53] 86 FR 3016, 3019–20 (Jan. 14, 2021).

[54] Public Law 94–163, 89 Stat. 871 (1975). EPCA created a comprehensive approach to federal energy policy, including establishing the CAFE program.

[55] 86 FR 3016, 3020 (Jan. 14, 2021).

[56] 86 FR 3016, 3020 (Jan. 14, 2021).

[57] To the extent that the interpretation of NHTSA's statutory authority in the interim final rule was reasonable, NHTSA nonetheless concludes that a different interpretation is appropriate now, for the reasons described throughout this rule.

[58] *NRDC,* 894 F.3d at 108. Agencies do possess some inherent powers, but issuing an interim final rule to delay the application of a previously-issued rule is not one of them.

[59] *See id.* at 112 (noting that EPCA provides no authority ''to delay the penalty as part of'' NHTSA's ''responsibility for administering the fuel economy portions of that statute'').

[60] *New York* v. *NHTSA,* 974 F.3d 87, 100 (2d Cir. 2020); *Natural Res. Def. Council* v. *NHTSA,* 894 F.3d 95, 109, 113 n.12 (2d Cir. 2018).

[61] *See New York,* 974 F.3d at 99–100.

[62] 84 FR 36007, 36021 (July 26, 2019).

[63] 28 U.S.C. 2461 note, sec. 2(b)(1)–(2).

[64] 86 FR 3016, 3020–21 (Jan. 14, 2021).

[65] 86 FR 3016, 3020–21 (Jan. 14, 2021).

[66] 28 U.S.C. 2461 note, sec. 6 (emphasis added).

[67] *Natural Res. Def. Council* v. *NHTSA,* 894 F.3d 95, 109 (2d Cir. 2018).

[68] Auto Innovators Comment, at 6.

immediately, or in any event, well before Model Year 2019. To the extent that manufacturers did not have notice by the 2015 Act itself, they unquestionably had notice by NHTSA's 2016 rules. The industry previously argued that vehicle designs are often fixed years in advance. Thus, by the time NHTSA promulgated its July 2019 final rule (that was promptly challenged in litigation and was subsequently vacated by the Second Circuit), automakers' designs for Model Years 2019 through 2021 were likely largely set already. At that time, NHTSA's regulations stated that the CAFE civil penalty adjustment to $14 (plus any other adjustments that needed to be made) would go into effect beginning with Model Year 2019. There was no guarantee at that time that NHTSA would have issued a rule reversing course and blocking the adjustment, and any attempt to do so would have been legally vulnerable. Any automakers that made their plans for Model Years 2019 through 2021 thinking that penalties would not increase did so at their own risk and in defiance of the Second Circuit's decisions.

The Second Circuit ruled that NHTSA's previous actions to delay or avoid the adjustment were unlawful, ultimately determining—twice—that the adjustment was ''now in force.'' [69] And the Auto Innovators concede that the Court's determinations that the adjustment is ''now in force'' is currently ''having effects on manufacturers' decisions with regard to future model-year fuel economy decisions,'' even though the interim final rule remained on the books until the effective date of this final rule.[70] That some manufacturers may have chosen to base their compliance decisions and production plans on the chance that NHTSA may take additional action to attempt to delay or avoid the adjustment despite legal vulnerability is a risk they took on their own, aware of the circumstances. The Auto Innovators' argument is expressly based on *assumptions* manufacturers made about how the Administration was ''likely'' to act.[71] These manufacturers—particularly those, as noted by the Auto Innovators, that participated in the court proceedings through their trade associations—were aware (or at least should have been aware) of the possibility that their predictions regarding NHTSA's actions would ultimately prove incorrect.[72] That possibility is not enough to create retroactivity concerns.

The Auto Innovators did argue that the statutory purposes of an adjustment are ''primarily deterrent,'' as stated in the 2015 Act and acknowledged by the Second Circuit.[73] However, the first purpose listed in the statute—and also recognized by the Second Circuit as ''a primary purpose'' of the statute [74]—is to ''allow for regular adjustment for inflation of civil monetary penalties.'' [75] Making the initial ''catch-up'' adjustment will allow NHTSA to conduct the required subsequent annual adjustments in line with the agency's other civil penalties that have already been adjusted on a regular basis. Furthermore, establishing the increased rate may have a deterrent effect in future model years as the rate continues to increase. And, indeed, the fact that automakers knew that an adjustment under the statute was likely at the time of the statute's passage, as well as upon the adoption of the 2016 rule—as the Auto Innovators acknowledged—very likely served as a deterrent for those manufacturers who opted to meet fuel economy standards rather than pay penalties.

Moreover, the Auto Innovators note elsewhere that imposing an appropriately adjusted rate to vehicles in Model Years 2019 to 2021 could still have future environmental impacts.[76] In any event, these purpose-based policy concerns, even if correct, are insufficient to override the language and structure of the governing statute, as the Second Circuit has plainly interpreted it.

The Auto Innovators also noted that ''in the December 2016 Final Rule, NHTSA recognized the need for lead time (and in fact used the 18-month CAFE statutory lead time as a proxy) when initially delaying applicability of the $14 civil penalty rate to MY 2019.'' [77] NHTSA does acknowledge the importance of lead time for manufacturers, but concludes here that manufacturers did receive appropriate lead time for Model Years 2019 through 2021 when the timing of the adjustment was established in December 2016—established at that time in response to a request from industry for delay. Under the interim final rule, the mandatory adjustment would not be applied until Model Year 2022, *i.e.,* to vehicles sold *more than five years* after the statutory deadline for agencies to make their initial adjustments.

NHTSA also notes that it does not need to give 18 months' lead time before this adjustment becomes effective. The statutory lead time provision in EPCA for increasing the CAFE civil penalty rate expressly refers to the specific process described in that paragraph for increasing the penalty rate, not to adjustments required to be made pursuant to a separate statute.[78] The 2015 Act established the timing NHTSA and all other federal agencies were required to follow for the initial catch-up adjustment and the process for doing so through an interim final rulemaking without notice-and-comment.

NHTSA will make the mandatory adjustments to the CAFE civil penalty rate going forward, as required by law for all civil monetary penalties.

5. Reliance Interests

For similar reasons, to the extent that industry relied on the CAFE civil penalty rate not being adjusted as required by the statute, any such reliance was unreasonable and was at those manufacturers' own risk—prior to the promulgation of the January 2021 interim final rule or after.

In the January 2021 interim final rule, NHTSA concluded that the industry's reliance on the $5.50 rate was reasonable, as NHTSA reconsidered application of the 2015 Act by proposing in 2018 that the 2015 Act did not apply and finalizing the proposal in

[69] *New York,* 974 F.3d at 101; *NRDC,* 894 F.3d at 116.

[70] Auto Innovators Comment, at 7.

[71] Auto Innovators Comment, at 7 (''[Manufacturers] had every reason to *assume* that, if the rule under review in the New York case were vacated, NHTSA would have the authority to undertake the same non-retroactivity analysis that the Obama Administration Department of Transportation undertook in the December 2016 Final Rule. They also had every reason to *assume* that NHTSA was *likely* to opt for a first model year later than MY 2019 for the application of the $14 civil penalty rate and was *not precluded* by either Second Circuit decision from doing so.'' (emphasis added)).

[72] At least one manufacturer had been budgeting for the possibility of paying civil penalties with the adjustment in effect before the July 2019 final rule was enacted. *See* IPI Comment, at 7.

[73] *See* 28 U.S.C. 2461 note, sec. 2(b)(2); *see also id.,* sec. 2(a)(2); *NRDC,* 894 F.3d at 109.

[74] *NRDC,* 894 F.3d at 109.

[75] 28 U.S.C. 2461 note, sec. 2(b)(1).

[76] Auto Innovators Comment, at 10. The Auto Innovators argue that ''the imposition of the $14 civil penalty rate to MYs 2019 to 2021 vehicles actually could have deleterious environmental impacts: Penalties that lead to increases in the prices of newer vehicles could discourage consumers from purchasing more efficient, cleaner vehicles.'' *Id.* While NHTSA agrees that applying the adjusted rate to Model Year 2019 to Model Year 2021 vehicles could have environmental effects, NHTSA believes it is likely that manufacturers have already priced in the potential of having to pay increased penalties—if not during the earlier rounds of litigation and rulemaking, then very likely when the SNPRM was made public.

[77] Auto Innovators Comment, at 7.

[78] ''A higher amount prescribed under subparagraph (A) of this paragraph is effective for the model year beginning at least 18 months after the regulation stating the higher amount becomes final.'' 49 U.S.C. 32912(c)(1)(D).

2019.[79] However, manufacturers knew (or should have known) that the CAFE civil penalty rate was going to be adjusted when the 2015 Act was enacted, when NHTSA issued its initial catch-up adjustments in July 2016, and when NHTSA issued its response to industry's petition in December 2016 establishing the timing of the adjustment (and accommodating the industry's request for additional lead time in doing so). Indeed, the industry petition in 2016 acknowledged and did not challenge that the 2015 Act applied to the CAFE civil penalty rate.[80] While there was subsequent rulemaking on the issue, industry participants were also aware that there was litigation over the subsequent rules—indeed, they participated actively in the litigation—and they relied on those subsequent rules at their own risk. Once the Second Circuit vacated each of the rules, the industry had no basis for relying on either of those agency actions.[81] By industry's own argument, to the extent that manufacturers relied on the July 2019 final rule, much less the January 2021 interim final rule, the planning for Model Years 2019 to 2021 was already or largely complete. This was not a longstanding policy in effect for years before. Moreover, the interim final rule, by definition, was an interim rule that remained subject to change following public comment. It was also quickly subject to legal challenge and agency reconsideration. In particular, the President issued Executive Order 13990, directing review of the interim final rule and other regulations, just one week after the interim final rule was published in the **Federal Register** and while the post-promulgation comment period was still open. Given this short window, there was minimal time for manufacturers to reasonably rely on the interim final rule remaining in effect.

Furthermore, there are countervailing reliance interests to consider here. It is very likely that some manufacturers relied on the 2015 statute, the July 2015 initial catch-up adjustment, and the December 2016 final rule in planning for an adjustment to be in effect for Model Year 2019 and continued to do so given the uncertainty of the legal challenges to NHTSA's subsequent actions regarding the CAFE civil penalty rate.[82] And manufacturers had a strong financial incentive to do so, given that the value of credits for over-complying with the standards would be expected to increase dramatically with the initial adjustment to the CAFE civil penalty rate.[83] Delaying the application of the adjustment would almost certainly diminish the value of those credits.

As noted in the comments,[84] industry could have asked the Second Circuit to invoke its equitable discretion and to remand to NHTSA without vacatur, but they did not do so in either case that has already been decided (nor in the pending case challenging the January 2021 interim final rule). The Court also did not do so on its own, instead confirming twice its conclusion that the December 2016 rule was ''now in force.'' [85]

6. Economic Impact of the COVID–19 Pandemic and Other Factors

In the January 2021 interim final rule, NHTSA concluded that, based on the available information, applying the adjustment to the CAFE civil penalty rate beginning in Model Year 2019 might inhibit economic recovery from the effects of the pandemic, while applying the adjustment beginning in Model Year 2022 was an appropriate action to take for the purpose of promoting job creation and economic growth, citing Executive Order 13924, ''Regulatory Relief To Support Economic Recovery.'' [86]

Executive Order 13924 has since been revoked.[87] Moreover, because NHTSA now concludes that it did not have the authority to issue the interim final rule and lacks discretion regarding when to apply the adjustment, there is no opportunity for NHTSA to consider the economic impact of the COVID–19 pandemic or other economic impacts such as those caused by supply chain shortages and microchip shortages in determining when to apply the adjustment.[88] It is true that the 2015 Act did allow an agency to make the first adjustment of the amount of a civil monetary penalty by less than the otherwise required amount if increasing the civil monetary penalty by the otherwise required amount would have a negative economic impact, or if the social costs of increasing the civil monetary penalty by the otherwise required amount outweighed the benefits.[89] However, NHTSA's attempt to apply this exception through the ''negative economic impact'' prong was vacated by the Second Circuit as too late, and the statute provides that the exception could only be applied to the initial ''catch-up'' adjustment. Accordingly, there is no need for NHTSA to evaluate the economic evidence now to determine when it should apply the required adjustment; as the Second Circuit held, NHTSA has no such discretion.

Regardless, the economic record on this question is mixed. For example, despite the industry having lower sales in the middle of 2020, sales bounced back in 2021. Indeed, NADA reported ''incredibly high sales in April 2021, . . . the fourth highest monthly total since the year 2000,'' [90] Demand also remained ''strong,'' despite ''new-vehicle average transaction prices reach[ing] record highs at the end of second quarter.'' [91] Additional information reported by the manufacturers themselves also shows evidence of economic success, despite the challenges presented by the COVID–19 pandemic, microchip shortages, and other supply chain issues.[92]

NHTSA also notes that the CAFE civil penalty formula incorporates the number of vehicles manufactured, so if production is reduced because of lower sales, supply chain issues, or microchip shortages, then the CAFE civil penalty

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[79] 86 FR 3016, 3021 (Jan. 14, 2021).

[80] *NRDC,* 894 F.3d at 102 (''[I]ndustry petitioners conceded that 'NHTSA was obligated to take some action in response to the Improvements Act' and 'NHTSA [was] not empowered to exempt the CAFE program from this directive.' '').

[81] *See* States Attorneys General Comment, at 5 (citing *Envtl. Def.* v. *Leavitt,* 329 F. Supp. 2d 55, 64 (D.C. Cir. 2004) (''[T]he vacatur restores the status quo before the invalid rule took effect and the agency must initiate another rulemaking proceeding if it would seek to confront the problem anew.'' (internal citations and quotations omitted))); *Nat'l Fuel Gas Supply Corp.* v. *Fed. Energy Regulatory Comm'n,* 59 F.3d 1281, 1288 (D.C. Cir. 1995); *see also United States* v. *Sec. Indus. Bank,* 459 U.S. 70, 79 (1982) (''The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student.'')).

[82] *See, e.g.,* Tesla Comment on IFR, NHTSA–2021–0001–0012, at 9.

[83] *See, e.g.,* Tesla Comment at 9–10.

[84] State Attorneys General Comment, at 5 (citing *NRDC* v. *EPA,* 808 F.3d 556, 584 (2d Cir. 2015) (when equity demands, remand without vacatur allows agencies to correct legal deficiencies while leaving challenged, unlawful regulations in place); *see also Sugar Cane Growers Coop. of Fla.* v. *Veneman,* 289 F.3d 89, 97–98 (D.C. Cir. 2002) (invoking equitable discretion to remand without vacatur because there was ''no apparent way to restore the status quo ante''); *Allied-Signal, Inc.* v. *U.S. Nuclear Regulatory Comm'n,* 988 F.2d 146, 150–51 (D.C. Cir. 1993)).

[85] *See NRDC,* 894 F.3d at 116; *New York,* 974 F.3d at 101.

[86] 86 FR 3016, 3022 (Jan. 14, 2021).

[87] 86 FR 11855, 11855 (Mar. 1, 2021).

[88] EPCA does, of course, allow the agency to consider general economic impacts in determining whether to further increase the CAFE civil penalty rate under U.S.C. 32912(c)(1), as well as the specific economic conditions of a particular manufacturer in determining whether to compromise or remit a penalty under 49 U.S.C. 32913. However, neither provision is relevant here.

[89] 28 U.S.C. 2461 note, 4(c). Note also that this exception only related to the amount of the adjustment, not the timing of it.

[90] NADA Blog, *NADA Issues 2021 Second Quarter Auto Sales Analysis* (July 8, 2021), *https://blog.nada.org/2021/07/08/nada-issues-2021-second-quarter-auto-sales-analysis/.*

[91] *Id.*

[92] *See, e.g.,* Tesla Comment, at 7–9.

liability will also be reduced (before accounting for credits).

Two additional points bear noting. On the ''front end,'' much of the relevant conduct (*i.e.,* designing and manufacturing) occurred before the COVID–19 pandemic commenced. The earliest cases that were later classified as COVID–19 were first identified in December 2019.[93] By that time, Model Year 2019 was complete for almost the entire industry, and under the industry's own view, the planning for Model Year 2020 had long since been completed by then with planning for Model Year 2021 well underway in the very least. Further, it was not until mid-March 2020 when the World Health Organization (WHO) declared COVID–19 a pandemic and the President declared a national emergency in the United States—approximately halfway through Model Year 2020 and only six months before the beginning of Model Year 2021 for most manufacturers.

On the ''back end,'' NHTSA has not yet assessed CAFE civil penalties for Model Year 2019 and beyond. It is possible that the economic state of the industry will be stronger, perhaps even above average, when those penalties are assessed. And the industry may have accrued or planned to accrue more credits by then to offset any additional penalty liability.

7. Usage of Credits

As noted in the SNPRM, some commenters on this issue have argued that delaying the application of the increased rate would negatively affect future compliance because manufacturers may be incentivized to hold credits for model years when the higher rate will apply. Similar to the economic evidence discussed above, NHTSA lacks discretion to consider manufacturers' planned uses of credits in determining when to apply the required adjustment. The government-wide 2015 Act applies regardless of how manufacturers plan to apply credits to any shortfalls.

Even if NHTSA could consider the use of credits in determining the appropriate timing of the adjustment, the Auto Innovators acknowledge that while manufacturers would likely use their earliest earned credits to offset their shortfalls before those credits expire, there could still be some credits that manufacturers would need to decide whether to use immediately or carry forward to future model years.[94] While the magnitude of the effects of these decisions may be small in the immediately affected model years, the magnitude of the effects could be compounded in future model years in a cascade as additional credits continue to be time-shifted.

8. Additional Adjustments Required by Law

Under the SNPRM, which NHTSA is now finalizing, the civil penalty rate for violations of CAFE standards for model years beginning with MY 2019 was $14, plus any adjustments that occurred or may occur.[95] $14 was the initial ''catch-up'' adjustment made by NHTSA on July 5, 2016, following the procedure and the formula in the 2015 Act. NHTSA is now addressing the adjustments that occurred since that time. Applying the annual adjustment procedures in the 2015 Act (including the requirement to round to the nearest $1) does not result in an increase in the $14 rate for the annual adjustments in 2017 through 2021,[96] but does result in an increase to $15 for 2022. Therefore, NHTSA is codifying the civil penalty rate of $15, along with clarifying regulatory text explaining that the civil penalty rate is $14 for MY 2019 through MY 2021 (and $5.50 for MYs before 2019).

EPCA provides a separate statutory authority for NHTSA to increase the CAFE civil penalty rate based on the impacts on energy conservation and the economy.[97] Any increase pursuant to that authority was initially capped by the statute at $10, based on the original $5 civil penalty rate. In the 2016 interim final rule, NHTSA noted that the 2015 Act, which required an initial adjustment of the CAFE civil penalty rate to $14, also required a corresponding adjustment on the cap under NHTSA's EPCA authority to $25 (from $10). NHTSA explained this in the preamble of the 2016 interim final rule, but this adjustment was inadvertently never codified in NHTSA's regulations.[98] NHTSA is now codifying that adjustment and the necessary adjustments for the intervening years. Applying the multipliers for the subsequent years, the adjusted amount would have remained $25 for 2017, increased to $26 for 2018, increased to $27 for 2019, remained $27 for 2020 and 2021, before being increased to $29 for 2022. Therefore, NHTSA is codifying the cap at $29, and NHTSA will make subsequent annual adjustments as required.

Pursuant to the 2015 Act, NHTSA did not undertake notice or comment to enact these adjustments. The 2015 Act provides clear direction for how to adjust the civil penalties, and states at Section 4(b)(2) that these adjustments shall be made ''notwithstanding section 553 of title 5, United States Code.'' NHTSA will continue to make the mandatory adjustments to the CAFE civil penalty rate and the statutory cap going forward, as required by law for all civil monetary penalties.

F. Rulemaking Analyses and Notices

1. Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures

NHTSA has considered the impact of this rulemaking action under Executive Order 12866, Executive Order 13563, and the Department of Transportation's regulatory policies and procedures. OMB has designated this rule as a ''significant regulatory action'' under section 3(f) of Executive Order 12866. The Office of Information and Regulatory Affairs (OIRA) has determined that this rulemaking is ''economically significant'' and a ''major rule'' as NHTSA believes that the difference in the amount of penalties received by the government as a result of this rule are likely to exceed $100 million in at least one of the years affected by this rulemaking and that there may be additional economic effects as discussed below.

As explained in the SNPRM, the adjusted civil penalty rate will likely induce some degree of greater compliance with fuel economy standards as a general matter. Manufacturers that are paying civil penalties for CAFE violations have likely calculated that it is less costly or otherwise preferable to pay the penalties than to meet the statutory and regulatory requirements. An increased penalty rate, as required by the statute, changes this calculation, as it likely raises either the costs of credits a noncompliant manufacturer may choose to purchase, the total penalty amount a manufacturer will pay, or both.

In this final rule, NHTSA is repealing the interim final rule, which delayed the adjusted penalty rate by three model years, two of which are already

[93] ''CDC Museum COVID–19 Timeline,'' *https://www.cdc.gov/museum/timeline/covid19.html.*

[94] Auto Innovators Comment, at 12 (''[O]lder credits will be used to mostly, if not completely, cancel any shortfalls. For this reason, delaying the application of a $14 civil penalty rate to MY 2022 is highly unlikely to affect manufacturers' compliance strategies by allowing them to delay the use of 2017 or later credits to MY 2022.'').

[95] The January 2021 interim final rule also used this language, requiring that the civil penalty rate be $14, plus any adjustments that occurred or may occur. 86 FR 3016, 3026 (Jan. 14, 2021).

[96] The adjusted amount would have rounded down to remain $14 for each required annual adjustment for 2017 through 2021.

[97] 49 U.S.C. 32912(c).

[98] 81 FR 43524, 43526 (July 5, 2016).

complete and the last one which is largely complete. This final rule also codifies the adjusted penalty rate for 2022. An analysis here would be limited to estimating over this short time horizon: (1) Which manufacturers did not produce compliant fleets for Model Years 2019 and 2020 and are likely to not produce compliant fleets for Model Years 2021 and 2022; (2) what the shortfalls will be for those non-compliant manufacturers; and (3) the extent to which those manufacturers will choose to use credits (either their own or those purchased from over-compliant manufacturers) or pay penalties to address these shortfalls. Pointedly, such an analysis would not have sufficient information to account for whether, and if so, how manufacturers will adjust the composition of the fleet for these model years in response to the penalty change.

Any analysis would estimate what the compliance shortfalls will be and whether manufacturers will pay penalties or use credits. These estimates could be used to estimate the effects on individual manufacturers in the form of higher penalty payments, higher payments to other manufacturers for credits, or higher receipts for overcomplying manufacturers for credits sold to other manufacturers. However, NHTSA has only limited ability to estimate what strategies manufacturers will take either to use credits or pay penalties to deal with any noncompliance. That is a decision that each manufacturer must take based on their unique circumstances, and historically, NHTSA is not privy to the financial terms of any trades manufacturers make with each other. In the past, the vast majority of manufacturers pay no penalties, as only five manufacturers have paid civil penalties since Model Year 2011.[99] And only one of those manufacturers faced particularly heavy penalties—even before the $14 rate would have gone into effect—for failing to comply with the minimum domestic passenger car standard, which cannot be made up through the application of transferred or traded credits.[100]

Despite this uncertainty, NHTSA continues to be confident that, based on the experience of recent model years, this rule will lead to at least $100 million difference in the amount of penalties in at least one model year. As explained in the SNPRM, NHTSA projects that the difference in the nationwide fleetwide net shortfall would result in at least $100 million more civil penalties being assessed at the $14 rate than the $5.50 for Model Year 2019.[101] Specifically, based on mid-model year fuel economy performance data and assuming a similar magnitude of production from Model Year 2018 for Model Year 2019, the projected shortfall of 1.3 miles per gallon across the U.S. fleet in Model year 2019 would result in a nationwide fleet-wide net shortfall of approximately $115.4 million at the $5.50 rate or an approximately $293.9 million shortfall at the $14 rate—an approximately $178.5 million difference.

As previously noted, it is expected that much of this increase would likely fall on a single automobile manufacturer and likely is due to a failure to comply with the minimum domestic passenger car standard (which, by law, cannot be made up for through transferred or traded credits).

In addition, NHTSA reiterates that commenters on this issue have raised valid questions about further economic effects, namely that longer-term impacts may vary as a result of manufacturer multi-year planning, the transfer of credits across model years and between manufacturers, and the changing value of credits over time. According to these commenters, if such variation were to occur, applying the $14 penalty rate beginning in Model Year 2019 may result in manufacturers applying credit balances to Model Year 2019 through 2021 vehicles and being incentivized to make fuel economy improvements in their fleet beyond that timeframe. And for manufacturers that do not currently have credits or cannot transfer or trade for them to make up a shortfall of the minimum domestic passenger car standard, applying the adjusted penalty rate beginning in Model Year 2019 places an even greater incentive on future compliance and fuel economy improvements to avoid additional higher penalties going forward, on top of the added benefits of energy conservation and improved environmental and public health benefits.

In any event, based on further consideration of the 2015 Act and the Second Circuit's decisions on this issue, NHTSA believes that that it does not have discretion over when the adjustment should begin to take effect. Further, the 2015 Act provided NHTSA no discretion over what the adjusted rate should be, as that is merely a function of the formula established by Congress and calculated by OMB, and mandated streamlined processes for making both the initial adjustment and any subsequent adjustments that do not require accompanying analyses or public comment.[102]

2. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of proposed rulemaking or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions). No regulatory flexibility analysis is required if the head of an agency certifies the proposal will not have a significant economic impact on a substantial number of small entities. NHTSA has considered the impacts of this notice under the Regulatory Flexibility Act and recertifies that this rule would not have a significant economic impact on a substantial number of small entities under 5 U.S.C. 605(b), based on the factual basis provided in the SNPRM. NHTSA requested comment on the economic impact of this rule on small entities. None of the comments NHTSA received in response to the interim final rule or the SNPRM discussed this issue. The Small Business Administration's (SBA) regulations define a small business in part as a ''business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.''[103] SBA's size standards were previously organized according to Standard Industrial Classification (''SIC'') Codes. SIC Code 336211 ''Motor Vehicle Body Manufacturing'' applied a small business size standard of 1,000 employees or fewer. SBA now uses size standards based on the North American Industry Classification System (''NAICS''), Subsector 336—Transportation Equipment Manufacturing. This action is expected to affect manufacturers of motor

[99] *See* ''Civil Penalties,'' available online at *https://one.nhtsa.gov/cafe_pic/CAFE_PIC_Fines_LIVE.html.*

[100] 49 U.S.C. 32903(f)(2), (g)(4); 49 CFR 536.9(c).

[101] 86 FR 46811, 46816–17 (Aug. 20, 2021).

[102] The 2015 Act, of course, did allow NHTSA one opportunity at the time of the initial catch-up to use the notice-and-comment process to adjust the rate ''less than the otherwise required amount'' under two conditions, but the Second Circuit rejected NHTSA's belated attempt to use this provision in its decision on the July 2019 final rule. *See New York,* 974 F.3d at 100–01.

[103] 13 CFR 121.105(a).

vehicles. Specifically, this action affects manufacturers from NAICS codes 336111—Automobile Manufacturing, and 336112—Light Truck and Utility Vehicle Manufacturing, which both have a small business size standard threshold of 1,500 employees.

Though civil penalties collected under 49 CFR 578.6(h)(1) and (2) apply to some small manufacturers, low volume manufacturers can petition for an exemption from the Corporate Average Fuel Economy standards under 49 CFR part 525. This would lessen the impacts of this rulemaking on small business by allowing them to avoid liability for penalties under 49 CFR 578.6(h)(2). Small organizations and governmental jurisdictions will not be affected significantly as the price of motor vehicles and equipment ought not to change as the result of this rule.

3. Executive Order 13132 (Federalism)

Executive Order 13132 requires NHTSA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on the States, on the relationship between the [N]ational [G]overnment and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, the agency may not issue a regulation with federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal Government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local officials early in the process of developing the proposed regulation. As noted previously, this rulemaking will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The reason is that this rulemaking is expected to generally apply to motor vehicle manufacturers. Thus, the requirements of Section 6 of the Executive order do not apply.

4. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995, Public Law 104–4, requires agencies to prepare a written assessment of the cost, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually. Because this rulemaking does not include a Federal mandate, no unfunded mandate assessment has been prepared.

5. National Environmental Policy Act

The National Environmental Policy Act of 1969 (NEPA) [104] directs that Federal agencies proposing ''major Federal actions significantly affecting the quality of the human environment'' must, ''to the fullest extent possible,'' prepare ''a detailed statement'' on the environmental impacts of the proposed action (including alternatives to the proposed action).[105] However, there are some instances where NEPA does not apply. One consideration is whether the action at issue is a non-discretionary action to which NEPA may not apply or for which NEPA may require less detailed analysis.[106]

NHTSA addressed NEPA in promulgating the interim final rule, concluding that even though a NEPA analysis ''is not required, this section [of the preamble to the interim final rule] may serve as the Agency's Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) for this interim final rule.'' [107] In the SNPRM, NHTSA again concluded that no further analysis pursuant to NEPA is required in adjusting the penalty rate this time, which is in line with legal precedent concerning non-discretionary agency action.[108] NHTSA reiterates that conclusion here.

Although NHTSA tentatively concluded in the SNPRM (and affirms here) that it does not have discretion on whether to adjust the CAFE civil penalty rate as required by the statute and thus that a NEPA analysis was not required, NHTSA prepared an environmental assessment to evaluate the effects of the timing of such an increase on the environment. When a Federal agency prepares an environmental assessment, the Council on Environmental Quality (CEQ) NEPA implementing regulations require the agency to (1) ''[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact,'' and (2) ''[b]riefly discuss the purpose and need for the proposed action, alternatives . . . , and the environmental impacts of the proposed action and alternatives, and include a listing of [a]gencies and persons consulted.'' [109] Generally, based on the environmental assessment, the agency must make a determination to prepare an environmental impact statement or ''prepare a finding of no significant impact if the [a]gency determines, based on the environmental assessment, not to prepare an environmental impact statement because the proposed action will not have significant effects.'' [110]

NHTSA solicited public comments on the applicability of NEPA to this action and the contents and tentative conclusions of the Draft EA. The comments were silent on NEPA issues or agreed that no additional analysis was necessary.[111] Having reviewed the comments, this section may serve as the Agency's EA and FONSI for this final rule. NHTSA considered the findings of this EA prior to deciding that the adjusted rate will go into effect beginning in Model Year 2019 and making the subsequent required adjustments through 2022.

I. Purpose and Need

The SNPRM and this final rule set forth the purpose of and need for this action. Pursuant to the 2015 Act and the Second Circuit's decision, NHTSA is required to make an initial ''catch-up''

[104] 42 U.S.C. 4321–4347.

[105] 42 U.S.C. 4332.

[106] *See Dept. of Transp.* v. *Public Citizen,* 541 U.S. 752, 768–69 (2014) (holding that the agency need not prepare an Environmental Impact Statement (EIS) or analyze certain environmental effects in its EA, and stating, ''[s]ince [the Federal Motor Carrier Safety Administration] FMCSA has no ability categorically to prevent the cross-border operations of Mexican motor carriers, the environmental impact of the cross-border operations would have no effect on FMCSA's decisionmaking—FMCSA simply lacks the power to act on whatever information might be contained in the EIS.'').

[107] 86 FR 3025.

[108] 86 FR 46818.

[109] 40 CFR 1501.5(c).

[110] 40 CFR 1501.6(a).

[111] *See* NHTSA–2021–0001–0036, at 5–6 (arguing that the interim final rule was ''procedurally invalid'' for failing to abide by the NEPA requirement to take a hard look at the environmental consequences of the rule, but raising no objections to the NEPA analysis in the SNPRM); NHTSA 2021–0001–0037, at 8 (''[T]he agency need not conduct a NEPA analysis before repealing the Exemption Rule.''); NHTSA 2021–0001–0043, at 13 (''NHTSA's NEPA analysis [in the interim final rule] was adequate,'' and ''to the extent that NHTSA is concerned about the NEPA issue or any of the other procedural issues raised by commenters, this SNPRM proceeding provides the opportunity to promulgate a rule in accordance with applicable procedural standards.'').

adjustment to the civil monetary penalties it administers for the CAFE program. The purpose of the SNPRM and this final rule is to consider the timing of the application of the adjustment to the CAFE civil penalty rate, consistent with the statutory requirements.

II. Alternatives

NHTSA considered two alternatives for this action. The first alternative was to restore the status quo ante prior to the interim final rule, which is adjusting the CAFE civil penalty rate from $5.50 to $14 beginning in Model Year 2019, before making any subsequent required adjustments. This timing was originally established by the December 2016 final rule and was twice made effective by decisions of the Second Circuit. The second alternative was applying the initial adjustment beginning in Model Year 2022, which reflects the action taken in the interim final rule (the No Action Alternative). As noted in the SNPRM, NHTSA was no longer considering the alternative of applying the initial adjustment beginning in Model Year 2023, but NHTSA accepted comments on whether it should consider other alternatives of the adjustment applying beginning with a model year later than Model Year 2019. No commenter suggested any other alternative. This EA describes the potential environmental impacts associated with the two alternatives in comparison with each other.

III. Environmental Impacts of the Action and Alternatives

In the interim final rule, NHTSA asserted that it anticipated no differences in environmental impacts associated with the alternatives of applying the adjustment beginning in Model Year 2019, 2020, 2021, or 2022. NHTSA based this conclusion on the fact that vehicles for Model Years 2019 and 2020 had largely if not entirely been produced already, and many manufacturers were already selling Model Year 2021 vehicles.

As explained in the SNPRM, NHTSA reconsidered whether this assessment is complete after reviewing the comments received in response to the interim final rule. Commenters had argued that, regardless of the impact of this rulemaking action on Model Year 2019 through 2021 vehicles, longer-term impacts may vary as a result of manufacturer multi-year planning, the transfer of credits across model years and between manufacturers, and the changing value of credits over time. If this is correct, applying the adjustment earlier could result in manufacturers applying credit balances to Model Year 2019 through 2021 vehicles and being incentivized to make fuel economy improvements in their fleet beyond that timeframe, rather than paying civil penalties at the $5.50 rate for Model Years 2019 through 2021 and saving the credits for future model years when they could be valued more due to the adjustment. Additionally, for manufacturers without credit balances, the potential application of a significantly higher civil penalty for Model Years 2019 through 2021 may spur more rapid implementation of fuel-saving technology in order to allow the manufacturer to accrue credits that may be carried back to cover the shortfall in Model Years 2019 through 2021.

Overall, NHTSA anticipates that applying the adjustment beginning with Model Year 2019 may lead to the eventual application of more fuel-saving technology, resulting in fewer greenhouse gas emissions and reductions in many criteria and toxic air pollutants compared to applying the adjustment beginning in Model Year 2022.[112] Although Model Years 2019 and 2020 are already completed, and Model Year 2021 is essentially complete, the civil penalty assessment process is not yet complete for any of them, much less for Model Year 2022.[113] As a result, NHTSA does not yet know the anticipated manufacturer compliance shortfall for these model years. Because manufacturers can apply credits across a multi-year window, their decisions about how to apply credits in earlier model years will affect the availability of credits and the application of fuel-saving technology in later model years. However, NHTSA does not know whether and to what degree manufacturers will choose to pay fines in lieu of applying accrued credits, trade credits with other manufacturers, or rely on multi-year planning and credit carry-forward and carry-back to address shortfalls. NHTSA invited comments, information, and analyses from the public on the degree to which this may occur as a result of changes to the civil penalty rate in Model Year 2019 versus Model Year 2022. The Auto Innovators provided an analysis arguing that ''delaying the application of a $14 civil penalty rate to MY 2022 is highly unlikely to affect manufacturers' compliance strategies by allowing them to delay the use of 2017 or later credits to MY 2022'' because ''older credits will be used to mostly, if not completely, cancel any shortfalls.''[114]

At this time, NHTSA continues to anticipate the impacts to be small. The difference between the alternatives contemplated in this action is only whether or not the initial civil penalty rate increase applies to three Model Years: 2019, 2020, and 2021. NHTSA continues to believe the impacts on those Model Years alone is expected to be de minimis, as all three model years have largely if not entirely been produced already. Further, as NHTSA has addressed in its CAFE rulemakings, many manufacturers have been unwilling to pay civil penalties historically. Those manufacturers may continue to opt to apply credits even if a lower civil penalty rate applied, rather than hold credits for future model years when the civil penalty rate would be higher.

IV. Agencies and Persons Consulted

NHTSA and DOT have consulted with OMB and the U.S. Department of Justice and provided other Federal agencies with the opportunity to review and provide feedback on this rulemaking.

V. Conclusion

NHTSA has reviewed the information presented in this EA and concludes that adjusting the CAFE civil penalty rate beginning with Model Year 2019, as compared to Model Year 2022, would have, at most, a more positive impact on the quality of the human environment to the extent that manufacturers may be more likely to expend credit balances on Model Year 2019 through 2021 vehicles than if the civil penalty rate remained at $5.50 for those model years. Lacking such credits in future years, manufacturers would be more likely to make improvements to the fuel economy of their fleets to avoid paying the higher civil penalty rates that would occur under either alternative. Additionally, higher civil penalty rates in Model Years 2019 through 2021 may cause manufacturers to more rapidly implement fuel-saving technology so that they may accrue credits to be carried back to cover compliance shortfalls. But NHTSA does not expect any differences in the impacts under either of the alternatives to rise to the

[112] See NHTSA's Final Environmental Impact Statements for the CAFE rulemaking for MYs 2017 and beyond (Docket No. NHTSA–2011–0056) and for MYs 2021–2026 (Docket No. NHTSA–2017–0069), both of which illustrate these trends as fuel economy standard stringency increases across alternatives. Both EISs are also available on the agency's fuel economy website: *https://www.nhtsa.gov/laws-regulations/corporate-average-fuel-economy.*

[113] Because NHTSA does not have final model year performance data verified by EPA for these model years, any quantitative projections of the environmental impact across multiple model years would be too speculative to rely upon at this time.

[114] Auto Innovators Comment, at 12.

level of significance that would necessitate the preparation of an Environmental Impact Statement.

VI. Finding of No Significant Impact

NHTSA has reviewed this EA. Based on the EA, NHTSA concludes that implementation of either of the action alternatives (including this final rule) will not have a significant effect on the human environment and that a ''finding of no significant impact'' is appropriate. This statement constitutes the Agency's ''finding of no significant impact,'' and an environmental impact statement will not be prepared.[115]

6. Executive Order 12988 (Civil Justice Reform)

This rulemaking does not have a preemptive effect. For the reasons explained above, this rulemaking does not have a retroactive effect. Judicial review of the interim final rule or a subsequent final rule may be obtained pursuant to 5 U.S.C. 702.

7. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980, NHTSA states that there are no requirements for information collection associated with this rulemaking action.

8. Privacy Act

Please note that anyone is able to search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit *https://www.transportation.gov/privacy.*

List of Subjects in 49 CFR Part 578

Imports, Motor vehicle safety, Motor vehicles, Penalties, Rubber and rubber products, Tires.

In consideration of the foregoing, 49 CFR part 578 is amended as set forth below.

PART 578—CIVIL AND CRIMINAL PENALTIES

■ 1. The authority citation for 49 CFR part 578 continues to read as follows:

Authority: Pub. L. 92–513, Pub. L. 94–163, Pub. L. 98–547, Pub. L. 101–410, Pub. L. 102–388, Pub. L. 102–519, Pub. L. 104–134, Pub. L. 109–59, Pub. L. 110–140, Pub. L. 112–141, Pub. L. 114–74, Pub. L. 114–94 (49 U.S.C. 30165, 30170, 30505, 32308, 32309, 32507, 32709, 32710, 32902, 32912, 33114, and 33115); delegation of authority at 49 CFR 1.81, 1.95.

■ 2. Amend § 578.6 by revising paragraph (h)(2) and adding paragraph (h)(3) to read as follows:

§ 578.6 Civil penalties for violations of specified provisions of Title 49 of the United States Code.

* * * * *

(h) * * *

(2) Except as provided in 49 U.S.C. 32912(c), 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 $15 (for model years before model year 2019, the civil penalty is $5.50; for model years 2019 through 2021, the civil penalty is $14), 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.

(3) If a higher amount for each .1 of a mile a gallon to be used in calculating a civil penalty under paragraph (h)(2) of this section is prescribed pursuant to the process provided in 49 U.S.C. 32912(c), the amount prescribed may not be more than $29 for each .1 of a mile a gallon.

* * * * *

Issued in Washington, DC, under authority delegated in 49 CFR 1.95 and 501.5.

Steven S. Cliff,

Deputy Administrator.

[FR Doc. 2022–06648 Filed 3–31–22; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[220325–0079]

RIN 0648–BL14

Pacific Halibut Fisheries; Catch Sharing Plan

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: This final rule approves changes to the Pacific Halibut Catch Sharing Plan for the International Pacific Halibut Commission's regulatory Area 2A off of Washington, Oregon, and California. In addition, this final rule implements management measures governing the 2022 recreational fisheries that are not implemented through the International Pacific Halibut Commission. These measures include the recreational fishery seasons, quotas, and management measures for Area 2A. These actions are intended to conserve Pacific halibut and provide angler opportunity where available.

DATES: This rule is effective on March 31, 2022.

ADDRESSES: Additional information regarding this action may be obtained by contacting the Sustainable Fisheries Division, NMFS West Coast Region, 1201 NE Lloyd Boulevard Suite 1100, Portland, OR, 97232. For information regarding all halibut fisheries and general regulations not contained in this rule, contact the International Pacific Halibut Commission, 2320 W. Commodore Way Suite 300, Seattle, WA 98199–1287.

FOR FURTHER INFORMATION CONTACT: Kathryn Blair, phone: 503–231–6858, fax: 503–231–6893, or email: *kathryn.blair@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Background

The Northern Pacific Halibut Act of 1982 (Halibut Act), 16 U.S.C. 773–773k, gives the Secretary of Commerce (Secretary) responsibility for implementing the provisions of the Convention between Canada and the United States for the Preservation of the Halibut Fishery of the North Pacific Ocean and Bering Sea (Halibut Convention), signed at Ottawa, Ontario, on March 2, 1953, as amended by a Protocol Amending the Convention (signed at Washington, DC, on March 29, 1979). The Halibut Act requires that the Secretary adopt regulations to carry out the purposes and objectives of the Halibut Convention and Halibut Act (16 U.S.C. 773c). Additionally, as provided in the Halibut Act, the Regional Fishery Management Councils having authority for the geographic area concerned may develop, and the Secretary of Commerce may implement, regulations governing harvesting privileges among U.S. fishermen in U.S. waters that are in addition to, and not in conflict with, approved International Pacific Halibut Commission (IPHC) regulations (16 U.S.C. 773c(c)).

At its annual meeting January 24–28, 2022, the IPHC recommended an Area

[115] 40 CFR 1501.6(a).