

The Deputy Administrator of the National Highway Traffic Safety Administration, Heidi R. King, signed the following notice on March 27, 2018, and we are submitting it for publication in the Federal Register. While we have taken steps to ensure the accuracy of this Internet version of the notice, it is not the official version. Please refer to the official version in a forthcoming Federal Register publication, which will appear on the Government Printing Office's FDSys website (www.gpo.gov/fdsys/search/home.action). Once the official version of this document is published in the Federal Register, this version will be removed from the Internet and replaced with a link to the official version.

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 578

Docket No. NHTSA-2018-0017

RIN 2127-AL94

Civil Penalties

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

ACTION: Notice of Proposed Rulemaking.

SUMMARY: This document proposes a civil penalty rate applicable to automobile manufacturers that fail to meet applicable corporate average fuel economy (CAFE) standards and are unable to offset such a deficit with compliance credits. The agency is proposing this civil penalty rate based on a tentative determination regarding the applicability of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, and in accordance with the Energy Policy and Conservation Act of 1975 (EPCA) and the Energy Independence and Security Act of 2007 (EISA).

DATES: *Comments:* Comments must be received by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].**

ADDRESSES: You may submit comments to the docket number identified in the heading of this document by any of the following methods:

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- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- Mail: Docket Management Facility, M-30, U.S. Department of Transportation, West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- Hand Delivery or Courier: U.S. Department of Transportation, West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m. Eastern time, Monday through Friday, except Federal holidays.
- Fax: 202-493-2251

FOR FURTHER INFORMATION CONTACT: Kerry Kolodziej, Office of Chief Counsel, NHTSA, telephone (202) 366-2992, facsimile (202) 366-3820, 1200 New Jersey Ave, SE, Washington, DC 20590.

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A. Executive Summary

NHTSA has almost forty years of experience in implementing the corporate average fuel economy (CAFE) program and its civil penalty component. This includes oversight and administration of the program's operation, how the automobile manufacturers respond to CAFE standards and increases, and the role of civil penalties in achieving the CAFE program's objectives. NHTSA has carefully considered these objectives in reconsidering the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Inflation Adjustment Act or 2015 Act) and its application to the CAFE civil penalty statute NHTSA administers.

As a result of this review, NHTSA is proposing to retain the current civil penalty rate in 49 U.S.C. 32912(b) of \$5.50 per tenth of a mile per gallon for automobile manufacturers that do not meet applicable CAFE standards and are unable to offset such a deficit with compliance credits. NHTSA's proposal is based on its tentative determination that the CAFE civil penalty rate is not a "civil monetary penalty," as defined by the 2015 Act, that must be adjusted for inflation. NHTSA's previous Federal Register notices on its inflation adjustments under the 2015 Act did not consider whether the CAFE civil penalty rate fit the definition of a "civil monetary penalty" subject to adjustment under the 2015 Act, instead proceeding—without analysis—as if the 2015 Act applied to the CAFE civil penalty rate. After taking the opportunity to fully analyze the issue, NHTSA tentatively concludes that the CAFE civil penalty rate is not covered by the 2015 Act and seeks comment on four ways that the provisions of the 2015 Act could be best approached.

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First, civil penalties assessed for CAFE violations under Section 32912(b) are not a “penalty, fine, or other sanction that” is either “a maximum amount” or “a specific monetary amount.” Rather, the civil penalties under consideration here are part of a complicated market-based enforcement mechanism. Any potential civil penalties for failing to satisfy fuel economy requirements, unlike other civil penalties, are not determined until the conclusion of a complex formula, credit-earning arrangement, and credit transfer and trading program. In fact, the ultimate penalty assessed is based on the noncompliant *manufacturer's* decision, not NHTSA's, on whether and how to acquire and apply any credits that may be available to the manufacturer, and on the decisions of *other* manufacturers to earn and sell credits to a potentially liable manufacturer. In other words, what the noncompliant manufacturer pays is as much a function of market forces as it is the CAFE penalty rate.

Moreover, NHTSA tentatively concludes that Congress did not intend for the 2015 Act to apply to this specialized civil penalty rate, which has longstanding, strict procedures previously enacted by Congress that limit NHTSA's ability to increase the rate. Congress specifically contemplated that increases to the CAFE civil penalty rate for manufacturer non-compliance with CAFE standards may be appropriate and necessary and included a mechanism in the statute for such increases. Critically, this mechanism requires the Secretary of Transportation to determine specifically that any such increase will not lead to certain specific negative economic effects. In addition, Congress explicitly limited any such increase to \$10 per tenth of a mile per

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gallon.¹ These restrictions have been in place since the statute was amended in 1978. Though Congress later amended the CAFE civil penalty provision in 2007, Congress did not amend either the mechanism for increases or the upper limit of an increased civil penalty under the statute. NHTSA seeks comment on this analysis.

Second, in the alternative, NHTSA is proposing to keep the civil penalty rate the same in order to comply with EPCA, which must be read harmoniously with the 2015 Act. The 2015 Act confers discretion to the head of each agency to adjust the amount of a civil monetary penalty by less than the amount otherwise required for the initial adjustment, with the concurrence with the Director of the Office of Management and Budget, upon determining that doing so would have a “negative economic impact” In EPCA, Congress previously identified specific factors that NHTSA is required to consider before making a determination about the “impact on the economy” as a prerequisite to increasing the applicable civil penalty rate. NHTSA believes that these statutory criteria are appropriate for determining whether an increase in the CAFE civil penalty rate would have a “negative economic impact” for purposes of the 2015 Act. Under EPCA, NHTSA faces a heavy burden to demonstrate that increasing the civil penalty rate “will not have a substantial deleterious impact on the economy of the United States, a State, or a region of a State.” Specifically, in order to establish that the increase would not have that “substantial deleterious impact,” NHTSA would need to affirmatively determine that it is likely

¹ NHTSA tentatively concludes the 2015 Act also does not apply to the \$10 cap.

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that the increase would *not* cause a significant increase in unemployment in a State or a region of a State; adversely affect competition; or cause a significant increase in automobile imports. In light of those statutory factors—and the absence of evidence to the contrary—NHTSA tentatively concludes it is likely that increasing the CAFE civil penalty rate would have a negative economic impact and thus is proposing not to adjust the rate under the 2015 Act. NHTSA is soliciting comments on this proposal, including whether the inflation adjustment would have a “negative economic impact,” and if so, how much less than the amount otherwise required should the penalty level be adjusted.

Third, even if EPCA's statutory factors for increasing civil penalties are not applied, NHTSA has tentatively determined that the \$14 penalty will lead to a negative economic impact that merits leaving the CAFE civil penalty rate at \$5.50. Based on available information, including information provided by commenters, the effect of applying the 2015 Act to the CAFE civil penalty could potentially drastically increase manufacturers' costs of compliance beyond those contemplated when NHTSA established the current CAFE standards in 2012. NHTSA is soliciting comments on this tentative conclusion, including the level at which the CAFE civil penalty rate should be set.

Fourth, even if the CAFE civil penalty rate is a “civil monetary penalty” under the 2015 Act and regardless of whether increasing it would have a “negative economic impact,” the increase is capped by statute at \$10 by EPCA. NHTSA seeks comment on this alternative,

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including whether the \$10 cap is itself a “civil monetary penalty” that is required to be adjusted under the 2015 Act.

NHTSA is also proposing an inflationary adjustment to the general penalty for other violations of EPCA, as amended.

B. Statutory and Regulatory Background

NHTSA sets² and enforces³ corporate average fuel economy (CAFE) standards for the United States light-duty vehicle fleet, and in doing so, assesses civil penalties against vehicle manufacturers that fall short of their compliance obligations and are unable to make up the shortfall with credits.⁴ The civil penalty amount for CAFE non-compliance was originally set by statute in 1975, and since 1997, has included a rate of \$5.50 per each tenth of a mile per gallon (0.1) that a manufacturer's fleet average CAFE level falls short of its compliance obligation. This shortfall amount is then multiplied by the number of vehicles in that manufacturer's fleet.⁵ The basic equation for calculating a manufacturer's civil penalty amount before accounting for credits, is as follows:

² 49 U.S.C. 32902.

³ 49 U.S.C. 32911, 32912.

⁴ 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.

⁵ 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.

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(penalty rate, in \$ per 0.1 mpg per vehicle) x (amount of shortfall, in tenths of an mpg) x
(# of vehicles in manufacturer's non-compliant fleet).

Without even accounting for costs of generating or purchasing credits, automakers have paid more than \$890 million in CAFE civil penalties, up to and including model year (MY) 2014 vehicles.⁶ Starting with the model year 2011, provisions in the CAFE program provided for credit transfers among a manufacturer's various fleets. Starting with that model year, 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 non-compliance. Manufacturers are required to notify NHTSA of the volumes of credits traded or sold, but the agency does not receive any information regarding total cost paid or cost per credit. NHTSA believes it is likely that credit purchases involve significant expenditures and that an increase in the penalty rate would correlate with an increase in such expenditures. The agency currently anticipates many manufacturers will face the possibility of paying larger CAFE penalties or incurring increased costs to acquire credits over the next several years than at present.⁷

⁶ Fine reporting for MY15 and newer vehicles was not reported at the time of this proposal. The highest CAFE penalty paid to date for a shortfall in a single fleet was \$30,257,920, paid by DaimlerChrysler for its imported passenger car fleet in MY 2006. Since MY 2012, only Jaguar Land Rover and Volvo have paid civil penalties. See https://one.nhtsa.gov/cafe_pic/CAFE_PIC_Fines_LIVE.html.

⁷ NHTSA's *Projected Fuel Economy Performance Report*⁷ indicates that many manufacturers are falling behind the standards for model year 2016 and increasingly so for model year 2017.

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NHTSA has long had authority under the Energy Policy and Conservation Act (EPCA) of 1975, Pub. L. 94-163, 508, 89 Stat. 912 (1975), to raise the amount of the penalty for CAFE shortfalls if it can make certain findings,⁸ as well as the authority to compromise and remit such penalties under certain circumstances.⁹ If NHTSA were to raise the penalty rate for CAFE shortfalls, the higher amount would apply to *any* manufacturer that owed them; the authority to compromise and remit penalties, however, is extremely limited and on a case-by-case basis. To date, NHTSA has never utilized its ability to compromise or remit a CAFE civil penalty.

Recognizing the economic harm that CAFE civil penalties could have on the automobile industry and the economy as a whole, Congress capped any increase in the original statutory penalty rate at \$10 per tenth of a mile per gallon. Further—and significantly—it provided that NHTSA may only raise CAFE penalties under EPCA if it concludes through rulemaking that the increase in the penalty rate both (1) will result in, or substantially further, substantial energy conservation for automobiles in model years in which the increased penalty may be imposed, *and* (2) will not have a substantial deleterious impact on the economy of the United States, a State, or a region of the State. A finding of “no substantial deleterious impact” may only be made if NHTSA determines that it is likely that the increase in the penalty (A) will not cause a significant increase in unemployment in a State or a region of a State, (B) adversely affect

⁸ 49 U.S.C. 32912.

⁹ 49 U.S.C. 32913.

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competition, or (C) cause a significant increase in automobile imports. Nowhere does EPCA define "substantial" or "significant" in the context of this provision.

If NHTSA seeks to compromise or remit penalties for a given manufacturer, a rulemaking is not necessary, but the amount of a penalty may be compromised or remitted only to the extent (1) necessary to prevent a manufacturer's insolvency or bankruptcy, (2) the manufacturer shows that the violation was caused by an act of God, a strike, or a fire, or (3) the Federal Trade Commission certifies that a reduction in the penalty is necessary to prevent a substantial lessening of competition. NHTSA has never previously attempted to undertake this process.

C. Civil Penalties Inflation Adjustment Act Improvements Act of 2015

On November 2, 2015, the Federal Civil Penalties Inflation Adjustment Act Improvements Act (Inflation Adjustment Act or 2015 Act), Pub. L. 114-74, Section 701, was signed into law. The 2015 Act required federal agencies to make an initial "catch-up" adjustment to the "civil monetary penalties," as defined, they administer through an interim final rule and then to make subsequent annual adjustments for inflation. The amount of increase for any "catch-up" adjustment to a civil monetary penalty pursuant to the 2015 Act was limited to 150 percent of the then-current penalty. Agencies were required to issue an interim final rule, without providing the opportunity for public comment ordinarily required under the Administrative Procedure Act, for the initial "catch-up" adjustment by July 1, 2016.

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The method of calculating inflationary adjustments in the 2015 Act differs substantially from the methods used in past inflationary adjustment rulemakings conducted pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (the 1990 Inflation Adjustment Act), Pub. L. 101-410. Civil penalty adjustments under the 1990 Inflation Adjustment Act were conducted under rules that sometimes required significant rounding of figures.

The 2015 Act altered these rounding rules. Now, penalties are simply rounded to the nearest \$1. Furthermore, the 2015 Act “resets” the inflation calculations by excluding prior inflationary adjustments under the 1990 Inflation Adjustment Act. To do this, the 2015 Act requires agencies to identify, for each civil monetary penalty, the year and corresponding amount(s) for which the maximum penalty level or range of minimum and maximum penalties was established (*i.e.*, originally enacted by Congress) or last adjusted other than pursuant to the 1990 Inflation Adjustment Act.

The Director of the Office of Management and Budget (OMB) provided guidance to agencies in a February 24, 2016 memorandum.¹⁰ For those penalties an agency determined to be “civil monetary penalties,” the memorandum provided guidance on how to calculate the initial adjustment required by the 2015 Act. The initial catch up adjustment is based on the change between the Consumer Price Index for all Urban Consumers (CPI-U) for the month of October in

¹⁰ 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> (last accessed December 14, 2017).

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the year the penalty amount was established or last adjusted by Congress and the October 2015 CPI-U. The February 24, 2016 memorandum contains 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 must multiply the penalty amount when it was established or last adjusted by Congress, excluding adjustments under the 1990 Inflation Adjustment Act, by the multiplier for the increase in CPI-U from the year the penalty was established or adjusted as provided in the February 24, 2016 memorandum. The 2015 Act limits the initial inflationary increase to 150 percent of the current penalty. To determine whether the increase in the adjusted penalty is less than 150 percent, the agency must multiply the current penalty by 250 percent. The adjusted penalty is the lesser of either the adjusted penalty based on the multiplier for CPI-U in Table A of the February 24, 2016 memorandum or an amount equal to 250% of the current penalty.

Additionally, the 2015 Act gives agencies discretion to adjust the amount of a civil monetary penalty by less than otherwise required if the agency determines that increasing the civil monetary penalty by the otherwise required amount will have either a negative economic impact or if the social costs of the increased civil monetary penalty will outweigh the benefits.¹¹ In either instance, the agency must publish a notice, take and consider comments on this finding,

¹¹ Pub. L. 114-74, Sec. 701(c).

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and receive concurrence on this determination from the Director of OMB prior to finalizing a lower civil penalty amount.

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

1. Interim Final Rule

On July 5, 2016, NHTSA published an interim final rule, adopting inflation adjustments for civil penalties under its administration, following the procedure and the formula in the 2015 Act. NHTSA did not analyze at that time whether the 2015 Act applied to all of its civil penalties. One of the adjustments NHTSA made at the time was raising the civil penalty rate for CAFE non-compliance from \$5.50 to \$14.¹² NHTSA also indicated in that notice that the maximum penalty rate that the Secretary is permitted to establish for such violations would increase from \$10 to \$25, although this was not codified in the regulatory text.¹³ NHTSA also raised the maximum civil penalty for other violations of EPCA, as amended, to \$40,000.¹⁴

In response to the changes to the CAFE penalty provisions issued in the interim final rule, the Alliance of Automobile Manufacturers (Alliance) and the Association of Global Automakers (Global) jointly petitioned NHTSA for reconsideration (the Industry Petition).¹⁵ The Industry

¹² 81 FR 43524 (July 5, 2016). This interim final rule also updated the maximum civil penalty amounts for violations of all statutes and regulations administered by NHTSA, and was not limited solely to penalties administered for CAFE violations.

¹³ For the reasons described in Section E.1, NHTSA is proposing to leave the maximum penalty rate that the Secretary is permitted to establish for such violations at \$10.

¹⁴ 81 FR 43524 (July 5, 2016).

¹⁵ 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 Industry Petition. Both petitions, along with a supplement to the Industry Petition, can be found in Docket ID NHTSA-2016-0075 at www.regulations.gov.

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Petition raised concerns with the significant impact, which they estimated to be at least \$1 billion annually, that the increased penalty rate would have on CAFE compliance costs. Specifically, the Industry Petition raised: the issue of retroactivity (applying the penalty increase associated with model years that have already been completed or for which a company's compliance plan had already been "set"); which "base year" (*i.e.*, the year the penalty was established or last adjusted) NHTSA should use for calculating the adjusted penalty rate; and whether an increase in the penalty rate to \$14 would cause a "negative economic impact."

2. Final Rule

In response to the Industry Petition, NHTSA issued a final rule on December 28, 2016.¹⁶ In that rule, NHTSA agreed that raising the penalty rate for model years already fully complete would be inappropriate, given how courts generally disfavor the retroactive application of statutes. NHTSA also agreed that raising the rate for model years for which product changes were infeasible due to lack of lead time, did not seem consistent with Congress' intent that the CAFE program be responsive to consumer demand. NHTSA therefore stated that it would not apply the inflation-adjusted penalty rate of \$14 until model year 2019, as the agency believed that would be the first year in which product changes could be made in response to the higher penalty rate.

3. Reconsideration and Request for Comments

¹⁶ 81 FR 95489 (December 28, 2016).

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Before NHTSA's December 2016 final rule became effective, in January 2017, NHTSA took action to delay the effective date of the December 2016 CAFE civil penalties rule.¹⁷ As part of that action, and in light of CAFE compliance data submitted by manufacturers to NHTSA showing that many automakers would begin to fall behind in meeting their applicable CAFE standards beginning in model years 2016 and 2017,¹⁸ the agency requested public comment on the civil penalties—the first opportunity the public had to do so.¹⁹ The comment period closed on October 10, 2017. NHTSA received thirteen comments from various interested parties.

Commenters included industry stakeholders and citizens. The array of commenters also included representatives from environmental groups, academia, and state governments such as attorneys general and environmental quality divisions. Industry stakeholders included comments from trade organizations and vehicle manufacturers.²⁰

Generally, commenters from environmental organizations, attorneys general of 10 states, and academia expressed support for upholding the December 2016 final rule. In addition, those supporting the \$14 civil penalty generally asserted reconsidering the 2016 final rule was outside of NHTSA's authority. None of the comments received from commenters specifically addressed whether the CAFE civil penalty rate was a "civil monetary penalty" as defined by the 2015 Act.

¹⁷ 82 FR 8694 (January 30, 2017); 82 FR 15302 (March 28, 2017); 82 FR 29009 (June 27, 2017); 82 FR 32139 (July 12, 2017). The portions of the July 5, 2016 interim final rule not dealing with CAFE remain in effect and are expected to be finalized as part of NHTSA's 2018 inflationary adjustments.

¹⁸ "MYs 2016 and 2017 Projected Fuel Economy Performance Report," February 14, 2017, available at https://one.nhtsa.gov/cape_pic/AdditionalInfo.htm

¹⁹ 82 FR 32140 (July 12, 2017).

²⁰ Comments on this notice can be found at: <https://www.regulations.gov/docket?D=NHTSA-2017-0059>.

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Vehicle manufacturers, either directly or via their respective representing organizations, also expressed support for the reconsideration of the 2016 final rule. These commenters provided an analysis of how increased CAFE civil penalties could potentially impact their efforts to develop and sell vehicles in the marketplace when faced with anticipated increases in CAFE stringencies. These commenters expressed support for using 2007 as the base year for calculating inflation adjusted increases in CAFE civil penalty amounts.

Additionally, some commenters suggested civil penalty amounts of 47 dollars per 0.1 mpg and \$8.47 per 0.1 mpg, the latter a 54% increase over the \$5.50 per 0.1 mpg value.

The California Air Resources Board (CARB) commented that NHTSA's considerations when adjusting a civil penalty rate under EPCA do not matter for purposes of making an adjustment under the 2015 Act. CARB also stated that in past joint documents, NHTSA did not indicate that the \$5.50 civil penalty rate would have a negative economic impact.

The Alliance and Global suggested that NHTSA's considerations when adjusting a civil penalty rate under EPCA are informative for purposes of making a determination of negative economic impact under the 2015 Act.

The December 28, 2016 final rule is not yet effective, and during reconsideration, the applicable civil penalty rate was \$5.50 per tenth of a mile per gallon, which was the civil penalty rate prior to NHTSA's inflationary adjustment.²¹ NHTSA's delay of the final rule pending

²¹ 82 FR 32140 (July 12, 2017). If the December 28, 2016 final rule had gone into effect, the penalty rate would have remained \$5.50 until MY 2019.

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reconsideration did not affect the amount of any CAFE penalties that would have otherwise applied prior to Model Year 2019.

E. Proposed Revisions to the CAFE Civil Penalty Rate

In this notice, NHTSA is announcing that it has tentatively determined, upon reconsideration, that the 2015 Act should not be applied to the CAFE civil penalty formula provision found in 49 U.S.C. 32912 and is proposing to retain the current civil penalty rate of \$5.50 per .1 of a mile per gallon.²² The agency is proposing this based on a legal determination that the CAFE civil penalty rate is not a “civil monetary penalty” as contemplated by the 2015 Act and that therefore the 2015 Act should not be applied to the NHTSA CAFE civil penalty formula. Additionally, in the alternative, NHTSA is proposing to maintain the current civil penalty rate based on a tentative finding that—in light of the factors Congress requires NHTSA to analyze in determining whether an increase in the civil penalty rate will have “a substantial

²² NHTSA chose to reconsider its prior determination consistent with its statutory authority to administer the CAFE standards program and its inherent authority to do so efficiently and in the public interest. *See, e.g., Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1360-61 (Fed. Cir. 2008) (“[A]dministrative agencies possess inherent authority to reconsider their decisions, subject to certain limitations, regardless of whether they possess explicit statutory authority to do so.”). OMB’s February 2016 guidance confirms that each agency is “responsible for identifying the civil monetary penalties that fall under the statutes and regulations [it] enforce[s].” And, as repeatedly confirmed by courts, an agency may reconsider how it previously interpreted a statute, particularly when its updated interpretation “closely fits the design of the statute as a whole and its object and policy.” *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417-18 (1993) (cleaned up); *see also Nat’l Classification Comm. v. United States*, 22 F.3d 1174, 1177 (D.C. Cir. 1994) (“[A]n agency may depart from its past interpretation [of a statute] so long as it provides a reasoned basis for the change.”) (citing *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)); *Torrington Extend-A-Care Employee Ass’n v. N.L.R.B.*, 17 F.3d 580, 589 (2d Cir. 1994) (similar). In the 2015 Act specifically, Congress did not prohibit or otherwise restrict agencies from reconsidering whether an initial catch-up adjustment is required or, if so, the magnitude of such an adjustment. Moreover, NHTSA’s regulations provide broadly that “[t]he Administrator may initiate any further rulemaking proceedings that he finds necessary or desirable.” 49 CFR 553.25.

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deleterious impact on the economy”—increasing the CAFE civil penalty rate would result in negative economic impact. Pursuant to OMB's guidance, NHTSA has consulted with OMB before proposing this reduced catch-up adjustment determination and submitted this notice of proposed rulemaking (NPRM) to the Office of Information and Regulatory Affairs (OIRA) for review. . In addition, if NHTSA determines that a reduced catch-up adjustment is appropriate in its final rule, it will seek OMB's concurrence before promulgating the rule, as required by the 2015 Act and confirmed by OMB's guidance. Finally, in this NPRM NHTSA has provided a series of tentative interpretations of the 2015 Act. In light of OMB's role in providing agencies guidance about the 2015 Act, NHTSA has requested OMB's views about the 2015 Act.

NHTSA is also proposing to finalize the 2017 and 2018 inflationary adjustments for the maximum penalty for general CAFE violations in 49 U.S.C. 32912(a).

1. NHTSA is Proposing to Retain the \$5.50 CAFE Civil Penalty Rate Because the 2015 Act is Inapplicable

Upon reconsideration, NHTSA has tentatively determined that the 2015 Act is not applicable to the CAFE civil penalty formula. The penalty in 49 U.S.C. 32912(b) for a manufacturer that violates fuel economy standards is not a “civil monetary penalty” subject to inflationary adjustment under the 2015 Act. This reflects a change in NHTSA's position on this issue from when NHTSA previously adjusted the CAFE civil penalty rate from \$5 to \$5.50.²³

²³ NHTSA may consider a separate rulemaking to consider whether the CAFE civil penalty rate should be \$5.

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Given that the current penalty figure has been in effect since it was set twenty years ago, NHTSA proposes to apply its new position on a prospective basis only from the effective date of the final rule of this rulemaking. As a result of this change, NHTSA is proposing to retain the \$5.50 multiplier in the CAFE civil penalty formula. NHTSA requests comment on this issue.

The 2015 Act requires agencies to adjust “civil monetary penalties” for inflation.²⁴ A “civil monetary penalty” means any penalty, fine, or other sanction” that meets three requirements.²⁵ First, the “penalty, fine, or other sanction” must be “for a specific monetary amount as provided by Federal law” or have “a maximum amount provided for by Federal law.”²⁶ Second, the “penalty, fine, or other sanction” must be “assessed or enforced by an agency pursuant to Federal law.”²⁷ Third, the “penalty, fine, or other sanction” must be “assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts.”²⁸

The 2015 Act required the Office of Management and Budget (OMB) to “issue guidance to agencies on implementing the inflation adjustments” under the Act.²⁹ OMB issued guidance on February 24, 2016 that stated: “Agencies are responsible for identifying the civil monetary penalties that fall under the statutes and regulations they enforce” and for determining the

²⁴ EPCA’s use of the terminology “civil penalty” in 49 U.S.C. 32912(b) is not dispositive. The 2015 Act does not apply to all civil penalties, but rather “civil monetary penalties,” a defined term.

²⁵ 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment § 3(2).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* § 7(a).

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“applicability of the inflation adjustment requirement to an individual penalty....”³⁰ In none of NHTSA’s July 2016 interim final rule, its December final rule, its July 2017 request for comments, nor its earlier adjustment from \$5 to \$5.50 did NHTSA specifically address whether the penalty for manufacturer violations of fuel economy standards in 49 U.S.C. 32912(b) is a “civil monetary penalty” subject to inflationary adjustment under the 2015 Act, or more generally, whether the 2015 Act should be made applicable to the penalty in Section 32912(b). Instead, it applied the 2015 Act without specific analysis of these issues.

Upon evaluation, NHTSA has tentatively concluded the penalty for manufacturer violations of fuel economy standards in 49 U.S.C. 32912(b) is not a “civil monetary penalty” subject to adjustment under the 2015 Act. Upon similar evaluation, NHTSA also has tentatively concluded the \$10 limit for such violations in 49 U.S.C. 32912(c)(1)(B) is not a “civil monetary penalty” subject to adjustment under the 2015 Act either. To be a “civil monetary penalty,” a penalty must meet all three criteria in the statutory definition.³¹ The penalty for manufacturer violations of fuel economy standards, which includes a rate of \$5.50 per .1 mile in its formula, does not meet the first set of criteria in the definition. It is not a “penalty, fine, or other sanction” that is either “a specific monetary amount” or “a maximum amount.” Instead, the statute outlines a process that NHTSA uses to determine a proposed penalty and that manufacturers use to assess

³⁰ OMB Guidance at 2. OMB’s guidance included the definition of “civil monetary penalty” applicable to the 2015 Act and explained: “Agencies with questions on the applicability of the inflation adjustment requirement to an individual penalty, should first consult with the Office of General Counsel of the agency for the applicable statute, and then seek clarifying guidance from OMB if necessary.”

³¹ The three criteria in the definition are joined by the conjunctive “and.”

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their specific penalty. In particular, the \$5.50 per .1 mile is merely a rate that goes into a complex, statutory formula used to calculate a variable penalty. Other factors, such as the manufacturer's credit earning arrangement and its participation in the credit trading program, are also integral parts of the multifaceted formula used to calculate a manufacturer's penalty for violations of the fuel economy standards in 49 U.S.C. 32912(b). Moreover, the decisions of other manufacturers to generate or not generate and sell or not sell credits will also influence the amount that a potentially liable manufacturer pays. NHTSA does not believe this complex formula and credit trading program generates the kind of simple civil penalty that lends itself to rote application of the 2015 Act.

Unlike other civil penalties under NHTSA's jurisdiction, the penalty for manufacturer violations of fuel economy standards is not for "a maximum amount." One example of a penalty that is for "a maximum amount" is the "general penalty" in EPCA for violations of 49 U.S.C. 32911(a). That "general penalty" is "a civil penalty of not more than \$10,000 for each violation."³² This sets "a maximum amount" of \$10,000 per violation. In other words, EPCA set "a maximum amount" of \$10,000 per violation of requirements such as the requirement for manufacturers to submit pre-model year and mid-model year reports to NHTSA on whether they

³² 49 U.S.C. 32912(a). Since the penalty in 49 U.S.C. 32912(a) is for a maximum amount, it is subject to inflationary adjustment under the 2015 Act. NHTSA's inflationary adjustment of that civil penalty in the July 2016 IFR to a maximum penalty of \$40,000 was therefore appropriate. The penalty in 49 U.S.C. 32912(a) is subject to additional inflationary adjustment for 2017 and 2018. Applying the multiplier for 2017 of 1.01636, as specified in OMB's December 16, 2016 guidance, results in an adjusted maximum penalty of \$40,654. Applying the multiplier for 2018 of 1.02041, as specified in OMB's December 15, 2017, results in an adjusted maximum penalty of \$41,484. NHTSA is proposing to finalize that inflationary adjustment.

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will comply with the average fuel economy standards.³³ Accordingly, this civil penalty level was properly adjusted to \$40,000 in NHTSA’s interim final rule and is further adjusted here for 2017 and 2018.³⁴ Violations of the Safety Act are also generally subject to “a maximum amount” of \$21,000 per violation and \$105 million for a related series of violations.³⁵ The agency determines the appropriate amount of such penalties, up to the statutory maximum. On the other hand, the penalty for manufacturer violations of fuel economy standards in 49 U.S.C. 32912(b) does not provide “a maximum amount” of a penalty and instead contains only a complex process for determining a penalty. Setting aside any credits available to the manufacturer, the greater shortfall there is in a manufacturer’s corporate average fuel economy, the greater the potential exists for the eventual application of a civil penalty for that shortfall.

The penalty for manufacturer violations of fuel economy standards also does not meet the definition of a “civil monetary penalty” because the fuel economy standards statute does not provide a “specific monetary amount” for manufacturer violations of fuel economy standards. In contrast to other provisions of the statute that provide for a specific amount on a per violation basis, often in the tens of thousands of dollars, section 32912(b) provides no specific amount. It only provides a \$5.50 rate, which is one input in a market-based enforcement mechanism involving the calculation established in 49 U.S.C. 32912(b), the ultimate result of which—the

³³ *See id.*; 49 U.S.C. 32907(a).

³⁴ 81 FR 43524, 43526 (July 5, 2016).

³⁵ 49 U.S.C. 30165(a)(1). These civil penalty amounts were established by Section 24110 of the Fixing America’s Surface Transportation Act (FAST Act), Pub. L. 114-94, after the 2015 Act was enacted, and thus were not adjusted in the interim final rule.

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penalty owed—is determined by how a manufacturer decides to use any available credits it has, or can acquire, to make up for the initial shortfall identified by NHTSA which in turn is based on the market price for credits which is dependent on the actions of other manufacturers.

For a manufacturer that does not meet an applicable fuel economy standard, NHTSA sends what is known as a “shortfall letter” to the manufacturer. NHTSA can only do so after it knows the average fuel economy “calculated under section 32904(a)(1)(A) or (B) of this title for automobiles to which the standard applies manufactured by the manufacturer during the model year.”³⁶ The fuel economy calculation is conducted by the Environmental Protection Agency (EPA). Following the end of a model year, manufacturers submit final model year reports to EPA. EPA reviews and verifies the information and values manufacturers provide before providing the reports to NHTSA, generally more than six months after the end of a model year.

Once NHTSA receives the average fuel economy calculation from EPA, NHTSA must then determine whether the manufacturer's average fuel economy fails to meet the applicable average fuel economy standard.³⁷ If so, the manufacturer has a shortfall. NHTSA then prepares a preliminary calculation of the manufacturer's *potential* civil penalty, which, as described above, varies depending on the relationship between the manufacturer's average fuel economy and the average fuel economy standards. NHTSA sends the manufacturer a shortfall letter with the

³⁶ 49 U.S.C. 32912(b)(1).

³⁷ 49 U.S.C. 32912(b)(1).

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preliminary calculation, which requires the manufacturer to respond by either submitting a plan on how it intends to make up the shortfall or by paying a penalty.

NHTSA's preliminary calculation is determined by multiplying three numbers: (1) \$5.50, (2) each tenth of a mile per gallon by which the average fuel economy falls short of the applicable average fuel economy standard, and (3) the number of automobiles manufactured by the manufacturer during the model year.³⁸ That calculation does not yield a final civil penalty amount because the statute requires that calculation to include a reduction "by the credits available to the manufacturer under section 32903 of this title for the model year."³⁹

However, applying the reduction for the number of available credits is not a matter of simple mathematics because manufacturers have control over both the amount of credits available to them and the use of their credits. If a manufacturer's performance for a given fleet does not meet the applicable standard, then the manufacturer must elect how to satisfy its shortfall.

Whether and to what extent the penalty calculation is reduced "by the credits available to the manufacturer under section 32903 of this title for the model year" (*i.e.*, how to deal with a non-compliance) is ultimately determined by the manufacturer. Only after this step in the process outlined in section 32912 occurs is the penalty calculation complete. Each manufacturer controls

³⁸ 49 U.S.C. 32912(b)(2).

³⁹ 49 U.S.C. 32912(b)(3).

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the allocation of its own credits, if credits are available.⁴⁰ A manufacturer that earned credits in a compliance category before MY 2008 may apply those credits to that same compliance category for the three model years prior to, and three model years after, the year in which the credits were earned.⁴¹ A manufacturer that earned credits in a compliance category during and after MY 2008 may apply those credits to the same compliance category for three model years prior to, and five model years after, the year in which the credits were earned.⁴² Manufacturers instruct NHTSA on how they wish to allocate their credits, or account for shortfalls.⁴³

Only once NHTSA hears back from the manufacturer on how it wishes to satisfy its shortfall does NHTSA know the specific civil penalty that the manufacturer owes for falling short of the applicable average fuel economy standard. In other words, the manufacturer's decision regarding use of credits is one of the several inputs in the complex formula set forth in the fuel economy standards statute, which ultimately produces the civil penalty for a manufacturer's violation of fuel economy standards. In sum, the statute describes a process to determine a penalty amount, but does not itself provide for a penalty, fine or sanction that is "for a specific amount." Instead, , due to additional flexibilities of credit transfers and trades, a manufacturer determines the amount of the civil penalty that is actually owed.⁴⁴ Considering this framework, the formula established under 49 U.S.C. 32912(b) and the variable amounts that

⁴⁰ See 49 CFR 536.5(c), (d)(2), (6).

⁴¹ *Id.* 536.6(a).

⁴² *Id.* 536.6(b).

⁴³ See 49 CFR 536.5(d)(2), (6).

⁴⁴ Pub. L. 110-140, Title I, 104(a), 121 Stat. 1501 (2007).

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result from application of the formula, are not a “specific monetary amount” of a penalty for manufacturer violations of fuel economy standards subject to adjustment pursuant to the 2015 Act.

NHTSA must conduct a preliminary calculation for each of the manufacturer's fleets. CAFE standards are fleet-wide standards that apply to the vehicles a manufacturer produced for sale in each of three compliance categories: passenger cars manufactured domestically, imported passenger cars, and light trucks.⁴⁵ Within specified limits, EISA permitted manufacturers to transfer credits across fleets. For example, credits earned for a manufacturer's domestic passenger fleet may be transferred to its domestic light-truck fleet. Likewise, EISA permitted manufacturers to sell (*i.e.*, trade) their credits to other manufacturers. The ability to trade credits with another manufacturer, authorized for the first time by EISA in 2007, introduced a new level of complexity that further differentiated civil penalties for violations of fuel economy requirements from other types of civil penalties. This added wrinkle further supports NHTSA's current understanding that the statutory CAFE civil penalty process is not included within the scope of the 2015 Act.

Since manufacturers control the use of their available credits, NHTSA has no way of determining on its own the amount of a penalty that a manufacturer must pay, or even if a

⁴⁵ *Id.* 32902-04.

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manufacturer must pay any penalty at all.⁴⁶ The options are plentiful.⁴⁷ A manufacturer can choose to use no credits and pay a penalty. A manufacturer can choose to use credits from the same compliance category and pay no penalty. A manufacturer can choose to use some credits from the same compliance category and pay a smaller penalty. A manufacturer can choose to transfer credits from another compliance category and pay no penalty. A manufacturer can choose to transfer some credits from another compliance category and pay a smaller penalty. A manufacturer can choose to purchase credits from another manufacturer and pay no penalty. A manufacturer can choose to purchase some credits from another manufacturer and pay a smaller penalty. A manufacturer can combine credits from the same compliance category and/or transfer credits from another compliance category and/or purchase credits from another manufacturer and pay no penalty or a smaller penalty.

Those are just the options for credits already earned. A manufacturer can also elect not to pay a penalty or pay a smaller penalty by using a “carryback” plan, in which the manufacturer applies credits it expects to earn in *future* model years.⁴⁸

There are additional considerations that strongly supports NHTSA's conclusion that the 2015 Act should not be applied to the CAFE civil penalty. Congress already adopted a specific scheme for increasing the civil penalty in 49 U.S.C. 32912(b) that requires a far more intensive

⁴⁶ NHTSA is able to request supplemental reports and audit a manufacturer's compliance plan, *see, e.g.*, 49 CFR 537.8, but ultimately, it is the manufacturer's decision on how to use the credits available to it.

⁴⁷ *See* 49 U.S.C. 32903.

⁴⁸ *See* 49 CFR 536.5(d).

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and restrictive process than the summary approach in the 2015 Act. First, EPCA placed an absolute limit on such an increase to “not more than \$10 for each .1 of a mile a gallon.”⁴⁹

Moreover, Congress set a high bar for adopting an increase. Specifically:

The Secretary of Transportation shall prescribe by regulation a higher amount for each .1 of a mile a gallon to be used in calculating a civil penalty under subsection (b) of this section, if the Secretary decides that the increase in the penalty—(i) will result in, or substantially further, substantial energy conservation for automobiles in model years in which the increased penalty may be imposed; and (ii) will not have a substantial deleterious impact on the economy of the United States, a State, or a region of a State.⁵⁰

Further, the Secretary must decide that an increase will not have a substantial deleterious impact “only when the Secretary decides that it is likely that the increase in the penalty will not—(i) cause a significant increase in unemployment in a State or a region of a State; (ii) adversely affect competition; or (iii) cause a significant increase in automobile imports.”⁵¹ These factors, which appear to demonstrate Congress’ concern that the CAFE civil penalties program could damage the economy, are far more specific and tailored to the CAFE program than any provisions in the 2015 Act. Although it is not specifically identified in the statute, the legislative history indicates that the “impact” of concern relates to “the automobile industry.”⁵² In its report

⁴⁹ 49 U.S.C. 32912(c).

⁵⁰ 49 U.S.C. 32912(c)(1)(A).

⁵¹ *Id.* 32912(c)(1)(C).

⁵² “Energy Initiatives of the 95th Congress,” S. Rep. No. 96-10, at 175-76 (1979) (“Representative Dingell (D-Mich.), concerned that increasing the penalties could lead to layoffs in the automobile industry, insisted that raising the penalties be contingent upon findings by the Secretary of Transportation that increasing the penalties would achieve energy savings and would not be harmful to the economy.”).

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on EPCA's original fuel economy provisions in 1975, the House Commerce Committee recognized:

The automobile industry has a central role in our national economy and that any regulatory program must be carefully drafted so as to require of the industry what is attainable without either imposing impossible burdens on it or unduly limiting consumer choice as to capacity and performance of motor vehicles.⁵³

Notably, Congress was aware that inflation would effectively reduce the real value of the civil penalty rate over time—the CBO Director and NHTSA Administrator recognized that the civil penalty structure under 1975 EPCA “actually become less stringent over time ... as inflation erodes [the penalties’] effect”—yet chose to require this strict procedure to increase the rate without allowing for inflationary adjustments to the multiplier in the formula. In contrast, Congress expressly purposes of the 2015 Act (and its predecessor) “to establish a mechanism that shall ... maintain the deterrent effect of civil monetary penalties” The omission of any inflation adjustment procedure makes sense in light of Congress’ requirement for NHTSA to continually increase fuel economy standards to maximum feasible levels.⁵⁴ Rather than increase the penalty each year, Congress directed NHTSA to determine whether fuel economy standards should be increased, because the goal of the CAFE standards is to increase fuel economy not punish manufacturers, as with other penalties subject to the 2015 Act. Requiring mandatory

⁵³ H.R. Rep. No. 94-340, at 87 (1975). *See also* 121 Cong. Rec. 18675 (June 12, 1975) (statement of Rep. Sharp) (“[W]e recognize that we have serious unemployment in the American auto industry and we want to preserve this important segment of the economy.”).

⁵⁴ 49 U.S.C. 32902(a).

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penalty inflation adjustments *and* continuous fuel standard increases would multiply the amount assessed against manufacturers in a way that does not occur with other types of penalties.

Congress also recognized the need for lead time in increasing the civil penalty for violations of fuel economy standards by specifying that an increase “is effective for the model year beginning at least 18 months after the regulation stating the higher amount becomes final.”⁵⁵

Congress additionally recognized the need for extensive input from the public and other parts of the Government before any such increase. It required that:

The Secretary shall publish in the Federal Register a proposed regulation under this subsection and a statement of the basis for the regulation and provide each manufacturer of automobiles a copy of the proposed regulation and the statement. The Secretary shall provide a period of at least 45 days for written public comments on the proposed regulation. The Secretary shall submit a copy of the proposed regulation to the Federal Trade Commission and request the Commission to comment on the proposed regulation within that period. After that period, the Secretary shall give interested persons and the Commission an opportunity at a public hearing to present oral information, views, and arguments and to direct questions about disputed issues of material fact to—(A) other interested persons making oral presentations; (B) employees and contractors of the Government that made written comments or an oral presentation or participated in the development or consideration of the proposed regulation; and (C) experts and consultants that provided information to a person that the person includes, or refers to, in an oral presentation.⁵⁶

These extensive, statutorily-mandated procedures specifically applicable to increases in the penalty rate in 49 U.S.C. 32912(b) are in stark contrast to the procedures applicable to the

⁵⁵ *Id.* 32912(c)(1)(D).

⁵⁶ *Id.* 32912(c)(2).

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2015 Act. For the initial catch-up adjustment, the 2015 Act specified that agencies should use an interim final rule.⁵⁷ For subsequent annual adjustments, the 2015 Act specified that agencies “shall make the adjustment notwithstanding section 553 of title 5, United States Code,” which contain the Administrative Procedure Act's requirements for rulemaking.⁵⁸

Finally, before Congress passed the 2015 Act, the CBO provided an assessment of the revenue that inflation adjustments pursuant to the 2015 Act would provide the Federal government. CBO determined that *all* inflation adjustments pursuant to the 2015 Act (across *every* Federal agency) would provide in total \$1.3 billion of revenue across ten years.⁵⁹

Commenters indicate that adjusting the civil penalty rate to \$14 could cost up to \$1 billion *annually* in penalty payments.⁶⁰ Across ten years, the penalty payments under this provision of the statute alone could dwarf CBO's contemporaneous estimate of the 2015 Act's effect on revenues from *all* civil monetary penalties across *all* statutes. The drastic difference between CBO's estimate of revenue from *all* inflation adjustments across *ten* years and the potential revenue from this adjustment alone further suggests Congress had not considered the civil

⁵⁷ 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment § 4(b)(1)(A).

⁵⁸ *Id.* § 4(b)(2).

⁵⁹ See “Estimate of the Budgetary Effects of H.R. 1314, the Bipartisan Budget Act of 2015, as reported by the House Committee on Rules on October 27, 2015,” at 4, available at <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/costestimate/hr1314.pdf>. Title VII of the Bipartisan Budget Act of 2015 includes three sections and the revenue estimate was for title VII in its entirety. Section 701 is the 2015 Act. The other two sections are the rescission of money deposited or available in two funds which CBO recognized would decrease direct government spending. Therefore, the 2015 Act is likely the only portion of title VII to provide revenue, and the CBO's revenue estimate for title VII can be understood as a revenue estimate for the 2015 Act.

⁶⁰ See, e.g., Comment ID NHTSA-2017-0059-0019, available at <https://www.regulations.gov/>.

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penalty rate subject to the 2015 Act's inflation adjustment. This is bolstered by the rounding rule adopted by Congress. The 2015 Act states, "[a]ny increase determined under this subsection shall be rounded to the nearest multiple of \$1."⁶¹ This rounding rule suggests the Act was not intended to apply to the small dollar value CAFE civil penalty rate, since it would not serve a *de minimis* rounding function. As a practical matter, if the rounding rule applied to a small dollar penalty rate, it would prevent any annual inflationary increases (absent extraordinary inflation).

NHTSA believes that applying the 2015 Act to the penalty in 49 U.S.C. 32912(b) would evade the statutory safeguards and limitations directly applicable to that penalty, in contrast to Congress's original awareness of penalty rate adjustments, and could result in the imposition of a potentially massive increase in civil penalties, in contrast to contemporaneous, pre-enactment evidence about the effect of the 2015 Act.

NHTSA has previously sought comment on related issues, but NHTSA believes it is important to provide the public with an opportunity to provide additional comments in light of NHTSA's analysis. Accordingly, NHTSA requests comments on this analysis. For these reasons, NHTSA tentatively concludes that it is not appropriate to apply the 2015 Act and is proposing to retain the \$5.50 rate in the CAFE civil penalty.

2. The Agency Tentatively Finds That Increasing the CAFE Civil Penalty Rate Will Result in Negative Economic Impact

⁶¹ 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment § 5(a).

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NHTSA is proposing to retain the CAFE civil penalty rate of \$5.50 per tenth of a mile per gallon, even if one were to assume that the penalties are subject to the 2015 Act, because NHTSA tentatively concludes that, in light of the statutory requirements in EPCA for raising the penalty rate, applying the increase would lead to a “negative economic impact” under the 2015 Act.

The 2015 Act states, “[a]ny increase determined under this subsection shall be rounded to the nearest multiple of \$1.”⁶² NHTSA requests comment on whether, and if so, how, this rounding rule should apply if NHTSA ultimately concludes that adjusting the \$5.50 CAFE civil penalty rate upwards would have a “negative economic impact.” Specifically, does the 2015 Act rule require a \$5.50 civil penalty rate, if finalized, to be rounded to \$6? Commenters should consider the potential application of the rounding rule to the initial catch-up adjustment, as well as the 2017 and 2018 adjustments and future annual adjustments. Commenters should also consider the relationship, if any, between the rounding rule and the criteria required to be met to raise the civil penalty under EPCA.

a. Negative Economic Impact

i. “Negative Economic Impact” is Not Defined

Under the 2015 Inflation Adjustment Act, NHTSA, under authority delegated by the Secretary, may adjust the amount of a civil monetary penalty by the less than the amount

⁶² 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment § 5(a).

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otherwise required for the “catch-up adjustment” upon determining in a final rule, after notice- and comment, that increasing the civil monetary penalty by the otherwise required amount will have a “negative economic impact,” or the social costs of increasing the civil monetary penalty by the otherwise required amount outweigh the benefits.⁶³ In either case, the Director of the Office of Management and Budget must concur with the agency's determination.

To determine whether increasing the CAFE civil penalty rate by the amount calculated under the inflation adjustment formula would have a “negative economic impact,” NHTSA must first establish the meaning of “negative economic impact.” The statute does not define “negative economic impact.” OMB issued a memorandum providing guidance to the heads of executive departments and agencies on how to implement the Inflation Adjustment Act, but the guidance does not define “negative economic impact” either.⁶⁴

ii. How to Interpret “Negative Economic Impact”

In interpreting “negative economic impact,” NHTSA cannot just consider the Inflation Adjustment Act in isolation: statutory interpretation is not conducted in a vacuum.⁶⁵ “It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”⁶⁶

⁶³ 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment § 4(c)(1).

⁶⁴ 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 at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2016/m-16-06.pdf>.

⁶⁵ *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989).

⁶⁶ *Id.* (citing *United States v. Morton*, 467 U.S. 822, 828 (1984)).

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Accordingly, NHTSA must interpret Congress' Inflation Adjustment Act in light of the longstanding CAFE civil penalty structure previously enacted by Congress. Interpreting the Inflation Adjustment Act in context is particularly important in determining the appropriate adjustment to make to the CAFE civil penalty rate given the unique nature of the CAFE civil penalties program. For example, in contrast to other federal civil penalty programs, the CAFE statute requires a minimum of eighteen months' lead time in advance of a model year before a higher civil penalty amount can become effective.⁶⁷ Congress mandated this interval because "manufacturers' product and compliance plans are difficult to alter significantly for years ahead of a given model year."⁶⁸ Indeed, "NHTSA believes that this approach facilitates continued fuel economy improvements over the longer term by accounting for the fact that manufacturers will seek to make improvements when and where they are most cost-effective."⁶⁹ For similar reasons, when DOT amends a fuel economy standard to make it more stringent, that new standard must be promulgated "at least 18 months before the beginning of the model year to which the amendment applies."⁷⁰

CAFE civil penalties are also atypical in that they follow a prescribed formula that can only be compromised or remitted by NHTSA in exceptionally limited circumstances.⁷¹ In

⁶⁷ 49 U.S.C. 32912(c)(1)(D).

⁶⁸ 81 FR 95491 (December 28, 2016).

⁶⁹ *Id.*

⁷⁰ 49 U.S.C. 32902(a)(2).

⁷¹ 49 U.S.C. 32913 (authorizing the Secretary to "compromise or remit the amount of civil penalty imposed" under CAFE "only to the extent" (1) necessary to prevent a manufacturer's insolvency or bankruptcy; (2) the manufacturer shows that the violation was caused by an act of God, a strike, or a fire; or (3) the Federal Trade Commission

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practice, therefore, any increase in the CAFE civil penalty rate would apply to all non-compliant manufacturers, regardless of the circumstances, and in turn, would likely increase the price of credits.⁷² Contrast this constrained structure with NHTSA's general civil penalty authority, which allows the Secretary to determine or compromise the amount of a civil penalty and delineates multiple factors for the Secretary to consider in making such a determination, including the nature, circumstances, extent, and gravity of the violation.⁷³

The principles underlying other traditional canons of statutory interpretation further support NHTSA's proposed approach. For example, statutes that relate to the same or to similar subjects are *in pari materia*. Such statutes should be construed together, even if they do not expressly reference each other or were passed at different times, unless a contrary intent is clearly expressed by Congress. Here, both the inflationary adjustment statute and the relevant provisions of the CAFE statute involve civil penalties and must be read *in pari materia*.⁷⁴ And

certifies that a reduction is necessary to prevent a substantial lessening of competition). NHTSA has never attempted to utilize this provision to compromise or remit a CAFE civil penalty.

⁷² See H.R. Rep. No. 95-1751, at 112 (1978) (Conf. Rep.) (“[T]he higher penalty ... will be the same for all manufacturers when adopted....”).

⁷³ 49 U.S.C. 30165(b)-(c).

⁷⁴ See *Wisconsin Cent. Ltd. v. United States*, 194 F. Supp. 3d 728, 738 (N.D. Ill. 2016), *aff'd*, 856 F.3d 490 (7th Cir. 2017) (“‘[C]onceptual similarity’ ... is precisely the point of the *in pari materia* canon: ‘statutes addressing the same subject matter *generally* should be read as if they were one law,’ with the traditional tools of statutory interpretation applied accordingly. ... [A]lthough FICA does not by completely define the RRTA’s various contours, examining the former to elucidate related provisions of the latter is an acceptable mode of statutory interpretation given the close linkages between the statutes.”) (internal citation omitted) (emphasis in original); *cf. Pound v. Airosol Co.*, 498 F.3d 1089, 1094 n.2 (10th Cir. 2007) (“The penalty provisions of the CAA and the Clean Water Act (CWA) are virtually identical; thus, CWA cases are instructive in analyzing issues arising from the CAA”); *United States v. Dell’Aquila*, 150 F.3d 329, 338 n.9 (3d Cir. 1998) (“[T]he Clean Water Act and the Clean Air Act are *in pari materia*, and courts often rely upon interpretations of the Clean Water Act to assist with an analysis under the Clean Air Act.”) (citations omitted).

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when one of the statutes is generalized and passed later—like the Inflation Adjustment Act—it cannot be read to implicitly repeal an earlier, more specific statute—like EPCA’s establishment of the CAFE civil penalties structure.⁷⁵ This approach to statutory interpretation is consistent with NHTSA’s past practice.⁷⁶

The principles underlying the rule of lenity also substantiate interpreting the Inflation Adjustment Act narrowly in light of EPCA. This canon instructs that statutes imposing penalties should be construed narrowly in favor of those against whom the penalties will be imposed. Although the rule of lenity is traditionally applied in criminal contexts,⁷⁷ the principles underlying the rule are worth considering when there are severe punitive implications of a broad interpretation, as is the case here. Construing the statute strictly is particularly important here because the inflation adjustment essentially acts as a “one-way ratchet,” where all subsequent annual adjustments will be based off this “catch-up” adjustment with no ensuing opportunity to invoke the “negative economic impact” exception.⁷⁸

⁷⁵ See *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (“Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.”) (cleaned up); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (“It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.”).

⁷⁶ See, e.g., 80 FR 40137, 40171 (Aug. 12, 2015) (interpreting a term in EISA by looking to how the term is defined in the Motor Vehicle Safety Act, “[g]iven the absence of any apparent contrary intent on the part of Congress in EISA”).

⁷⁷ Some courts have applied the rule of lenity in civil and administrative contexts as well. See, e.g., *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 (1992); *Rand v. C.I.R.*, 141 T.C. 376, 393 (2013), overturned on other grounds due to legislative action.

⁷⁸ This “one-way ratchet” constraint is also imposed by EPCA. H.R. Rep. No. 95-1751, at 113 (1978) (Conf. Rep.) (“No provision [in EPCA] is made for lowering the penalty.”).

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iii. Reading Section 32912 with the Inflationary Adjustment Act

Under 49 U.S.C. 32912(b), a manufacturer that violates a fuel economy standard is potentially subject to a civil penalty rate for each tenth of a mile per gallon that the manufacturer misses the applicable average fuel economy standard for the number of automobiles manufactured by the manufacturer during the model year, unless the manufacturer is able and willing to apply credits or establish a plan to generate and apply credits in subsequent years, as discussed above. NHTSA has exceptionally limited discretion in whether to impose the penalty or the amount of the preliminary calculation of the penalty when it does indeed apply.

The Secretary is required to increase the applicable civil penalty rate up to \$10 per each tenth of a mile per gallon if she decides that the increase in the penalty:

- (i) will result in, or substantially further, substantial energy conservation for automobiles in model years in which the increased penalty may be imposed; and
- (ii) will not have a substantial deleterious impact on the economy of the United States, a State, or a region of a State.⁷⁹

The Secretary can only decide that the increase “will not have a substantial deleterious impact on the economy” if she decides that it is likely that the increase in the penalty will not:

- (i) cause a significant increase in unemployment in a State or a region of a State;
- (ii) adversely affect competition; or

⁷⁹ 49 U.S.C. 32912(c)(1)(A)-(B).

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(iii) cause a significant increase in automobile imports.⁸⁰

Thus, to increase the civil penalty rate for CAFE violations, the Secretary must affirmatively determine that doing so “will not have a substantial deleterious impact on the economy of the United States, a State, or a region of a State.” Critically, if she is unable to make such a determination or, put another way, if she determines that increasing the civil penalty may have “a substantial deleterious impact on the economy of the United States, a State, or a region of a State,” she is prohibited by statute from increasing the applicable civil penalty rate.⁸¹ Therefore, in determining whether adjusting the CAFE civil penalty rate for inflation will have a “negative economic impact,” it is appropriate to consider the potential negative economic impact the adjustment would have not just on the United States in general, but also, at a minimum, on whether such impact could occur in any particular State or region of a State.

NHTSA also believes it is appropriate to consider the impact raising the CAFE civil penalty rate would have on individual manufacturers who fall short of fuel economy standards, and those affected, such as dealers. Such a broad interpretation is consistent with how other statutory provisions permitting or requiring agencies to consider economic impacts have been interpreted. For example, under the Safety Act, a discretionary factor in determining the amount of a penalty is “the appropriateness of such penalty in relation to the size of the business of the

⁸⁰ 49 U.S.C. 32912(c)(1)(C).

⁸¹ In addition to the substantive findings that must be made before the civil penalty rate can be increased, Section 32912 also imposes procedural requirements. For instance, the Secretary must hold a public hearing during which interested persons and the Federal Trade Commission be allowed to make presentations. 49 U.S.C. 32912(c)(2).

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person charged, including the potential for *undue adverse economic impacts*.”⁸² NHTSA interpreted that factor in its regulation to include consideration of “financial factors such as liquidity, solvency, and profitability.”⁸³ Other federal statutes likewise contemplate consideration of negative economic impacts on individual actors in determining an appropriate civil penalty.⁸⁴ NHTSA’s proposal, which includes consideration of the “negative economic impact” the level would have on individual noncompliant actors, represents a uniform approach with how it determines the appropriate civil penalty level in these other, non-CAFE cases. Moreover, the Senate Conference report on the 1975 version of EPCA directed “the Secretary [to] weigh the benefits to the nation of a higher average fuel economy standard against the difficulties of individual automobile manufacturers.”⁸⁵

Note also that “negative economic impact,” as used in the Inflation Adjustment Act, need not mean “*net* negative economic impact.” Congress expressly utilized the “net” concept in the very next provision of the statute, authorizing a lesser increase to a civil penalty if the agency determines that “the social costs of increasing the civil monetary penalty by the otherwise required amount *outweigh* the benefits.”⁸⁶ The absence of comparable phrasing for the “negative economic impact” provision immediately prior implies either that term is ambiguous or that

⁸² 49 U.S.C. 30165(c)(7) (emphasis added).

⁸³ 49 CFR 578.8.

⁸⁴ See 15 U.S.C. 2069(b), (c) (Consumer Product Safety Commission); 33 U.S.C. 1232(a)(1) (Coast Guard); 33 U.S.C. 1319(d), 1321(b)(8) (Environmental Protection Agency).

⁸⁵ S. Rep. No. 94-516, at 155 (1975) (Conf. Rep.).

⁸⁶ 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment § 4(c)(1)(B) (emphasis added).

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Congress intentionally omitted the word “net.” Either way, without any express indications that Congress meant “net negative economic impact,” NHTSA proposes that the provision should be interpreted without reference to any potential benefits of increasing the penalty.

a. NHTSA has not Determined that an Increase in the CAFE Civil Penalty Rate will not have a Substantial Deleterious Impact on the Economy

To summarize: the 2015 Act allows an agency to set a lower penalty amount than would otherwise be required if it can show that raising the penalty in accordance with the 2015 Act will lead to a “negative economic impact,” which is not defined either in the 2015 Act or OMB’s implementing guidance. However, the statute specifically related to penalties for violations of NHTSA’s fuel economy standards has a provision allowing for an increase in the penalty rate only if the agency can determine that increasing the rate will not have a “substantial deleterious impact on the economy.” To read these two provisions together harmoniously, NHTSA interprets the statutes to mean that the agency must be able to affirmatively show that increasing the penalty as would be required by the 2015 Act will not have the adverse economic effects identified in the definition of “substantial deleterious impact.” Since the agency cannot make those affirmative findings, discussed further below, it is therefore prohibited from raising the penalty rate because doing so would have a “negative economic impact.”

Since NHTSA does not have sufficient evidence to make the requisite finding under EPCA that an increase in the CAFE penalty rate will not have a substantial deleterious impact on the economy, NHTSA is proposing to retain the \$5.50 penalty rate pursuant to the negative

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economic impact exception to inflationary adjustments. NHTSA invites comments on whether this is the appropriate penalty level, and if not, requests data or other evidence that would support the findings necessary under EPCA that would allow for such an increase.

The comments should take into account that the factors are probabilistic and prospective, that is, to increase the penalty rate, the Secretary must determine that doing so likely would not have the statutorily-enumerated effects in the future.

The comments should also reflect the considerable burdens that must be overcome to make the findings needed to increase the civil penalty under EPCA, in part reflected in the statute's repeated use of "substantial" and "significant." Indeed, the burden is so great that NHTSA has been unable to make all of the determinations necessary since the provisions were added in 1978.

The comments should also address the impact of increasingly stringent fuel economy standards established in existing statute and NHTSA regulation, and whether this increasing stringency has a relationship to a "negative economic impact" or "substantial deleterious impact determination."

b. NHTSA has not Determined that an Increase in the CAFE Civil Penalty Rate will not Cause a Significant Increase in Unemployment in a State or Region of a State

NHTSA tentatively concludes that an increase in the CAFE penalty rate could plausibly cause a significant increase in unemployment in a State or a region of a State. For instance,

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vehicle price increases—resulting from increased penalty payments or compliance costs passed through to customers—could result in customers keeping their current vehicles longer or shifting purchases towards less expensive new vehicles or toward the used vehicle market. Either outcome could lead to fewer jobs with vehicle manufacturers. Losses may be concentrated in particular States and regions within those States where automobile manufacturing plants are located. Some manufacturers who have historically paid civil penalties in lieu of compliance have automobile assembly and parts manufacturing plants located in the Midwest and Southeastern U.S. These plants employing thousands of people could be most adversely impacted by a civil penalty increase resulting in employment losses. In response to substantial increases in potential penalties, some manufacturers could plausibly lose sales due to resulting higher prices, which may result in reduced employment at facilities currently producing vehicles and engines.

Fewer new vehicle sales attributable to price increases resulting from increased penalty payments and/or compliance costs could also plausibly result in fewer jobs within new motor vehicle dealerships franchised to sell vehicles manufactured or distributed by manufacturers subject to penalties and/or increased compliance costs. A manufacturer's decision to change allocation of vehicles distributed to dealers to address increased penalties and/or compliance costs could also result in job losses within the franchised dealer network. For example, one might expect that increased CAFE penalties could lead to a decrease in the number of vehicles with

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powerful engines being produced or sold. Dealers in States or intra-State regions where these types of vehicles are more popular would be affected disproportionately.

c. NHTSA has not Determined that an Increase in the CAFE Civil Penalty Rate will not Adversely Affect Competition

Notably, unlike the other two factors, this factor does not require a finding of a “significant” effect. The absence of this modifier implies that even a modest adverse effect on competition would suffice to block a civil penalty increase. This phrasing similarly contrasts with the provision in the next section of the Code, describing the compromising or remitting the amount of a CAFE civil penalty. That provision requires the Federal Trade Commission to certify that a reduction in the penalty is “necessary to prevent a substantial lessening of competition.”⁸⁷

In establishing CAFE stringency requirements, NHTSA has consistently evaluated risks to competition, including the potential effects on individual automakers. For instance, in the 1985 rulemaking, NHTSA analyzed the potential effect of a 1.5 mpg fuel economy improvement on the domestic auto industry, stating:

It is always possible that higher levels of fuel economy could be achieved by the domestic manufacturers if they were to restrict severely their product offerings. For example, sales of particular larger light truck models and larger displacement engines could be limited or eliminated entirely. As discussed by the October 1984 notice, Ford submitted an analysis of the potential effects of restricting product offerings in this manner. This analysis showed that to achieve a 1.5 mpg average fuel economy benefit through such restrictions, sales reductions of 100,000 to 180,000 units at Ford could occur, with resulting employment losses of 12,000

⁸⁷ 49 U.S.C. 32913(a)(3).

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to 23,000 positions at Ford, its dealers and suppliers. The agency believes this analysis to be a reasonable projection of the impacts of restricting the availability of larger light trucks in the current market.

Impacts of this magnitude go beyond the realm of "economic practicability" as contemplated in the Act. This is particularly true since it is likely that a standard set at a level resulting in impacts of this magnitude would result in little or no net fuel economy benefit. This is because consumers could meet their demand for larger light trucks by merely shifting their purchases to other manufacturers which continue to offer such trucks. The other manufacturers could increase sales of these vehicles without risking noncompliance with the standards. An additional possible negative economic consequence would be reduced competition in the market for larger light trucks. Given the small number of manufacturers producing larger light trucks, a decision by Ford (or GM or [Chrysler]) to significantly reduce its role in this market could have serious consequences for competition.⁸⁸

NHTSA continues to believe that, in the context of CAFE rulemakings, an analysis of the effects of a regulation on competition should be undertaken in a broad manner, similar to the analysis traditionally used in establishing CAFE stringency requirements, and seeks comments on this approach.

NHTSA tentatively concludes that it is reasonable to believe that an increase in the CAFE penalty rate could distort the normal market competition that would be expected in a free market by favoring one group of manufacturers over another. This could adversely impact the affected manufacturers through higher prices for their products (without corresponding benefits to consumers), restricted product offerings, and reduced profitability. An increased CAFE penalty benefits fleets of already-compliant fuel efficient vehicles over fleets of less fuel-efficient vehicles. A manufacturer who is already generating or possesses over-compliance credits will

⁸⁸ 50 FR 40398, 40400-40401 (Oct. 3, 1985).

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find itself with much more valuable credits to sell and may use this additional capital to invest more heavily in research and development, marketing, add other features to its vehicles which make them more desirable to consumers, or reduce the price of its vehicles. Through model year 2015, manufacturers with positive credit balances had credits in varying amounts up to nearly 396 million credits.⁸⁹ A hypothetical manufacturer with 10 million credits could see the potential value of its credits increase from \$55 million to \$140 million, while a hypothetical manufacturer with 100 million credits could see the potential value even more dramatically increase from \$550 million to \$1.4 billion. Meanwhile, a manufacturer who is not compliant and facing increased difficulties in meeting future stringency requirements may be forced to purchase credits at an increased price, invest more heavily in fuel economy improvements, discontinue less fuel-efficient models or configurations, increase vehicle prices, or some combination of these options—instead of investing in other areas to address consumer demands that would have been satisfied if the manufacturer was able to pay a lower penalty. While this result may be beneficial for purposes of fuel savings, it would further diminish the competitiveness of those manufacturers who are least able to comply with CAFE standards.

In addition to the impact on competition an increase in penalties might have on market participants, it could also have an impact on the market itself by limiting consumer choice involving vehicles and vehicle configurations that would otherwise be produced with penalties at

⁸⁹ See “CAFE Public Information Center,” available at https://one.nhtsa.gov/cape_pic/CAFE_PIC_Credit_LIVE.html.

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their current values. For instance, faced with the prospect of having to pay larger penalties in the future, a manufacturer could decide that it makes financial sense to shift resources from its planned investments in capital towards payment of possible future penalties. If the possibility of paying penalties looms too large, a manufacturer could go out of business, reducing competition even further.

d. NHTSA has not Determined that an Increase in the CAFE Civil Penalty Rate will not Cause a Significant Increase in Automobile Imports

Final model year fuel economy performance reports published by NHTSA indicate import passenger car fleets are performing better than domestic passenger car fleets. The model year 2015 fleet performance report⁹⁰, the latest available, indicates the performance of the imported passenger car fleet has a one-tenth of one mpg advantage. While this slight advantage could be viewed as negligible, performance has varied significantly in recent years—the most significant being model year 2010 where the import fleet outpaced the domestic fleet by more than two mpg.

In light of this historical variation, it is unclear whether increasing the civil penalty fine amount would have a significant effect on either the domestic or import passenger cars fleets, and NHTSA seeks comment on potential positive or negative impacts civil penalties may have

⁹⁰ Available at https://one.nhtsa.gov/cape_pic/CAFE_PIC_fleet_LIVE.html (last accessed December 15, 2017)

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on the domestic and import passenger car fleets, along with any potential positive or negative impacts to the light truck fleet. Please provide supporting information for your position.

iv. Analysis of Comments Received on “Negative Economic Impact” and EPCA Considerations

NHTSA has reviewed the comments it received on the July 2017 notice regarding “negative economic impact,” and—from previous requests for comment—on the EPCA considerations. NHTSA did not identify anything persuasive in the submissions that would undermine NHTSA’s proposed interpretation of “negative economic impact.”

In its July 2017 request for comments, NHTSA specifically sought comments on:

- Whether the EPCA considerations for “substantial deleterious impact” are relevant to a determination of “negative economic impact”?
- And if so, whether those considerations must be accounted for in determining negative economic impact, or simply that they are informational, and what is the legal basis for that belief?

Only two commenters submitted comments touching on these questions. But none of the comments addressed whether the EPCA criteria for “substantial deleterious impact on the economy” should guide NHTSA’s consideration of whether the inflation adjustment would have a “negative economic impact,” and if so, how much less than the otherwise required amount should the penalty level be adjusted after analyzing data relevant to the EPCA factors.

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CARB observed that the 2016 joint Technical Assessment Report stated that manufacturers “who have consistently chosen to pay CAFE fines in the past may continue to do so,” even if the civil penalty rate changes. CARB concluded from that NHTSA saw no reason at the time to think its fines would have a negative economic impact. However, this conclusion does not necessarily follow, as the greatly increased civil penalty rate, in light of longstanding expectations about the steadiness of that rate, could significantly upset manufacturers’ expectations about compliance and thus cause operational or other challenges given the lead time necessary to make significant fuel economy improvements in subsequent model years.

The Alliance and Global jointly submitted comments that also relate to these issues. These associations contended that although the EPCA factors “do not override” the Inflation Adjustment Act and “are not binding” in the inflation adjustment, they provide “helpful support” and “useful guidance” in deciding whether there would be a “negative economic impact” and, if so, how much to adjust the civil penalty amount. In their view, the “stringent” factors required by EPCA demonstrate that the CAFE civil penalty amount should not be increased without evidence of “substantial net benefits” and evidence that there would be “no substantial harm to the economy.”⁹¹

NHTSA has previously sought comment on the EPCA civil penalty criteria in other rulemaking proceedings. In 2009, NHTSA sought comment on whether it should initiate a

⁹¹ The groups go on to claim that the evidence shows that adjusting the penalty to \$14 “will cost society \$3.5 billion and will not produce commensurate benefits.”

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proceeding to consider raising the CAFE civil penalty under EPCA. Most of the comments on this issue focused on the energy conservation factor, rather than the impact on the economy. But no commenter argued that raising the penalty would have a positive or neutral impact on the economy.⁹²

In 2010, NHTSA specifically solicited comments on how raising or not raising the penalty amount under EPCA would impact the economy. Only Ferrari and Daimler commented on this issue. Both manufacturers argued that raising the penalty would have no impact on fuel savings and would simply hurt the manufacturers forced to pay it. Daimler stated further that manufacturers pay fines because they cannot increase energy savings any further. No commenter argued or provided any information supporting the opposing position that raising the penalty amount would have a positive or neutral impact on the economy. Ultimately, NHTSA “defer[red] consideration of this issue for purposes of this rulemaking.”⁹³

In 2012, NHTSA again solicited comments on how raising or not raising the penalty amount under EPCA would impact the economy. This time, “no comments specific to this issue were received,” so NHTSA declared it would “continue to attempt to evaluate this issue on its own.”⁹⁴

⁹² 74 FR 14195, 14427 (Mar. 30, 2009).

⁹³ 75 FR 25323, 25666-67 (May 7, 2010).

⁹⁴ 77 FR 62623, 63131 (Oct. 15, 2012).

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The public has had multiple opportunities to comment on the EPCA civil penalty provisions and now the Inflation Adjustment Act. NHTSA has considered all the comments it received in generating this proposed rule.

Based on the findings discussed above, NHTSA has tentatively made a determination that negative economic impact will result if the CAFE civil penalty rate is increased. For this reason, NHTSA is proposing to retain the existing CAFE civil penalty rate of \$5.50 per .1 of a mile per gallon. NHTSA also seeks comment on whether a modest increase in the CAFE civil penalty rate, less than the amount that would otherwise be required if the 2015 Act applies, would “result in, or substantially further, substantial energy conservation for automobiles in model years in which the increased penalty may be imposed,” as expected by EPCA.

3. Increasing the CAFE Civil Penalty Rate to \$14 Would Have a “Negative Economic Impact,” Even If The EPCA Factors Were Not Mandatory

Even if NHTSA was not required to apply the EPCA factors, NHTSA has tentatively determined that raising the CAFE civil penalty rate to \$14 would have a “negative economic impact.” NHTSA believes that the economic consequences described above are a reasonable estimate of what would occur if the CAFE civil penalty rate was increased 150 percent, regardless of any effect from EPCA. That is, increasing the penalty rate to \$14 would lead to significantly greater costs than the agency had anticipated when it set the CAFE standards because manufacturers who had planned to use penalties as one way to make up their shortfall would now need to pay increased penalty amounts, purchase additional credits at likely higher

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prices, or make modifications to their vehicles outside of their ordinary redesign cycles. NHTSA believes all of these options would increase manufacturers' compliance costs, many of which would be passed along to consumers. Considering the agency's past analyses of CAFE's impact on vehicle costs, NHTSA tentatively concludes that the estimate provided by industry showing annual costs of at least one billion dollars is a reasonable estimate of this impact. NHTSA requests comments, including any substantive analysis, on this issue. The agency further believes that an increase in costs of this significant magnitude exceeds the range of adjustments Congress intended to cover when it enacted the 2015 Act, as described above.

If NHTSA determines that raising the CAFE civil penalty rate to \$14 would have a "negative economic impact," it is permitted to adjust the rate by less than the otherwise required amount. Without any statutory direction or OMB guidance on how much to adjust the rate, if at all, it falls to NHTSA to determine the appropriate adjustment—and NHTSA has wide discretion in making this determination.⁹⁵

In light of the regulatory concerns described above, and in consideration of the unique regulatory structure with non-discretionary penalties tied to standards that increase over time, NHTSA is proposing to keep the CAFE civil penalty rate at \$5.50 because it tentatively

⁹⁵ *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 214-15 (D.C. Cir. 2013) ("An agency has 'wide discretion' in making line-drawing decisions and '[t]he relevant question is whether the agency's numbers are within a zone of reasonableness, not whether its numbers are precisely right.' ... An agency 'is not required to identify the optimal threshold with pinpoint precision. It is only required to identify the standard and explain its relationship to the underlying regulatory concerns.'") (quoting *WorldCom, Inc. v. FCC*, 238 F.3d 449, 461-62 (D.C. Cir. 2001)).

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concludes that retaining the \$5.50 rate would avoid the “negative economic impact” caused by any adjustment upwards.

Although NHTSA has previously sought comment on these issues, NHTSA believes it is important to provide the public with an opportunity to provide additional information in light of NHTSA's analysis. Therefore, NHTSA requests comment on whether increasing the CAFE civil penalty rate to \$14 would have a “negative economic impact,” and if so, to what level the rate should be raised, if at all.

4. The CAFE Civil Penalty Rate is Capped At \$10

Under 49 U.S.C. 32912(c)(1)(B), if the CAFE civil penalty rate is increased, the rate at which it is set “may not be more than \$10 for each .1 of a mile a gallon.” This upper limit has been in effect since EPCA was amended in 1978 and was left in place when Congress amended the civil penalty provision in 2007.⁹⁶

The 2015 Act requires adjustments of “civil monetary penalties,” which must be penalties that are “assessed or enforced by an agency pursuant to Federal law.”⁹⁷ NHTSA believes that the \$10 cap is not the maximum amount of a penalty that is “assessed or enforced.” Rather, it is a limit on the amount NHTSA can set for the CAFE civil penalty rate if the required determinations are made. NHTSA cannot assess or enforce the \$10 cap against anyone. In

⁹⁶ In the interim final rule required by the 2015 Act, NHTSA announced that the adjusted maximum civil penalty would be increased from \$10 to \$25. 82 FR 32139 (July 12, 2017). However, this change was never formally codified in the Code of Federal Regulations nor adopted by Congress. Even if the adjustment is considered to have been adopted, however, NHTSA is now reconsidering that decision for the reasons explained above.

⁹⁷ 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment § 3(2)(B), (C).

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contrast, other penalties in EPCA have a maximum amount that can be “assessed or enforced.” One example of such a penalty is the “general penalty” in EPCA for violations of 49 U.S.C. 32911(a). That “general penalty” is “a civil penalty of not more than \$10,000 for each violation.” NHTSA has the authority, without any additional rulemakings, to subject the entity committing a violation to the maximum amount—\$10,000—for that violation, or a lower amount, in its discretion. By contrast NHTSA has no discretion to enforce anything other than the result of the CAFE formula against a manufacturer, which includes the current \$5.50 multiplier. The \$10 figure is not part of that formula and could only become so after further rulemaking.

Accordingly, NHTSA is tentatively proposing in the alternative that any potential adjustment NHTSA makes to the CAFE civil penalty rate be capped at \$10 and seeks comment on this proposal. Commenters should consider whether the \$10 limit is itself a “civil monetary penalty” that must be adjusted under the 2015 Act, keeping in mind that the level was kept the same when the previous adjustment was made in 1997. Commenters should also consider the effect of the 2007 amendments in ratifying the \$10 level and whether the market-based complexities established by those amendments bear on what Congress meant subsequently by “civil monetary penalty” in the 2015 Act.

F. Rulemaking Analyses and Notices

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

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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. This rulemaking document has been considered a "significant regulatory action" under Executive Order 12866. At this stage, NHTSA believes that this rulemaking could also be "economically significant," but cannot definitively make that determination until the final rule stage, as it depends entirely on the civil penalty rate established in the final rule.

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. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a 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 certifies that this rule would not have a significant economic impact on a substantial number

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of small entities. The following provides the factual basis for this certification under 5 U.S.C. 605(b).

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." 13 CFR 121.105(a). 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 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 49 CFR 578.6(h)(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

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significantly affected as the price of motor vehicles and equipment ought not 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 national government 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.

This rule 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 rule will 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

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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 rule is not expected to include a Federal mandate, no Unfunded Mandates assessment will be prepared.

5. National Environmental Policy Act

The National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4347) requires Federal agencies to analyze the environmental impacts of proposed major Federal actions significantly affecting the quality of the human environment, as well as the impacts of alternatives to the proposed action. 42 U.S.C. 4332(2)(C). When a Federal agency prepares an environmental assessment, the Council on Environmental Quality (CEQ) NEPA implementing regulations (40 CFR parts 1500–1508) require it to “include brief discussions of the need for the proposal, of alternatives [...], of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.” 40 CFR 1508.9(b). This section serves as the agency’s Draft Environmental Assessment (Draft EA). NHTSA invites public comments on the contents and tentative conclusions of this Draft EA.

i. Purpose and Need

This notice sets forth the purpose of and need for this action. NHTSA is required to consider whether it is appropriate, pursuant to the Inflation Adjustment Act, to make an initial

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“catch-up” adjustment to the civil monetary penalties it administers for the CAFE program.

Further, if the agency determines that the Inflation Adjustment Act applies, it must consider the appropriate approach to undertake pursuant to the legislation. The purpose of this notice is to consider the applicability of the Inflation Adjustment Act and to propose adjustments pursuant to the Act, consistent with its requirements as well as the agency's responsibilities under EPCA (as amended by EISA).

ii. Alternatives

NHTSA has considered a range of alternatives for the proposed action, including maintaining the civil penalty amount at \$5.50 per each tenth of a mile per gallon (the No Action Alternative) and increasing the civil penalty amount to \$14.00 per each tenth of a mile per gallon (as previously proposed). This notice also seeks public comment on whether it is required to increase the civil penalty amount to \$6.00 per each tenth of a mile per gallon (rounding pursuant to the 2015 Act) or whether the civil penalty amount is capped at \$10.00 per each tenth of a mile per gallon (pursuant to EPCA). In this notice, the agency proposes maintaining the civil penalty amount at \$5.50 as its preferred alternative, although it may select any value along this range of alternatives, including any civil penalty amount between \$5.50 and \$14.00. NHTSA is also proposing to increase the “general penalty” to a maximum penalty of \$41,484,⁹⁸ pursuant to the requirements of the Inflation Adjustment Act.

⁹⁸ NHTSA adjusted this penalty to a maximum of \$40,000 in its July 2016 IFR. Applying 1.01636 multiplier for 2017 inflationary adjustments, as specified in OMB's December 16, 2016 guidance, results in an adjusted maximum

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iii. Environmental Impacts of the Proposed Action and Alternatives

Under all of the alternatives under consideration, the agency would maintain or increase the civil penalty amount for a manufacturer's failure to meet its fleet's average fuel economy target (assuming the manufacturer does not have sufficient credits available to cover the shortfall). When deciding whether to add fuel-saving technology to its vehicles, a manufacturer might consider the cost to add the technology, the price and availability of credits, the potential reduction in its civil penalty liability, and the value to the vehicle purchaser of the change in fuel outlays over a specified "payback period." A higher civil penalty amount could encourage manufacturers to improve the average fuel economy of their passenger car and light truck fleets if the benefits of installing fuel-saving technology (*i.e.*, lower civil penalty liability and increased revenue from vehicle sales) outweigh the costs of installing the technology.

However, there are many reasons why this might not occur to the degree anticipated. Apart from the civil penalty rate, as CAFE standards increase in stringency, manufacturers have needed to research and install increasingly less cost-effective technology that may not obtain levels of consumer acceptance necessary to offset the investment. A higher civil penalty amount combined with the value of the potential added fuel economy benefit of new, advanced technology to the vehicle purchaser may not be sufficient to outweigh the added technology costs (including both the financial outlays and the risk that consumers may not value the technology or

penalty of \$40,654. Applying the multiplier for 2018 of 1.02041, as specified in OMB's December 15, 2017, results in an adjusted maximum penalty of \$41,484.

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accept its impact on the driving experience, therefore opting not to purchase those models). This may be especially true when gas prices are low. If the added cost in civil penalty payments is borne by the manufacturer, this may result in reduced investment in fuel saving technology or reduced consumer choice. If the added cost in civil penalty payments is passed on to the consumer, the consumer would see higher vehicle purchase costs without a corresponding fuel economy benefit or other benefits, resulting in fewer purchases of newer, more fuel-efficient vehicles. Based on the foregoing, NHTSA believes that each of the alternatives under consideration in this notice could result, at most, only marginally better levels of compliance with the applicable fuel economy targets.

An increase in a motor vehicle's fuel economy is associated with reductions in fuel consumption and greenhouse gas (GHG) emissions for an equivalent distance of travel. Increased global GHG emissions are associated with climate change, which includes increasing average global temperatures, rising sea levels, changing precipitation patterns, increasing intensity of severe weather events, and increasing impacts on water resources. These, in turn, could affect human health and safety, infrastructure, food and water supplies, and natural ecosystems. Fewer GHG emissions would reduce the likelihood of these impacts. Changes in motor vehicle fuel economy are also associated with impacts on criteria and hazardous air pollutant emissions, safety, life-cycle environmental impacts, and more.

As part of recent rulemaking actions establishing CAFE standards, NHTSA evaluated the impacts of increasing fuel economy standards for passenger cars and light trucks on these and

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other environmental impact areas.⁹⁹ The analyses assumed a civil monetary penalty of \$5.50 per each tenth of a mile per gallon. Though particular values reported in its recent Environmental Impact Statements (EISs) may no longer be replicable due to updated assumptions and new information obtained since their publication, the agency believes that the environmental impact trends reported remain adequate and valid. The agency has considered the information and trends presented in those EISs in preparing this proposal. For example, the MY 2017–2025 CAFE EIS showed that the large stringency increases in the fuel economy standards as a result of that rulemaking would result in reductions of global mean surface temperature increases of no more than 0.016°C by 2100. Further, that EIS showed nationwide reductions in most criteria pollutant emissions in 2040 (usually in ranges of 10% or less) and small increases or reductions in most toxic pollutant emissions in 2040 (usually in ranges of 3% or less). NHTSA believes the impacts on fuel economy resulting from this action would be very small compared to the impacts on fuel economy resulting from the stringency increases that were reported in those EISs. Therefore, NHTSA anticipates that the environmental impacts resulting from the proposed action would range from no change (No Action Alternative) to negligible impacts consistent with, but to a much smaller degree than, the trends reported in those EISs (increase in the civil penalty).

⁹⁹ See, e.g., NHTSA, *Final Environmental Impact Statement, Corporate Average Fuel Economy Standards, Passenger Cars and Light Trucks, Model Years 2017–2025*. Docket No. NHTSA-2011-0056. July 2012.

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NHTSA will prepare a new EIS for its forthcoming proposal for new CAFE standards.¹⁰⁰ The agency's civil penalty rate is an input in the CAFE Model that will inform the development of that EIS and, ultimately, the agency's final decision for setting CAFE standards. The agency does not believe the civil penalty rate being proposed will limit its ability to set "maximum feasible" standards pursuant to 49 U.S.C. 32902(b)(2)(B), nor will it unreasonably constrain the potential environmental outcomes associated with future rulemakings. In addition, NHTSA will review the new EIS and the updated CAFE Model as it prepares its final EA for this action, which will ultimately inform the development of the final rule.

NHTSA is also proposing to increase the "general penalty" pursuant to the Inflation Adjustment Act. This increase is not anticipated to have impacts on the quality of the human environment. The "general penalty" is applicable to other violations, such as a manufacturer's failure to submit pre-model year and mid-model year reports to NHTSA on whether they will comply with the average fuel economy standards. These violations are not directly related to on-road fuel economy, and therefore the penalties are not anticipated to directly or indirectly affect fuel use or emissions.

¹⁰⁰ NHTSA, *Notice of Intent to Prepare an Environmental Impact Statement for Model Year 2022–2025 Corporate Average Fuel Economy Standards*. 82 FR 34740 (Jul. 26, 2017).

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iv. Agencies and Persons Consulted

NHTSA and DOT have consulted with OMB as described earlier in this proposal.

NHTSA and DOT have not consulted with any other agencies in the development of this proposal.

v. Conclusion

NHTSA has reviewed the information presented in this Draft EA and concludes that the proposed action and alternatives would have no impact or a small positive impact on the quality of the human environment. The preferred alternative is anticipated to have no impact on the quality of the human environment, as it would result in no change, as compared to current law, to the civil penalty amount for failure to meet fuel economy targets. Further, the proposed change to the "general penalty" is not anticipated to affect on-road emissions. Any of the impacts anticipated to result from the alternatives under consideration are not expected to rise to a level of significance that necessitates the preparation of an Environmental Impact Statement. Based on the information in this Draft EA and assuming no additional information or changed circumstances, NHTSA expects to issue a Finding of No Significant Impact (FONSI). Such a finding will not be made before careful review of all public comments received. A Final EA and a FONSI, if appropriate, will be issued as part of the final rule.

6. Executive Order 12778 (Civil Justice Reform)

This rule does not have a retroactive or preemptive effect. Judicial review of a rule based on this proposal may be obtained pursuant to 5 U.S.C. 702.

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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 (Volume 65, Number 70; Pages 19477-78), or you may visit <http://dms.dot.gov>.

9. Executive Order 13771

This proposed rule is expected to be a deregulatory action under Executive Order 13771, although NHTSA, at this point, has not been able to quantify potential cost savings.

Proposed Regulatory Text

List of Subjects in 49 CFR Part 578

Imports, Motor vehicle safety, Motor vehicles, Rubber and Rubber Products, Tires, Penalties.

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

1. The authority citation for 49 CFR Part 578 is revised to read as follows: Authority: Pub. L. 101-410, Pub. L. 104-134, Pub. L. 109-59, Pub. L. 114-74, Pub. L. 114-94, 49 U.S.C.

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30165, 30170, 30505, 32308, 32309, 32507, 32709, 32710, 32902, 32912, and 33115; delegation of authority at 49 CFR 1.81, 1.95.

(h) *Automobile fuel economy.* (1) A person that violates 49 U.S.C. 32911(a) is liable to the United States Government for a civil penalty of not more than \$41,484 for each violation. A separate violation occurs for each day the violation continues.

(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 \$5.50 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 manufactured 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.

* * * * *

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Issued on _____ in Washington, D.C., under authority delegated in 49 CFR
1.81, 1.95, and 501.5

Heidi R. King,
Deputy Administrator

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[Signature page for Notice of Proposed Rulemaking – CAFE Civil Penalties]