Case No._____

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

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STATE OF NEW YORK, STATE OF CALIFORNIA, STATE OF CONNECTICUT, STATE OF DELAWARE, DISTRICT OF COLUMBIA, STATE OF ILLINOIS, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF NEW JERSEY, STATE OF OREGON, STATE OF RHODE ISLAND, STATE OF VERMONT, and STATE OF WASHINGTON,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION; HEIDI KING in her capacity as Deputy Administrator of the National Highway Traffic Safety Administration; and ELAINE L. CHAO, in her capacity as Secretary of the United States Department of Transportation,

Respondents.

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**PETITION FOR REVIEW OF A FINAL RULE OF THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION**


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## PETITION FOR REVIEW

Pursuant to the Energy Policy and Conservation Act, Section 702 of the Administrative Procedure Act, 5 U.S.C. § 702, and Rule 15 of the Federal Rules of Appellate Procedure, the States of New York, California, Connecticut, Delaware, Illinois, Maryland, New Jersey, Oregon, Rhode Island, Vermont and Washington, the Commonwealth of Massachusetts, and the District of Columbia hereby petition this Court to review and set aside a final action taken by Respondents that reverses a Congressionally mandated inflation adjustment to the penalty for violations of the Corporate Average Fuel Economy (CAFE) standards. In their final action, Respondents conclude that the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 does not apply to the penalty for violations of the CAFE standards and, on this and other grounds, they are reducing the civil penalty for such violations from $14 to $5.50 per tenth of a mile per gallon for model year 2019 and later vehicles. The rule challenged herein was published in the Federal Register on July 26, 2019. *See* 84 Fed. Reg. 36,007 (July 26, 2019).

A copy of the challenged final rule is attached as Exhibit A to this Petition.

Dated: August 2, 2019

Respectfully submitted,


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# EXHIBIT A

340–142–0005 Definitions as Used in This Division Unless Otherwise Specified
340–142–0030 Emergency Action
340–142–0040 Required Reporting
340–142–0050 Reportable Quantities
340–142–0060 Cleanup Standards
340–142–0070 Approval Required for Use of Chemicals
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340–142–0090 Cleanup Report
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(3) Oregon Administrative Rules, Chapter 340, Division 150.

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340–150–0006 Applicability and General Requirements
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340–150–0020 UST General Permit Registration Certificate Required except insofar as this provision applies to a person who does not own or operate an underground storage tank and except insofar as the payment of fees is required
340–150–0021 Termination of Temporary Permits
340–150–0052 Modification of Registration Certificates for Changes in Ownership and Permittee except insofar as the payment of fees is required
340–150–0080 Denial, Suspension or Revocation of General Permit Registration Certificates except insofar as this provision applies to a person who does not own or operate an underground storage tank
340–150–0102 Termination of Registration Certificates
340–150–0110 UST General Permit Registration, Annual Compliance and Other Fees except insofar as the payment of fees is required
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340–150–0315 Priodic operation and maintenance walkthrough inspections
340–150–0320 Corrosion Protection Performance Standards for USTs and Piping
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340–150–0350 UST System Repairs
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340–150–0354 UST System Replacements
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340–150–0540 Applicability to Previously Closed UST Systems
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[FR Doc. 2019–15311 Filed 7–25–19; 8:45 am]
BILLING CODE 6560–50–P

## 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:** Final rule.

**SUMMARY:** This final rule confirms the determination NHTSA announced in the notice of proposed rulemaking (NPRM) that the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Inflation Adjustment Act or 2015 Act) does not apply to the 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. In addition, this final rule is finalizing the agency's determination that even if the Inflation Adjustment Act applies, increasing the CAFE civil penalty rate would have a negative economic impact, and therefore, in accordance with the Energy Policy and Conservation Act of 1975 (EPCA) and the Energy Independence and Security Act of 2007 (EISA), the current CAFE civil penalty rate of $5.50 should be retained, instead of increasing to $14 in model year 2019.

**DATES:**

*Effective dates:* This rule is effective as of September 24, 2019. Upon reconsideration, this rule supersedes the final rule published at 81 FR 95489, December 28, 2016 (delayed at 82 FR 8694, January 30, 2017, 82 FR 15302, March 28, 2017, 82 FR 29010, June 27, 2017, and 82 FR 32139, July 12, 2017), which went into force in accordance with the decision of the United States Court of Appeals for the Second Circuit in *NRDC* v. *NHTSA*, Case No. 17–2780.

*Petitions for reconsideration:* Petitions for reconsideration of this final rule must be received not later than September 9, 2019.

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

**FOR FURTHER INFORMATION CONTACT:** Kerry Kolodziej, Office of Chief

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## A. Executive Summary

As explained in the proposed rule (83 FR 13904 (April 2, 2018)), 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. The CAFE civil penalty provisions 49 U.S.C. 32912(b) and (c), established by EPCA, are complex, containing statutory requirements that must be met if the penalty amount is to be increased, as well as a statutory cap of $10 on the maximum penalty amount, among other provisions, that distinguish it from ordinary civil penalty provisions, such as the general penalty for CAFE violations found in 49 U.S.C. 32912(a).

After the new administration took office and upon further consideration of the issues, NHTSA determined that it was appropriate and necessary to reconsider the applicability of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Inflation Adjustment Act or 2015 Act) to the CAFE civil penalty provision found in EPCA. In reconsidering the CAFE civil penalty rule and the applicability of the 2015 Act to the statutory provision, NHTSA had two objectives: First, to determine whether the CAFE civil penalty rate was the kind of penalty to which the 2015 Act applied, and second, if it did apply, whether increasing the civil penalty rate for the CAFE provision will have a negative economic impact. NHTSA has carefully considered these objectives and comments received in reconsidering the CAFE civil penalty statute that NHTSA administers and the application of the 2015 Act to it.[1]

As a result of this review, including consideration of all the comments received on its proposed rule, NHTSA has reconsidered its earlier decisions that accepted applicability of the 2015 Act and its predecessors to the CAFE civil penalty provision in 49 U.S.C. 32912(b).[2] Accordingly, NHTSA is finalizing its determination that the CAFE civil penalty rate is not a "civil monetary penalty" that must be adjusted for inflation under the 2015 Act. Prior to the proposed rule, NHTSA's **Federal Register** notifications 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 reconsider this matter and fully analyze the issue and consider the comments received on its proposal, NHTSA concludes that the CAFE civil penalty rate is not covered by the 2015 Act.

NHTSA is finalizing its determination that 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."[3] As explained in the proposed rule, 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, after NHTSA determines there is a violation, 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.[4] Manufacturers can also claim future credits as a means of meeting their current liability based upon projected credits to be earned within three subsequent model years. The amount that a manufacturer might actually pay under the CAFE civil penalty statute is dependent upon a fluid, multi-year process, involving credit trading with other manufacturers at unknown prices and unverifiable credits to be earned in the future. In other words, what the noncompliant manufacturer pays is much more the function of market forces, trading of credits, and manufacturers' projections of future performance, than it is just the application of the CAFE penalty rate.

Moreover, after consideration of comments, NHTSA 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 gallon.[5] 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 left in place unaltered both the mechanism for increases and the upper limit of an increased civil penalty under the

[1] This final rule is promulgated under NHTSA's authority, delegated to it by the Secretary (49 CFR 1.95(a)), under 49 U.S.C. Chapter 329. *Cf.* Opinion, ECF No. 205, *NRDC* v. *NHTSA*, Case No. 17–2780, at 13, 17 (2d Cir., June 29, 2018) (citing the "judicial review provision of EPCA [49 U.S.C. 32909(a)] as "the legislative authorization to petition for review" of NHTSA's indefinite delay rule; "Judicial review here is authorized by Section 32909 of EPCA.").

[2] NHTSA has the authority to reconsider its prior rules for the reasons described in Section D.1.

[3] As discussed below, this determination 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 in 1997 and its earlier announcements of adjustments of the rate to $14 in its July 2016 interim final rule and its December 2016 final rule.

[4] *See* 49 U.S.C. 32903.

[5] NHTSA concludes the 2015 Act also does not apply to the $10 cap.

statute. NHTSA's determination regarding the applicability of the 2015 Act to the EPCA CAFE civil penalty provision is also confirmed by the Office of Management and Budget (OMB), the office directed by Congress to issue guidance on the implementation of the 2015 Act. OMB's views regarding the applicability of the 2015 Act to the EPCA CAFE civil penalty provision are set forth in a comprehensive opinion included in the docket for this final rule, in which OMB concurs with NHTSA's assessment that the 2015 Act does not apply to the CAFE civil penalty rate.[6] OMB supported its conclusion by noting first, that it was not aware of any other penalty scheme with the unique features of the CAFE civil penalty scheme, and also "[i]n light of (1) EPCA's distinction between the penalty rate and the penalty itself, (2) the incompatibility of the structure of the CAFE penalty scheme and the 2015 Act, and (3) the inconsistent treatment of the CAFE penalty rate under inflation adjustment schemes over time." These factors, which OMB found supportive of NHTSA's conclusion that the 2015 Act does not apply to the CAFE civil penalty rate, are discussed throughout this document.

In addition to reconsidering the application of the 2015 Act to the EPCA CAFE civil penalty provision, NHTSA has reconsidered its decisions in the July 2016 interim final rule and December 2016 final rule to increase the CAFE civil penalty rate and, as a result, is retaining the current civil penalty rate applicable to 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, rather than increasing the rate to $14 in model year 2019.

Even if the 2015 Act is applied to the CAFE civil penalty rate, NHTSA has determined that the rate should remain 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 of 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 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 persuasive evidence to support making the EPCA findings—NHTSA concludes that increasing the CAFE civil penalty rate would have a negative economic impact. Thus, NHTSA is not adjusting the rate under the 2015 Act, even if it applied.

Even if EPCA's statutory factors for increasing civil penalties are not applied, NHTSA has determined, after consideration of comments, 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 would potentially drastically increase manufacturers' costs of compliance. OMB has concurred with NHTSA's determination that increasing the CAFE civil penalty rate by the otherwise required amount will have a negative economic impact.[7]

In summary, NHTSA concludes that:

- The 2015 Act does not apply to the CAFE civil penalty rate, so no rate increase is permitted, except pursuant to the scheme established in EPCA;
- Even if the 2015 Act did apply to the CAFE civil penalty rate, the 2015 Act must be read in conjunction with EPCA, and considering the EPCA factors, increasing the CAFE penalty rate to $14 would have a "negative economic impact"; and
- Even if the EPCA factors did not apply, increasing the CAFE civil penalty rate to $14 would still have a "negative economic impact."

The result is the same under all of these scenarios: The CAFE civil penalty rate is and will continue to be set at $5.50, rather than increasing to $14 in MY 2019.[8]

In EPCA, Congress also imposed a cap of $10 on the CAFE civil penalty rate. NHTSA has determined that this statutory cap also does not meet the definition of a "civil monetary penalty" that requires adjustment under the 2015 Act. OMB agrees with this assessment.[9] Thus, 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," NHTSA has determined that any increase would be statutorily capped by EPCA at $10.

The general penalty in 49 U.S.C. 32912(a) for other violations of EPCA, as amended, promulgated in 49 CFR 578.6(h)(1), is subject to additional inflationary adjustments for 2017, 2018, and 2019. In this rule, NHTSA is finalizing the 2017, 2018, and 2019 inflationary adjustments to this general penalty amount.

## B. Background

### 1. CAFE Program

NHTSA sets[10] and enforces[11] 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 the standards and are unable to make up the shortfall with credits.[12] 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 the applicable standard. This shortfall amount is then multiplied by the number of vehicles in that manufacturer's fleet.[13] The basic

[6] July 12, 2019 Letter from Russell T. Vought, Acting Director of the Office of Management and Budget, to Elaine L. Chao, Secretary of the United States Department of Transportation, available at Docket No. NHTSA–2018–0017–0018 (OMB Non-Applicability Letter).

[7] July 12, 2019 Letter from Russell T. Vought, Acting Director of the Office of Management and Budget, to Elaine L. Chao, Secretary of the United States Department of Transportation, available at Docket No. NHTSA–2018–0017–0019 (OMB Negative Economic Impact Letter).

[8] Without this rule, the CAFE civil penalty rate would increase to $14 beginning with civil penalties assessed for model year 2019.

[9] OMB Non-Applicability Letter.

[10] 49 U.S.C. 32902.

[11] 49 U.S.C. 32911, 32912.

[12] 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.

[13] A manufacturer may have up to three fleets of vehicles, for CAFE compliance purposes, in any

Continued

equation for calculating a manufacturer's civil penalty amount before accounting for credits, is as follows:

(penalty rate) × (amount of shortfall, in tenths of an mpg) × (number of vehicles in manufacturer's fleet).

Automakers have paid more than $890 million in CAFE civil penalties, up to and including model year (MY) 2014 vehicles.[14] On top of the costs of paying these civil penalties, manufacturers have also spent additional money towards generating overcompliance credits and purchasing credits from other manufacturers. Starting with the model year 2011, provisions in the CAFE program provided for credit transfers among a manufacturer's various fleets. Commencing 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. Thus, while NHTSA is not aware of the amount of money manufacturers spend on generating overcompliance credits or purchasing credits from other manufacturers, NHTSA believes it is likely that credit generation and credit purchases involve significant expenditures. Moreover, NHTSA expects that an increase in the penalty rate, which would apply to all manufacturers, would result in an increase in such expenditures.[15]

Because of expected shortfalls in CAFE compliance in current and upcoming model years, the agency currently anticipates many manufacturers will face the possibility of larger expenditures on CAFE penalties or increased costs to acquire credits over the next several years than at present.[16]

NHTSA has long had authority under the Energy Policy and Conservation Act (EPCA) of 1975, Public Law 94–163, 508, 89 Stat. 912 (1975), to raise the amount of the penalty for CAFE shortfalls if it makes certain findings,[17] as well as the authority to compromise and remit such penalties under certain circumstances.[18] Recognizing the economic harm that increases in 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—Congress has forbidden NHTSA from increasing the CAFE civil penalty rate under EPCA unless NHTSA 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 competition, or (C) cause a significant increase in automobile imports. Nowhere does EPCA define "substantial" or "significant" in the context of this provision.

The authority to compromise and remit penalties is extremely limited and must be applied on a case-by-case basis. 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. To date, NHTSA has never utilized its ability to compromise or remit a CAFE civil penalty. These various statutory provisions and requirements, coupled with the formula for determining the total potential civil penalty due from a manufacturer, demonstrate the unique nature of the CAFE civil penalty provision and distinguish it from a typical civil penalty provision that merely sets forth an amount to be paid for a regulatory violation.

### *2. 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), Public Law 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.[19] 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. Unless an exception applied, agencies were required to issue an interim final rule for the initial "catch-up" adjustment—without providing the opportunity for public comment ordinarily required under the Administrative Procedure Act (APA)—by July 1, 2016.[20]

given model year—a domestic passenger car fleet, an import 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.

[14] Penalty reporting for MY15 and newer vehicles was not reported at the time of this rule. The highest CAFE penalty paid to date for a shortfall in a single fleet was $30,257,920, paid by DaimlerChrysler for its import passenger car fleet in MY 2005. 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.*

[15] *See* 83 FR 13904, 13916 (Apr. 2, 2018) ("[I]ncreasing 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 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."). NHTSA did not receive any comments providing information to the contrary.

[16] NHTSA's "Manufacturer Projected Fuel Economy Performance Report" indicates that the total U.S. fleet projected fuel economy value fails to meet the standards for model year 2017 and increasingly so for model year 2018. Available at *https://one.nhtsa.gov/CAFE_PIC/MY_2017_and_2018_Projected_Fuel_Economy_Performance_Report.pdf* (Apr. 30, 2018).

[17] 49 U.S.C. 32912.

[18] 49 U.S.C. 32913.

[19] A "'civil monetary penalty' means any penalty, fine, or other sanction" that meets three requirements: 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"; the "penalty, fine, or other sanction" must be "assessed or enforced by an agency pursuant to Federal law"; and 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 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 3(2).

[20] The 2015 Act authorized full notice-and-comment rulemaking procedures if the head of an agency was adjusting the amount of a civil monetary penalty by less than the otherwise required amount because she determined either that increasing the civil monetary penalty by the otherwise required amount would have a negative economic impact or that the social costs of increasing the civil monetary penalty by the otherwise required amount outweighed the benefits. Such a determination required the concurrence of the Director of the Office of Management and Budget. 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 4(c).

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), Public Law 101–410. Civil penalty adjustments under the 1990 Inflation Adjustment Act were conducted under rules that sometimes required significant rounding of figures. For example, any increase determined under the 1990 Inflation Adjustment Act had to be rounded to the nearest multiple of $25,000 in the case of penalties greater than $200,000. Under these rules, NHTSA never adjusted the CAFE civil penalty rate above $5.50.

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.

Significantly, Congress also included a provision in the 2015 Act that directed the Director of OMB to issue periodic guidance to agencies implementing the inflation adjustments required under the 2015 Act. The Director of OMB provided initial guidance to agencies in a February 24, 2016 memorandum.[21] In that guidance, OMB specifically instructed agencies to identify the penalties to which the 2015 Act would apply among the penalties that each agency is responsible for administering, and noted that:

> 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.[22]

Subsequent guidance from OMB reiterated agencies' responsibility to identify applicable penalties and to consult with the individual agency's Office of General Counsel and to seek clarifying guidance from OMB with questions regarding the applicability of the 2015 Act to particular penalties.[23]

For those penalties subject to the statute's definition of "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 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.[24] In either instance, the agency must publish a notice, take and consider comments on this finding, and receive concurrence on this determination from the Director of OMB prior to finalizing a lower civil penalty amount.

### *3. NHTSA's Actions to Date Regarding CAFE Civil Penalties*

#### a. Interim Final Rule

On July 5, 2016, NHTSA published an interim final rule, without notice and comment, 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.[25] 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.[26] NHTSA made these adjustments without seeking public comment and without discussing with the Department of Transportation Office of General Counsel whether the 2015 Act applied to these rates, whether the adjustments conflict with EPCA's penalty rate increase procedures, or whether making the adjustments would have negative economic consequences. NHTSA also raised the maximum civil penalty for other violations of EPCA, as amended, to $40,000.[27]

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).[28] The Industry

[21] 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 May 22, 2018).

[22] *Id.*

[23] Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of the 2017 Annual Adjustment Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 16, 2016), available online at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/m-17-11_0.pdf* (last accessed July 10, 2018); Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of Penalty Inflation Adjustments for 2018, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 15, 2017), available online at *https://www.whitehouse.gov/wp-content/uploads/2017/11/M-18-03.pdf* (last accessed July 10, 2018); Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of Penalty Inflation Adjustments for 2019, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Dec. 14, 2018), available online at *https://www.whitehouse.gov/wp-content/uploads/2017/11/m_19_04.pdf* (last accessed May 31, 2019).

[24] Public Law 114–74, Sec. 701(c).

[25] 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.

[26] For the reasons described in Section D.5, the maximum penalty rate that the Secretary is permitted to establish for such violations is $10.

[27] 81 FR 43524 (July 5, 2016).

[28] 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.

Continued

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."

b. Final Rule

In response to the Industry Petition, NHTSA issued a final rule on December 28, 2016.[29] 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.

Beginning in January 2017, NHTSA took action to delay the effective date of the December 2016 final rule.[30] As a result of a recent decision of the United States Court of Appeals for the Second Circuit, that December 2016 final rule is now in force.[31] That decision by the Second Circuit does not affect NHTSA's authority to reconsider the applicability of the 2015 Act to the EPCA CAFE civil penalty provision through notice-and-comment rulemaking and to issue this final rule.[32] Absent this final rule determining that the 2015 Act does not apply to the CAFE civil penalty rate, the rate would have increased beginning with model year 2019 for noncompliances that will likely be determined in approximately late 2020.[33]

c. Initial Reconsideration and Request for Comments

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,[34] in July 2017, the agency indicated it was reconsidering its earlier decision in the July 2016 interim final rule to increase the CAFE civil penalty rate. In that reconsideration announcement, the agency explained that it was, for the first time, seeking public comment on the legal, factual, and policy issues implicated by the question of whether the rate should be increased. NHTSA requested public comment on whether and, if so, how to amend the CAFE civil penalty rate.[35]

d. Notice of Proposed Rulemaking

On April 2, 2018, NHTSA published a notice of proposed rulemaking (NPRM) announcing that it had 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 proposed to retain the current civil penalty rate of $5.50 per .1 of a mile per gallon, rather than to increase it to $14 beginning in model year 2019.[36] Through its reconsideration of the applicability of the 2015 Act to the CAFE civil penalty rate, NHTSA is carrying out its responsibility, as OMB instructed in its guidance, to determine whether the penalties under its jurisdiction are "civil monetary penalt[ies]" as defined by the 2015 Act.[37] The agency's proposal is based on a legal determination, after reconsideration, that the CAFE civil penalty rate is not a "civil monetary penalty" as contemplated by the 2015 Act and that therefore the 2015 Act does not apply to the NHTSA CAFE civil penalty formula. Specifically, NHTSA proposed that the formula is not a "penalty, fine, or other sanction" that is either "a specific monetary amount" or "a maximum amount." Instead, as OMB highlights in the docketed opinion,[38] Congress expressly described the rate in the CAFE statute as an "amount . . . to be used in calculating a civil penalty," not a "civil penalty" itself.[39] The CAFE statute outlines a process that NHTSA uses to determine a potential penalty and that manufacturers use to determine 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 potential penalty amount, but the actual civil penalty amount ultimately depends on the decisions of both the violator and potentially other manufacturers.

This proposal reflected a change in NHTSA's position on this issue from when NHTSA previously adjusted the CAFE civil penalty rate from $5 to $5.50. Mindful of the Alliance and Global's comment that "the practical and legal issues implicated by such a reduction may prove to be insuperable,"[40] at this time, NHTSA is

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

[29] 81 FR 95489 (December 28, 2016). The December 2016 final rule did not impact the portions of the July 5, 2016 interim final rule not dealing with CAFE, which are expected to be finalized as part of NHTSA's 2019 inflationary adjustments.

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

[31] Order, ECF No. 196, *NRDC* v. *NHTSA*, Case No. 17–2780 (2d Cir., Apr. 24, 2018); Opinion, ECF No. 205, *NRDC* v. *NHTSA*, Case No. 17–2780, at 44 (2d Cir., June 29, 2018) ("The Civil Penalties Rule, 81 FR 95,489, 95,489–92 (December 28, 2016), no longer suspended, is now in force.").

[32] NHTSA is permitted to issue this final rule for the reasons explained in Section D.1.

[33] *See* 81 FR 95489, 95492 (Dec. 28, 2016). Civil penalties are determined after the end of a model year, following NHTSA's receipt of final reports from the Environmental Protection Agency (EPA), *i.e.*, no earlier than April 2020 for model year 2019 noncompliance. *See* 77 FR 62624, 63126 (Oct. 15, 2012).

[34] "MYs 2016 and 2017 Projected Fuel Economy Performance Report," February 14, 2017, available at *https://one.nhtsa.gov/cafe_pic/AdditionalInfo.htm.*

[35] 82 FR 32140 (July 12, 2017). Comments on this document can be found at: *https://www.regulations.gov/docket?D=NHTSA-2017-0059.* In the NPRM, NHTSA generally described the comments it received in response to its reconsideration notice, including that "[v]ehicle manufacturers, either directly or via their respective representing organizations, also expressed support for the reconsideration of the 2016 final rule." 83 FR 13904, 13907 (Apr. 2, 2018). NHTSA did not intend to suggest, as one commenter to the NPRM read it, that *all* "the vehicle manufacturers who submitted comments uniformly supported reconsideration of the CAFE penalty increase." Comment by Workhorse Group Inc., NHTSA–2018–0017–0016 (Workhorse Comment), at 2 n.3. NHTSA acknowledges that one electric vehicle manufacturer, Faraday Future, submitted a comment to the reconsideration notice requesting that NHTSA consider the economic impact of a change to the CAFE civil penalty rate on electric vehicle manufacturers. *See* Docket ID NHTSA–2017–0059–0016. NHTSA discusses this issue below.

[36] NHTSA's reconsideration authority is discussed in Section D.1.

[37] 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]." 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, at 2 (Feb. 24, 2016), available at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2016/m-16-06.pdf.*

[38] OMB Non-Applicability Letter, at 4–5.

[39] 49 U.S.C. 32912(c)(1)(A).

[40] Comment by Alliance of Automobile Manufacturers and Association of Global Automakers, NHTSA–2018–0017–0011 (Alliance and Global Comment), 18 n.75. Because of these practical and legal issues and because the agency is "reluctant to draw inferences from Congress' failure to act," *Schneidewind* v. *ANR Pipeline Co.*,

exercising its judgment not to revisit its determination from more than twenty years ago to increase the rate by fifty cents, even if that decision did not take into account the agency's considered interpretation of the statute.[41]

Even if one were to assume that the CAFE penalty rate was subject to the 2015 Act, NHTSA proposed in the alternative to maintain the current $5.50 civil penalty rate based on a tentative finding that—either in light of the statutory factors Congress requires NHTSA to analyze under EPCA in determining whether an increase in the civil penalty rate will have "a substantial deleterious impact on the economy" or otherwise—increasing the CAFE civil penalty rate would result in a "negative economic impact." Pursuant to OMB's guidance, NHTSA consulted with OMB before proposing this reduced catch-up adjustment determination and submitted its NPRM to the Office of Information and Regulatory Affairs (OIRA) for review. In any event, NHTSA proposed that any adjustment would be capped by the $10 limit in 49 U.S.C. 32912(c)(1)(B), which would remain unadjusted.

NHTSA also proposed to finalize the 2017 and 2018 inflationary adjustments for the maximum penalty for general CAFE violations in 49 U.S.C. 32912(a).[42]

## C. Overview of the Comments

NHTSA received sixteen comments on the NPRM. NHTSA received comments from the following entities and individuals: The Alliance of Automobile Manufacturers; the Association of Global Automakers; Jaguar Land Rover North America LLC; Center for Biological Diversity; Natural Resources Defense Council; Sierra Club (and some of its members); the Union of Concerned Scientists; Center for American Progress; Attorneys General of New York, California, Delaware, the District of Columbia, Illinois, Iowa, Maryland, Massachusetts, New Jersey, Oregon, Vermont, Virginia, and Washington; the California Air Resources Board; the California Department of Transportation; the District of Columbia Department of Energy and Environment; the New Jersey Department of Environmental Protection; the Institute for Policy Integrity at New York University School of Law; Workhorse Group Inc.; and other individuals.

## D. Response to the Comments

### 1. NHTSA's Reconsideration Authority

As a threshold matter, NHTSA must address the various comments submitted regarding the agency's ability to reconsider its previous rules on this issue and upon reconsideration, change its position regarding the applicability of the 2015 Act to the CAFE civil penalty rate and the need to invoke the "negative economic impact" exception.[43] NHTSA, like all agencies, is permitted to change its views based upon its experience and expertise, provided that the requirements of the APA and other governing statutes are met. To do so, an agency must show that it is aware it is changing its position and provide a reasoned explanation for the change.[44] This holds true even if the agency's position has been "longstanding," as some commenters characterized here,[45] because the agency must continually consider varying interpretations and reassess their validity.[46]

Here, NHTSA expressly acknowledged in the NPRM that its tentative determination that the CAFE civil penalty rate is not a "civil monetary penalty" subject to inflationary adjustment under the 2015 Act "reflects a change in NHTSA's position on this issue."[47] As NHTSA explained in the NPRM, NHTSA proposed the change because it previously "did not consider" the issue and had proceeded in the July 2016 interim final rule "without analysis" of the statutory interpretation and policy issues considered in this rulemaking and without the benefit of public comment.[48] Accordingly, after providing a comprehensive "reasoned explanation" in the NPRM,[49] NHTSA reached a tentative determination that a change was appropriate and that its proposed change was justified—an analysis upon which it then sought comment.[50]

485 U.S. 293, 306 (1988), Congress not reinstating the $5 rate—in 2007 in EISA or otherwise—means little, contrary to the suggestion of some commenters. *See* Comment by California Air Resources Board, California Department of Transportation, District of Columbia Department of Energy and Environment, and New Jersey Department of Environmental Protection, NHTSA–2018–0017–0014 (CARB Comment), at 20; Comment by Attorneys General of New York, California, Delaware, the District of Columbia, Illinois, Iowa, Maryland, Massachusetts, New Jersey, Oregon, Vermont, Virginia, and Washington, NHTSA–2018–0017–0015 (Attorneys General Comment), at 8, 9–10.

[41] In light of the conclusions that NHTSA reaches in this final rule and the agency's decision to maintain the current $5.50 civil penalty rate at this time, rather than increase it to $14 beginning in MY 2019, any modifications to the civil penalty rate, as appropriate, would be more properly the subject of future rulemakings. As stated in the NPRM, NHTSA is considering a separate rulemaking to determine whether the CAFE civil penalty rate should be reduced to $5, in light of NHTSA's decision here that the 2015 Act should not be applied to the CAFE civil penalty rate. In addition, some commenters here have contended that the CAFE civil penalty rate of $5.50 should be *increased* under EPCA, even if the 2015 Act is not applied. *See infra* at Section D.4.a. NHTSA plans to consider these potentially conflicting positions and any further changes to the CAFE civil penalty rate that might be appropriate in a future rulemaking.

[42] In this final rule, NHTSA also finalizes the 2019 inflationary adjustments for the general CAFE maximum penalty.

[43] *See, e.g.*, Workhorse Comment, at 3; Comment by Center for American Progress, NHTSA–2018–0017–0013 (CAP Comment), at 3; Attorneys General Comment, at 6; Comment by Institute for Policy Integrity at New York University School of Law, NHTSA–2018–0017–0017 (IPI Comment), at 2–3.

[44] Alliance and Global Comment, at 4–5 (citing *Encino Motorcars LLC* v. *Navarro*, 136 S. Ct. 2117, 2125 (2016); *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009)).

[45] *See, e.g.*, Workhorse Comment, at 3; Attorneys General Comment, at 6; IPI Comment, at 1.

[46] *Rust* v. *Sullivan*, 500 U.S. 173, 186–87 (1991); *see also Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2126 (2016); *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Nat'l Cable & Telecommunications Ass'n* v. *Brand X internet Servs.*, 545 U.S. 967, 981 (2005); *GenOn REMA, LLC* v. *U.S. E.P.A.*, 722 F.3d 513, 525 (3d Cir. 2013) (An agency "is not forever held to its prior interpretations, as the continued validity and appropriateness of the agency's rules is an evolving process."); *Strickland* v. *Comm'r, Maine Dep't of Human Servs.*, 48 F.3d 12, 18 (1st Cir. 1995) ("[A]n explained modification, even one that represents a sharp departure from a longstanding prior interpretation, ordinarily retains whatever deference is due."). Given that the current penalty rate has been in effect since it was set decades ago, however, NHTSA will apply its new position on a prospective basis only from the effective date of this final rule.

[47] 83 FR 13904, 13908 (May 2, 2018). As established in OMB's opinion and explained further below, NHTSA's changed position comports with OMB's interpretation of the 2015 Act—that is, the interpretation provided by the office designated by Congress to issue guidance to all agencies on how the 2015 Act should be implemented. OMB Non-Applicability Letter.

[48] 83 FR 13904, 13904–05 (May 2, 2018). Comments noting that NHTSA has previously "acknowledged" that the 2015 Act applies to the CAFE civil penalty rate, Comment by Center for Biological Diversity, Natural Resources Defense Council, Sierra Club, and the Union of Concerned Scientists, NHTSA–2018–0017–0012 (CBD Comment), at 9; *see also* CARB Comment, at 6; IPI Comment, at 2, miss the point: NHTSA expressly recognized its past position in the NPRM, but the agency noted that it had adopted that position without analyzing the issue. After appropriate examination, NHTSA changed its position to comport with the applicable statutes. It is irrelevant that "none of the commenters who responded to NHTSA's [previous] request for comments offered the legal interpretation that NHTSA is now proposing." Workhorse Comment, at 3–4, or that the Alliance and Global have previously stated that "NHTSA is not empowered to exempt the CAFE program from th[e] directive" of the 2015 Act, Industry Petition, at 1. NHTSA is permitted to—and, in fact, has the responsibility to—interpret Federal statutes related to matters under its purview, *see U.S. ex rel. Hall* v. *Payne*, 254 U.S. 343, 347–48 (1920) ("[The Secretary of the Interior] could not administer or apply the act without construing it."), and the public has now had a full opportunity to comment on the proposed interpretation.

[49] 83 FR 13904, 13908–11 (May 2, 2018).

[50] One commenter noted that "NHTSA did not consult with the Department of Justice or any other

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To the extent that NHTSA's "prior policy has engendered serious reliance interests that must be taken into account," NHTSA has provided "a more detailed justification" than what sufficed to create its previous policy.[51] As explained in the NPRM and further below, NHTSA did not previously consider the issue at all and thus any explanation is "more detailed" than the one it previously provided. Regardless, "reliance does not overwhelm good reasons for a policy change," even in instances that would "necessitate systemic, significant changes" to regulated entities' practices.[52] NHTSA believes that correcting an erroneous legal interpretation of a statute to align its practice with what Congress required and exercising authority conferred by Congress to avoid a "negative economic impact" both constitute "good reasons for a policy change." Moreover, "the extent to which the Department is obliged to address reliance will be affected by the thoroughness of public comments it receives on the issue," [53] and only one regulated entity submitted a comment containing any argument that its reliance on NHTSA's previous policy supports an increase in the CAFE civil penalty rate to $14.[54] The reliance argued in this single comment does not override NHTSA's obligation to apply the 2015 Act as enacted or to act in accord with the statute—and with OMB's concurrence [55]—to avoid imposing a "negative economic impact."

It is of no consequence that the 2015 Act does not expressly state that NHTSA may reconsider its previous rules on the initial inflation adjustment. For one, the APA defines "rule making"—the mechanism mandated by the 2015 Act for enacting the initial catch-up adjustment and for invoking the "negative economic impact" exception—to include the process of "amending, or repealing a rule." [56] But in any event, no specific statutory or codified regulatory authority is required. It is well-established that agencies have various inherent powers.[57] And it has been affirmed repeatedly that, in the absence of a Congressional prohibition, agencies have the inherent power to reconsider their own decisions.[58] This inherent authority encompasses an agency reconsidering how it previously interpreted a statute and amending an

agencies besides DOT and OMB in crafting its interpretation of the Inflation Adjustment Act applicable to the entire federal government," as evidence that NHTSA's interpretation does not merit deference. Workhorse Comment, at 3. As noted above, OMB has provided its views on the applicability of the 2015 Act to the CAFE civil penalty rate in a comprehensive opinion included in the docket for this rulemaking. OMB Non-Applicability Letter. In addition, as part of its review of the NPRM before publication in the Federal Register, OIRA within OMB managed an interagency review process, in which the Department of Justice and other agencies were able to review and provide comments on NHTSA's proposal. Moreover, consultation principally with OMB was appropriate as the 2015 Act directed OMB to provide guidance to agencies on implementing the inflation adjustments required under the 2015 Act.

[51] *Fox*, 556 U.S. at 515.

[52] *Navarro*, 136 S. Ct. at 2128 (2016) (Ginsburg, J., concurring).

[53] *Id.* at 2128 n.2.

[54] *See* Workhorse Comment, at 3.

[55] OMB Negative Economic Impact Letter.

[56] 5 U.S.C. 551(5) ("'[R]ule making' means agency process for formulating, amending, or repealing a rule."). Moreover, NHTSA's regulations provide that "[t]he Administrator may initiate any further rulemaking proceedings that he finds necessary or desirable." 49 CFR 553.25.

[57] *See, e.g., Vermont Yankee Nuclear Power Corp.* v. *Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 544 (1978) (noting "the very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure"); *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."); *Gadda* v. *Ashcroft*, 377 F.3d 934, 948 n.8 (9th Cir. 2004) ("Of course, our statutory and inherent powers to regulate attorneys admitted to the Ninth Circuit bar coexist with the separate, independent powers of federal administrative agencies to do the same. . . . In the case of agencies, this power, though limited, exists whether or not expressly authorized by statute."); *Ober* v. *Whitman*, 243 F.3d 1190, 1194–95 (9th Cir. 2001) (indicating that agencies have the inherent authority to exempt *de minimis* violations from regulation if not prohibited by statute); *Tate & Lyle, Inc.* v. *C.I.R.*, 87 F.3d 99, 104 (3d Cir. 1996) ("Inherent in the powers of an administrative agency is the authority to formulate policies and to promulgate rules to fill any gaps left, either implicitly or explicitly, by Congress.") (citing *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)); *Nat. Res. Def. Council, Inc.* v. *Sec. & Exch. Comm'n*, 606 F.2d 1031, 1056 (D.C. Cir. 1979) ("An agency is allowed to be master of its own house, lest effective agency decisionmaking not occur in [a]ny proceeding.").

[58] *See, e.g., Motor Vehicles Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("[A]n agency must be given ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'" (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968))); *Am. Trucking Associations* v. *Atchison, T. & S. F. Ry. Co.*, 387 U.S. 397, 416 (1967) ("We agree that the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice. . . . This kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.") (cleaned up); *Cobra Nat. Res., LLC* v. *Fed. Mine Safety & Health Review Comm'n*, 742 F.3d 82, 101 (4th Cir. 2014) ("[A]n administrative agency, charged with the protection of the public interest, is certainly not precluded from taking appropriate action because of a mistaken action on its part in the past." (quoting *NLRB* v. *Balt. Transit Co.*, 140 F.2d 51, 55 (4th Cir. 1944))); *Kindred Nursing Centers E., LLC* v. *N.L.R.B.*, 727 F.3d 552, 560 (6th Cir. 2013) ("An agency may depart from its precedents, and provided that the departure from precedent is explained, our review is limited to whether the rationale is so unreasonable as to be arbitrary and capricious. An administrative agency may reexamine its prior decisions and may depart from its precedents provided the departure is explicitly and rationally justified.") (cleaned up); *ConocoPhillips Co.* v. *U.S. E.P.A.*, 612 F.3d 822, 832 (5th Cir. 2010) ("Embedded in an agency's power to make a decision is its power to reconsider that decision."); *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."); *Friends of Boundary Waters Wilderness* v. *Bosworth*, 437 F.3d 815, 823–24 (8th Cir. 2006) ("Agencies given the authority to promulgate a quota are presumed to have the authority to adjust that quota."); *S. California Edison Co.* v. *F.E.R.C.*, 415 F.3d 17, 22–23 (D.C. Cir. 2005) ("[O]f course, agencies may alter regulations. Agencies may even alter their own regulations *sua sponte*, in the absence of complaints, provided they have sufficient reason to do so and follow applicable procedures."); *Macktal* v. *Chao*, 286 F.3d 822, 825–26 (5th Cir. 2002) ("[I]t is generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions."); *Harrington* v. *Chao*, 280 F.3d 50, 59 (1st Cir. 2002) ("Agencies do have leeway to change their interpretations of laws, as well as of their own regulations, provided they explain the reasons for such change and provided that those reasons meet the applicable standard of review."); *Belville Mining Co.* v. *United States*, 999 F.2d 989, 997 (6th Cir. 1993) ("Even where there is no express reconsideration authority for an agency, [] the general rule is that an agency has inherent authority to reconsider its decision."); *Rainbow Broad. Co.* v. *F.C.C.*, 949 F.2d 405, 409 (D.C. Cir. 1991) ("Agencies enjoy wide latitude when using rulemaking to change their own policies and the manner by which their policies are implemented. . . . According agencies the power to change their minds about their own policies, practices and procedures rests on a sound policy basis. Agencies need some flexibility in carrying out their authority."); *Dun & Bradstreet Corp. Found.* v. *United States Postal Serv.*, 946 F.2d 189, 193 (2d Cir. 1991) ("It is widely accepted that an agency may, on its own initiative, reconsider its interim or even its final decisions, regardless of whether the applicable statute and agency regulations expressly provide for such review."); *Dawson* v. *Merit Sys. Prot. Bd.*, 712 F.2d 264, 267 (7th Cir. 1983) (describing "the general rule that administrative agencies have the power to reconsider decisions on their own initiative"); *Dana Corp.* v. *ICC*, 703 F.2d 1297, 1305 (D.C. Cir. 1983) ("[T]he agency is entitled to have second thoughts, and to sustain action which it considers in the public interest upon whatever basis more mature reflection suggests."); *Trujillo* v. *Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) ("Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider."); *Mazaleski* v. *Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977) ("We have many times held that an agency has the inherent power to reconsider and change a decision if it does so within a reasonable period of time.") (quoting *Gratehouse* v. *United States*, 512 F.2d 1104, 1109 (Ct. Cl. 1975)); *Albertson* v. *FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950) ("The power to reconsider is inherent in the power to decide.").

existing regulation by going through the notice-and-comment rulemaking process under the APA, particularly when its updated interpretation "closely fits the design of the statute as a whole and its object and policy." [59]

It is common practice for agencies—including NHTSA—to exercise their inherent reconsideration authority.[60] That is because "reconsideration is often the sole means of correcting errors of procedure or substance," and "[t]here may also be instances when unmistakable shifts in our basic judgments about law or policy necessitate the revision or amendment of previously established rules of conduct." [61] In fact, agencies may even have a *duty* to reconsider their rules. As the Supreme Court has noted:

> An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, *must* consider varying interpretations and the wisdom of its policy *on a continuing basis.*[62]

At bottom, "[i]f an agency is to function effectively, however, it must have some opportunity to amend its rules and regulations in light of its experience." [63]

OMB's February 2016 guidance on implementing the 2015 Act confirms that each agency is "responsible for identifying the civil monetary penalties that fall under the statutes and regulations [it] enforce[s]." [64] This is an ongoing responsibility for each agency, as confirmed in OMB's subsequent guidance in December 2016, December 2017, and December 2018.[65] In the docketed opinion regarding NHTSA's determination that the 2015 Act does not apply to the CAFE civil penalty rate, OMB affirms that it is appropriate for NHTSA to reconsider its previous interpretation of the 2015 Act.[66] NHTSA has specific statutory authority to administer the CAFE standards program [67] and retains general authority—beyond its inherent authority—to do so efficiently and in the public interest.[68] In the text of the 2015 Act, 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.

*2. Applicability of the 2015 Act*

Multiple commentators disagreed with NHTSA's proposed determination that the $5.50 civil penalty rate used in the formula 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.[69] After thorough consideration of all these comments, NHTSA adopts its tentative determination. To be a "civil monetary penalty" that must be adjusted for inflation under the 2015 Act, a "penalty, fine, or other sanction" must be, among other things, "for a specific monetary amount as provided by Federal law" or have "a maximum amount provided for by Federal law." [70] The CAFE civil penalty rate is neither.

For one, the CAFE civil penalty rate is an input in a formula that is used to calculate a penalty. And although the CAFE civil penalty rate is capped at $10 by statute,[71] the civil penalty for manufacturers that violate an average fuel economy standards, as defined in 49 U.S.C. 32912(b), has no maximum amount. The higher the shortfall or the higher the number of vehicles in the fleet, the higher the potential penalty (before accounting for credits). This formula stands in stark contrast to the immediately preceding provision specifying the "general penalty" for

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[59] *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 417–18 (1993) (cleaned up); *see also U.S. Telecom Ass'n* v. *F.C.C.*, 400 F.3d 29, 35 (D.C. Cir. 2005) ("[I]f an agency adopts 'a new position inconsistent with' an existing regulation, or effects 'a substantive change in the regulation,' notice and comment are required.") (quoting *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995)); *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).

[60] *See, e.g.*, 82 FR 14671, 14671 (Mar. 22, 2017) ("The EPA [in a joint notice with NHTSA] has inherent authority to reconsider past decisions and to revise, replace or repeal a decision to the extent permitted by law and supported by a reasoned explanation." (citing *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009))); 76 FR 22565, 22578 (Apr. 21, 2011) ("An agency generally remains free to revise improperly promulgated or otherwise unsupportable rules, even in the absence of a remand from a Court. . . . Agencies have particularly broad authority to revise their regulations to correct their errors. . . . Moreover, an agency may reconsider its methodologies and application of its statutory requirements and may even completely reverse course, regardless of whether a court has determined that its original regulation is flawed, so long as the agency explains its bases for doing so.") (citations omitted); 75 FR 6883, 6884 (Feb. 12, 2010) ("The Department [of Labor] has inherent authority to change its regulations in accordance with the Administrative Procedure Act (APA)."); 64 FR 60556, 60580 (Nov. 5, 1999) (NHTSA "believe[s] that nothing in [the statute] derogates our inherent authority to make temporary adjustments in the requirements we adopt if, in our judgment, such adjustments are necessary or prudent to promote the smooth and effective achievement of the goals of the amendments.").

[61] *Bookman* v. *United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972).

[62] *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863–64 (1984) (emphasis added). In a subsequent case, the Supreme Court confirmed that such reconsiderations should be done, at a minimum, "in response to changed factual circumstances, or a change in administrations." *Nat'l Cable & Telecommunications Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (citing *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part)).

[63] *Fla. Cellular Mobil Commc'ns Corp.* v. *F.C.C.*, 28 F.3d 191, 195 (D.C. Cir. 1994).

[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, at 2 (Feb. 24, 2016), available at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2016/m-16-06.pdf.*

[65] Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of the 2017 annual adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, at 2 (Dec. 16, 2016), available at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/m-17-11_0.pdf* ("Agencies are responsible for identifying the civil monetary penalties that fall under the statutes and regulations they enforce."); Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of Penalty Inflation Adjustments for 2018, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, at 2 (Dec. 15, 2017), available at *https://www.whitehouse.gov/wp-content/uploads/2017/11/M-18-03.pdf* ("Agencies are responsible for identifying the civil monetary penalties that fall under the statutes and regulations within their jurisdiction."); Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of Penalty Inflation Adjustments for 2019, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, at 2 (Dec. 14, 2018), available online at *https://www.whitehouse.gov/wp-content/uploads/2017/11/m_19_04.pdf* (last accessed May 31, 2019) ("Agencies are responsible for identifying the civil monetary penalties that fall under the statutes and regulations within their jurisdiction.").

[66] *See generally* OMB Non-Applicability Letter.

[67] *See, e.g.*, 49 U.S.C. 32902, 32912. The Secretary's authority under EPCA is delegated to NHTSA. 49 CFR 1.95(a) (delegating authority to NHTSA to exercise the authority vested in the Secretary under chapter 329 of title 49 of the U.S. Code); *see also* 1.94(c).

[68] *See* 49 U.S.C. 302(a) (stating the Secretary of Transportation is governed by the transportation policy described in part in 49 U.S.C. 13101(b), which provides that oversight of the modes of transportation "shall be administered and enforced to carry out the policy of this section and to promote the public interest"); 49 U.S.C. 322(a) ("The Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary. An officer of the Department of Transportation may prescribe regulations to carry out the duties and powers of the officer."); 49 U.S.C. 105(c)(2) (directing the NHTSA Administrator to "carry out . . . additional duties and powers prescribed by the Secretary"); 49 CFR 1.81(a)(3) ("Except as prescribed by the Secretary of Transportation, each Administrator is authorized to . . . [e]xercise the authority vested in the Secretary to prescribe regulations under 49 U.S.C. 322(a) with respect to statutory provisions for which authority is delegated by other sections in this part.").

[69] *See, e.g.*, Workhorse Comment, at 3; CBD Comment, at 7; CAP Comment, at 2–3; CARB Comment, at 7–8; Attorneys General Comment, at 7; IPI Comment, at 1.

[70] 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 3(2).

[71] 49 U.S.C. 32912(c)(1)(B). The $10 cap is addressed further in Section D.5.

EPCA violations: "A person that violates section 32911(a) of this title is liable to the United States Government for a civil penalty of not more than $10,000 for each violation." [72] The phrase "not more than" plainly denotes that the $10,000 civil penalty is a maximum amount for each violation, and, as such, this amount (as promulgated in 49 CFR 578.6(h)(1)) was properly adjusted pursuant to the 2015 Act.[73]

The $5.50 rate also is not a "penalty" for a "specific monetary amount." Again, the rate is one factor in a complex formula that is used to calculate the penalty. Moreover, the portion of the penalty calculated by NHTSA is only the potential penalty. The ultimate penalty owed is determined by the manufacturer based on the statutory provision authorizing the deduction of "the credits available to the manufacturer." [74] The CAFE civil penalty statute states expressly that this credit reduction process is part of the calculation of the civil penalty.[75] It is not, as some commenters suggested,[76] a distinct process that is conducted after the penalty has already been calculated.[77] The inputs to the civil penalty formula, including the reduction for available credits, are joined by the conjunctive "and" in the statute.[78] And while it is true, as one commenter noted, that "a specific penalty amount will still result after manufacturer credits are taken into account," [79] that is not "a specific monetary amount as provided by Federal law," as required by the 2015 Act. The amount is determined by a *process* codified in Federal law, but the specific final penalty *amount* itself is not "provided by Federal law." The "specific monetary amount" is unknown until the manufacturer decides to use any available credits it has, or can acquire, to make up for the shortfall identified by NHTSA.[80] In fact, if a manufacturer has enough credits or has a plan to earn sufficient credits in the future, the penalty ultimately calculated may be zero.[81] It is the manufacturer who decides this, not the agency.[82]

Credit flexibilities were expressly included in the statute by Congressional design to give industry the ability to decide how to achieve the required fuel economy improvements efficiently. Notably, as mentioned in the NPRM, Congress gave manufacturers the ability to trade credits with other manufacturers in 2007 in EISA, introducing an additional level of complexity to the calculation process, which is different from other civil penalty calculations. This is far from a direction to the agency to execute a "minor mathematic calculation used to figure up a total penalty number," as one commenter described it.[83]

As explained in the opinion included in the docket for the rule, OMB concurs with NHTSA's interpretation of the 2015 Act: OMB agrees that the CAFE civil penalty rate is not a "penalty, fine, or other sanction" that "is for a specific monetary amount" because EPCA distinguishes between the rate, the "amount . . . used in calculating a civil penalty," and the "civil penalty" itself.[84] Nor does OMB believe that the CAFE penalty has a "maximum amount provided for by Federal law": There is no limit to the level of civil penalty that can be imposed under EPCA because the civil penalty rate is merely one factor in the formula used to calculate the potential civil penalty liability. OMB explains further that the $10 cap does not qualify as "maximum amount provided for by Federal law" because it limits the "amount . . . used in calculating a civil penalty," not the "civil penalty" itself. Moreover, the $10 cap cannot be "assessed or enforced" at the time of the violation as required by the 2015 Act. Rather, it serves as a limitation on NHTSA's authority to alter the penalty rate.

Because of the changes that Congress enacted to the CAFE program through

[72] 49 U.S.C. 32912(a); *see also* 49 U.S.C. 30165(a) (establishing that violations of the National Traffic and Motor Vehicle Safety Act are generally subject to "a maximum amount" of "not more than" $21,000 per violation and a "maximum penalty" of $105 million for a related series of violations).

[73] 81 FR 43524, 43526 (July 5, 2016). The penalty in 49 U.S.C. 32912(a), promulgated in 49 CFR 578.6(h)(1), is subject to additional inflationary adjustments for 2017 and 2018, which were proposed in the NPRM, and for 2019, which is being finalized in this rule. 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 guidance, results in an adjusted maximum penalty of $41,484. NHTSA received no comments objecting to these proposed adjustments and finalizes those inflationary adjustments in this rule. Applying the multiplier for 2019 of 1.02522, as specified in OMB's December 14, 2018 guidance, results in an adjusted maximum penalty of $42,530. In accordance with the procedures provided in the 2015 Act, and confirmed by OMB's guidance on implementing the 2015 Act, NHTSA finalizes the 2019 adjustment for the general CAFE penalty through this final rule. 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 4(b)(2); Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of Penalty Inflation Adjustments for 2019, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, at 4 (Dec. 14, 2018), available online at *https://www.whitehouse.gov/wp-content/uploads/2017/11/m_19_04.pdf* (last accessed May 31, 2019) ("In accordance with the 2015 Act, agencies shall adjust civil monetary penalties notwithstanding Section 553 of the Administrative Procedure Act (APA). This means that the public procedure the APA generally requires (*i.e.*, notice, an opportunity for comment, and a delay in effective date) is not required for agencies to issue regulations implementing the annual adjustment.") (footnote omitted).

[74] 49 U.S.C. 32912(b)(3).

[75] 49 U.S.C. 32912(b)(3). Section 32903(h) is not to the contrary, as one commenter suggested. *See* CAP Comment, at 2. That provision describes a refund process that is relevant only after "a civil penalty has been collected," not before the civil penalty—including any credit reduction—is fully calculated.

[76] *See, e.g.*, CARB Comment, at 11 ("NHTSA knows exactly how much a manufacturer owes and must pay in civil penalties for failing to meet the CAFE standard—NHTSA calculates that amount. What NHTSA may not know is how exactly the manufacturer will satisfy that amount (direct payment vs. credits), but the specific amount owed, *i.e.*, the civil penalty, is very much known."); Attorneys General Comment, at 7 ("Nor does the availability of a credit mechanism that allows a manufacturer an alternate means to fully or partially comply with the CAFE standards have any bearing on the nature of the penalty. . . ."); IPI Comment, at 3 ("Credit trading and transfers allow the manufacturer to reduce its incidence of non-compliance, but the penalty per incidence of non-compliance remains fixed and specific. . . .").

[77] One commenter stated "many, if not all, civil monetary penalties assessed by any agency depend, on some level, on the regulated entity's decisions about whether, and how, to comply with a regulatory standard." IPI Comment, at 2–3. The comment cited no specific examples, but regardless, the unique feature in the CAFE civil penalty scheme relevant in this context is that the calculation of the civil penalty amount expressly includes a reduction for the credits available to the manufacturer. A manufacturer could both decide not to meet an applicable CAFE standard and not to pay a civil penalty (or to pay a smaller penalty). Under other civil penalty schemes, a person who does not comply with a regulatory standard does not get to decide whether or how much of a penalty to pay.

[78] 49 U.S.C. 32912(b).

[79] CBD Comment, at 8. The comment further stated that "[t]his is no different from other rate-based penalty systems which allow for some reduction of liability," but cited no example.

[80] 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.

[81] 49 CFR 536.5(d). A manufacturer may propose a plan to earn future credits within the subsequent three model years in order to comply with its regulatory obligations for the current model year, and NHTSA will not even initiate compliance proceedings until the time that the manufacturer's approved plan indicates that credits will be earned or acquired to achieve compliance. 49 CFR 536.7. Although many manufacturers have not met applicable standards, only one manufacturer paid civil penalties for MY 2014 and only two paid civil penalties for MYs 2012 and 2013. *See https://one.nhtsa.gov/cafe_pic/CAFE_PIC_Fines_LIVE.html.*

[82] Manufacturers instruct NHTSA on how they wish to allocate their credits or otherwise account for shortfalls. *See* 49 CFR 536.5(d)(2), (6).

[83] CARB Comment, at 9–10. Although the introductory language of the statutory provision may be "similar" to that of the general penalty for EPCA violations, as noted by the commenter, the process described for calculating the penalty is the material difference, as explained above.

[84] OMB Non-Applicability Letter, at 4–5.

EISA in 2007, Congress was not necessarily "on notice" that NHTSA would apply the 2015 Act to the CAFE civil penalty rate, as one comment stated, merely because it had done so in 1997.[85] In fact, NHTSA did not make any subsequent adjustments to the $5.50 rate, even as it repeatedly made adjustments to its other civil penalties—including an adjustment to the maximum general penalty under EPCA in 49 U.S.C. 32912(a).[86]

Apparently concerned about the ease with which the CAFE civil penalties program could damage the economy and the automobile industry in particular,[87] Congress imposed a strict, tailored procedure for adjusting the CAFE civil penalty rate, requiring robust substantive findings and specific procedures, including providing opportunity for the Federal Trade Commission to comment and requiring at least eighteen months before an increased rate can go into effect.[88] This process stands in stark contrast to the summary approach delineated in the 2015 Act, which presumptively requires an interim final rule without notice and comment for the initial catch-up adjustment and similarly requires subsequent adjustments to be made without the traditional notice-and-comment process outlined in the APA.[89]

One comment observed that "the 2015 Act provides that an agency need not make inflation-based adjustments if it has implemented a discretionary adjustment . . . greater than the annual inflation adjustment." [90] NHTSA agrees with the general notion offered by the commenter that this provision suggests Congress intended the inflation adjustments required under the 2015 Act to coexist with discretionary adjustments provided for under other statutes. But as described in the NPRM and below—and recognized by OMB in the opinion included in the docket for this rulemaking [91]—the CAFE civil penalty program is unique—namely, that the amount in question is a single input in a complex market-based penalty program, and not the penalty amount itself. And as OMB further explains in its opinion, the statutory structure of EPCA itself strongly indicates that Congress did not intend the 2015 Act to apply to the CAFE civil penalty rate. Under EPCA, there is no automatic increase in the penalty rate, the burden is on the Secretary to demonstrate an absence of economic harm before increasing the rate, and any increase is capped at $10. In contrast, under the 2015 Act, increases are automatic, the Secretary has the burden of demonstrating economic harm to stop an initial increase and has no power to stop future increases, and the potential penalty increases are unlimited. It is highly unlikely that Congress intended to shift from the EPCA scheme to the 2015 Act scheme without any reference to EPCA. Accordingly, NHTSA determines that Congress did not intend for the 2015 Act to apply to the CAFE civil penalty rate.[92]

Some commenters noted that the 2015 Act is designed to keep civil monetary penalties at the same levels, in real terms, not increase them.[93] In response, NHTSA notes that the 2015 Act itself repeatedly refers to the adjustments as "increases." [94] Accepting the commenters' point, however, would actually provide further support for NHTSA's determination that the 2015 Act does not apply to the CAFE civil penalty rate. Because of the unique nature of the CAFE civil penalty formula, applying the 2015 Act to it would exceed the purpose of the 2015 Act noted by those commenters to "maintain" the real value of civil monetary penalties: Instead, doing so would constitute an increase.[95] Moreover, as OMB noted in the opinion included in the docket, the unique features of EPCA also make the 2015 Act inconsistent with the CAFE civil penalty rate because, under EPCA, Congress required the Secretary of Transportation to regularly establish the maximum feasible fuel efficiency standards based on, among other things, developing technology, as opposed to applying a rote, formulaic increase to the penalty rate.[96] Rather than "maintain[ing]" the real value of the CAFE civil penalty formula through inflation adjustment procedures, Congress chose other means: The CAFE civil penalty formula is based in part on the amount of the manufacturer's shortfall, and Congress requires NHTSA to prescribe the maximum feasible average fuel economy standards annually.[97] If a manufacturer failed to

[85] Attorneys General Comment, at 9.

[86] 64 FR 37876 (July 14, 1999); 66 FR 41149 (Aug. 7, 2001); 69 FR 57864 (Sept. 28, 2004); 70 FR 53308 (Sept. 8, 2005); 71 FR 28279 (May 16, 2006); 73 FR 9955 (Feb. 25, 2008) (adjusting maximum general penalty under EPCA and another NHTSA penalty); 75 FR 5244 (Feb. 2, 2010).

[87] *See, e.g.*, "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."); H.R. Rep. No. 94–340, at 87 (1975) ("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."); 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.").

[88] *See* 49 U.S.C. 32912(c).

[89] 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 4(b).

[90] Attorneys General Comment, at 9 (citing 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 4(d)).

[91] OMB Non-Applicability Letter, at 4–6.

[92] To the extent the 2015 Act does apply to the CAFE civil penalty rate, EPCA prohibits NHTSA from increasing the CAFE civil penalty rate—for an inflation adjustment or otherwise—at this time, for the reasons described below.

[93] *See, e.g.*, CBD Comment, at 7; CAP Comment, at 3–4; CARB Comment, at 13; IPI Comment, at 19–20. One of these commenters claimed that "Congress especially intended inflationary adjustments to apply in areas of heightened regulatory concern, such as health and safety, the environment, and consumer protection." CBD Comment, at 6 (citing James Ming Chen, *Inflation-Based Adjustments in Federal Civil Monetary Penalties*, 34 Yale L. & Pol'y Rev. 1, 3 (2015)). There is nothing in the 2015 Act that supports this claim. The original source cited by the comment's cited source is not the legislative history of the 2015 Act—or even the 1990 Inflation Adjustment Act—but a Federal Register notice from 1973, identifying various recommendations from the Administrative Conference of the United States. 38 FR 19782, 19792 (July 23, 1973). The recommendation in question had nothing to do with inflation adjustments; the Administrative Conference merely noted that "[i]n many areas of increased concern (*e.g.*, health and safety, the environment, consumer protection) availability of civil money penalties might significantly enhance an agency's ability to achieve its statutory goals." 38 FR 19782, 19792 (July 23, 1973).

[94] 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 4(c), 5(a), 5(b)(2)(C), 6.

[95] 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 2(b)(2). One commenter noted that "remedial legislation should be construed broadly to effectuate its purposes." CARB Comment, at 10, 16–17 (quoting *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967)). As one of the cases cited by this commenter expressly affirms, "[t]hat principle, however, 'does not give the judiciary license, in interpreting a provision, to disregard entirely the plain meaning of the words used by Congress.'" *Belland* v. *Pension Ben. Guar. Corp.*, 726 F.2d 839, 844 (D.C. Cir. 1984) (quoting *Symons* v. *Chrysler Corp. Loan Guar. Bd.*, 670 F.2d 238, 241 (D.C. Cir. 1981)).

[96] OMB Non-Applicability Letter, at 6.

[97] 49 U.S.C. 32902(a). One commenter noted that "[w]hile Congress has directed NHTSA to set CAFE standards at the maximum feasible level, this does not necessarily amount to 'continuous fuel standard increases,'" pointing out that "CAFE standards have once decreased and otherwise, until a few years ago, remained the same for 20 years." CARB Comment, at 13. This is an accurate but misleading characterization. What the comment failed to mention was that it was Congress' decision to keep the standards flat over this period, not the agency's. For a significant portion of this period, Congress prohibited NHTSA from using funds "to prepare, propose, or promulgate any regulations . . . prescribing corporate average fuel economy standards for automobiles . . . in any model year that differs from standards promulgated for such automobiles prior to enactment of this section." Public Law 104–50, Sec. 330; *see also* Public Law 104–205, Sec. 323; Public Law 105–65, Sec. 322;

Continued

adapt to the increasing standards, its shortfall—and in turn, its penalty calculation (before accounting for credits)—increases automatically.[98] Requiring an inflation adjustment on top of that would be gratuitous. The fact that Congress deliberately enacted a mechanism that would increase the potential CAFE penalty amounts without requiring inflation adjustments—fully "aware that inflation would effectively reduce the real value of the [CAFE] civil penalty rate over time" [99]—indicates that Congress did not intend for the CAFE civil penalty rate to be subject to inflation adjustments and thus that the 2015 Act was not intended to apply to that calculation.[100]

It is important to keep in mind that the overarching purpose of the CAFE program is to conserve petroleum. Thus, although the penalty is expressed based on the shortfall from the standard rather than the additional amount of fuel that will be consumed as a result of the shortfall, the cost of the penalty per increased gallon consumed shows how the actual penalty rate for excessive fuel consumption has increased as the standards themselves have increased.

Assume the CAFE civil penalty rate is fixed at $5, and consider two cases. In the first case, Manufacturer A has a fuel economy shortfall of 1.0 mpg and a production volume of 1 million passenger cars for MY 1978 in which the applicable CAFE standard is 18.0 mpg. Before accounting for credits, the civil penalty for MY 1978 would be $50 million [= (10 tenths of a mile per gallon shortfall) × ($5.00 per tenth of a mile per gallon shortfall) × (1,000,000 vehicles)]. Assuming an average lifetime of 130,000 miles for Manufacturer A's vehicles, the fuel use over the lifetimes of all of Manufacturer A's vehicles would be 7.65 billion gallons [= (130,000 miles)/(17 miles per gallon) × (1,000,000 vehicles)]. Had Manufacturer A met the CAFE standard of 18.0 mpg, the total fuel use would have been 7.22 billion gallons [= (130,000 miles)/(18 miles per gallon) × (1,000,000 vehicles)]. Thus, the increased fuel use impact on society attributed to the CAFE non-compliance would be 0.43 billion gallons [= (7.65 billion gallons) − (7.22 billion gallons)]. This means that the penalty cost per gallon is $0.116.

In the second case, Manufacturer A's MY 2017 vehicle attribute-based CAFE standard is 36.0 mpg, double the MY 1978 standard. Holding everything else identical, Manufacturer A's fuel economy shortfall would have to be 3.8 mpg (for a fuel economy of 32.2 mpg) to produce the same 0.43 billion gallons of societal impact of increased fuel use: Assuming the same average lifetime of 130,000 miles for Manufacturer A's vehicles, the fuel use over the lifetimes of all of Manufacturer A's vehicles would be 4.04 billion gallons [= (130,000 miles)/(32.2 miles per gallon) × (1,000,000 vehicles)]. Had Manufacturer A met the CAFE standard of 36.0 mpg, the fuel use would have been 3.61 billion gallons [= (130,000 miles)/(18 miles per gallon) × (1,000,000 vehicles)]. The increased fuel use impact on society attributed to the CAFE non-compliance would be 0.43 billion gallons [= (4.04 billion gallons) − (3.61 billion gallons)]. With this 3.8 mpg shortfall, Manufacturer A would incur, before accounting for credits, a civil penalty of $190 million [= (38 tenths of a mile per gallon shortfall) × ($5.00 per tenth of a mile per gallon shortfall) × (1,000,000 vehicles)]. For the same impact on societal fuel use, Manufacturer A's MY 2017 potential civil penalty is 3.8 times higher than the MY 1978 potential civil penalty, meaning that the penalty cost per gallon is $0.442.

Three comments argued that Congress demonstrated it knew how to exempt statutes from the application of the 2015 Act by expressly excepting statutes like the Internal Revenue Code of 1986 and the Tariff Act of 1930 from the adjustment process.[101] But the penalties under these statutes are not exempted from the definition of "civil monetary penalty"; rather, Congress acknowledged that the penalties under these statutes are "civil monetary penalties" that would otherwise need to be adjusted but for Congress' express exemption. In contrast, NHTSA's determination is that the CAFE civil penalty rate does not satisfy the definition of "civil monetary penalty" given by Congress and thus does not need to be exempted from Congress' adjustment mandate.

One comment noted "on a fundamental level that Congress specifically designated the CAFE penalty as 'a civil penalty.'" [102] As NHTSA noted in its NPRM, however, "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." [103] Moreover, as explained above, the "civil penalty" referenced in 32912(b) is not referring to the $5.50 rate, but the result of the entire complex calculation and credit application process.

Several commenters pointed out that other agencies adjusted civil penalties for inflation under the 2015 Act that involved what the commenters characterized as a rate or formula.[104] In support, these commenters provided numerous examples of penalties involving a simple multiplier that other agencies adjusted for inflation. The examples involve maximum penalties

Public Law 105–277, Sec. 322; Public Law 106–69, Sec. 321; Public Law 106–346, Sec. 320. Moreover, from 1985 until EISA was signed into law in 2007, Congress set the average fuel economy standard for passenger automobiles at 27.5 miles per gallon by default and did not require any increases—annually or otherwise, or to the maximum feasible level or otherwise. *See* Public Law 94–163, Sec. 301; Public Law 103–272, Sec. 1(d). Instead, Congress permitted, but did not require, that NHTSA establish a higher or lower standard for passenger cars if the agency found that the maximum feasible level of fuel economy is higher or lower than 27.5 miles per gallon.

[98] *See, e.g.*, Workhorse Comment, at 1 ("In effect, increasing the civil penalty rate increases the stringency of the CAFE Standards."). This mechanism also counters the argument that a CAFE civil penalty rate of $5.50 "effectively stall[s] fuel economy," CARB Comment, at 10; *see also* CAP Comment, at 2 ("[R]educing the penalty below the statutorily-mandated rate will likely lead to many more manufacturers electing to pay penalties rather than to comply with the law."). The CAFE civil penalty formula enacted by Congress already incentivizes automakers to improve fuel economy without the need to conduct inflation adjustments—a reality that the same commenter that made this argument appeared to recognize just a few pages later: "Increases in the CAFE standards reflect continuing improvements in the technological ability of manufacturers to increase fuel economy, as reflected in the fact that most manufacturers have been meeting or exceeding the CAFE standards in recent years even as the standards have been increasing." CARB Comment, at 13.

[99] 83 FR 13904, 13910–11 (May 2, 2018).

[100] One commenter argued that "other agencies have had no trouble applying inflation adjustments to the civil penalties associated with" regulatory standards that "undergo statutorily required reviews at regular intervals to increase stringency." IPI Comment, at 4. The comment only cited one example: An adjustment by the Department of Energy to the maximum civil penalties it can impose for violations of its energy efficiency standards, among other violations. *See* 83 FR 1289, 1291 (Jan. 11, 2018) ("Any person who knowingly violates any provision of § 429.102(a) may be subject to assessment of a civil penalty of no more than $449 for each violation."; "In accordance with sections 333 and 345 of the Act, any person who knowingly violates any provision of paragraph (a) of this section may be subject to assessment of a civil penalty of no more than $449 for each violation."). This example is wholly distinct from the CAFE civil penalty calculation, in which the increased stringency is expressly included as a factor.

[101] CBD Comment, at 6; CARB Comment, at 8; Attorneys General Comment, at 9.

[102] CARB Comment, at 9 (quoting 49 U.S.C. 32912(b)); *see also* Attorneys General Comment, at 7 ("Congress expressly designated the CAFE penalty, which is monetary, as 'a civil penalty.'").

[103] 83 FR 13904, 13908 n.24 (Apr. 2, 2018).

[104] CBD Comment, at 8 (citing numerous examples of agencies adjusting "rate-based penalties" to account for inflation); CAP Comment, at 3; CARB Comment, at 8–9; Attorneys General Comment, at 8.

per violation and/or per day.[105] NHTSA did not and does not take the position that any penalty involving a multiplier is not a "civil monetary penalty" subject to inflationary adjustment under the 2015 Act. Indeed, most of the civil penalties that NHTSA properly adjusted for inflation under the 2015 Act in its interim final rule are like the examples provided by commenters: Maximum penalties involving a simple multiplier.[106] NHTSA acknowledged in the NPRM that these types of maximum penalties are subject to inflationary adjustment.[107] As NHTSA explained in its NPRM: "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.' This sets 'a maximum amount' of $10,000 per violation. . . . Accordingly, this civil penalty level was properly adjusted. . . ."[108] NHTSA is finalizing its inflationary adjustment of that maximum penalty per violation in this final rule. NHTSA also adjusted many non-CAFE penalties that are maximum penalties that use a simple multiplier of the number of violations or number of days.[109]

NHTSA agrees with commenters that maximum penalties such as these are properly subject to inflationary adjustment. But the penalty for violations of CAFE standards is not a maximum penalty that uses a simple multiplier. As a threshold matter, the CAFE civil penalty rate alone is not a "civil monetary penalty" as defined by the 2015 Act. The CAFE statute expressly states that the rate is an "amount . . . to be used in calculating a civil penalty," not a "civil penalty" on its own.[110] In any event, unlike maximum penalties that use a simple multiplier, the CAFE civil penalty rate is not subject to inflation as a "maximum amount provided by federal law." Other penalties expressly include language, such as "a maximum civil penalty" or a "civil penalty of not more than" a specified value per violation, which indicate they are for a maximum amount.[111] No such language is included for the CAFE penalty, which instead expressly may not "be compromised or remitted" except in extremely rare circumstances.[112] This stands in stark contrast to maximum penalties, where the agency has authority to determine the appropriate penalty amount.[113]

Additionally, the penalty for violating a CAFE standard does not use a simple multiplier comparable to the examples provided by commenters. For the examples provided, as well as the penalties NHTSA properly adjusted for inflation, the agency can readily determine the penalty inputs by adding up the number of violations and/or the number of days as appropriate under the statute. The multiplier for a regulated entity that violated a provision of law can only go up (if the penalty uses a multiplier of the number of days); it cannot go down. Even if there were a set penalty per day (as opposed to a maximum), that is a certain penalty: For every day that an entity violates the law, it must pay the specific penalty set by law.

None of this is true of the penalty for violations of CAFE standards. Unlike other penalties, the entity that violated the law can take unilateral action to decrease or eliminate the penalty.[114] A reduction in the control of the entity that violated the law means the penalty is not for "a specific monetary amount." The agency cannot readily calculate the penalty inputs: It needs instructions from the regulated entity to do so. That makes this a complex formula unlike any other. The CAFE penalty is not a fixed penalty based on the number of violations and amount of time that has passed. The law allows manufacturers to base their penalty on future actions (a carry-back plan or acquisition of credits from a competitor), on actions unrelated to the specific violation at issue (transfers or trades), or even to obtain a refund of a civil penalty previously paid.[115] The multipliers in other penalty schemes relate to how much the entity violated the law (how many violations, or for how long). The CAFE penalty calculation, on the other hand, includes a reduction unrelated to the manufacturer's actions to meet the standard. A manufacturer can intentionally design its vehicles to exceed the standard and yet still not pay a penalty. But that decision is up to the manufacturer, not the agency—which is compelled by law to reduce the penalty if the manufacturer elects to use credits available to it. NHTSA is not aware of any comparable penalty structure with a similarly complex statutory formula that must factor in decisions of the violator and third-party actors (*i.e.*, other manufacturers), and no commenter has provided an example of one.

The Institute for Policy Integrity critiqued NHTSA for relying on the Congressional Budget Office's (CBO's) assessment of the 2015 Act's revenue effects across all applicable penalties for ten years.[116] Some courts have relied on CBO cost estimates to determine legislative intent.[117] The Institute for Policy Integrity provided no evidence that the CBO's assessment was flawed nor did it provide its own calculation of the amount of fines NHTSA should expect to collect to compare to the CBO estimate, much less one that would offset the significant disparity between the CBO's estimate and the Alliance and Global's calculation as described in the NPRM.[118] OMB has reviewed CBO's assessment and, as stated in its opinion, reached the same conclusion as NHTSA: The billions of dollars estimated to be paid in CAFE civil penalty payments grossly exceeds CBO's projection of additional revenue that would be collected across the entire Federal Government under the 2015 Act over the same time period—an analysis Congress was aware of when it enacted the 2015 Act.[119] Regardless, the CBO estimate is not the sole support NHTSA relied on to make its determination that

[105] *See* CBD Comment, at 8; CAP Comment, at 3; CARB Comment, at 8–9; Attorneys General Comment, at 8.

[106] NHTSA is not reconsidering portions of the interim final rule (81 FR 43524 (July 5, 2016)) that address non-CAFE penalties. Most of the penalties adjusted for inflation are maximum penalties that involve a multiplier. For example, NHTSA adjusted the penalties for school bus-related violations of the National Traffic and Motor Vehicle Safety Act from a maximum of $10,000 per violation, as set by statute, to a maximum of $11,940 per violation. *Id.* at 43525 (adjusting 49 CFR 578.6(a)(2)) A separate violation occurs for each school bus or item of school bus equipment, "and for each failure or refusal to allow or perform a required act." 49 CFR 578.6(a)(2).

[107] *See* 83 FR at 13909.

[108] 83 FR at 13909 (citations omitted).

[109] *See* 81 FR 43524 (July 5, 2016).

[110] 49 U.S.C. 32912(c)(1)(A).

[111] *See, e.g.*, 49 U.S.C. 30165(a)(3); 32912(a).

[112] *See* 49 U.S.C. 32913(a). Contrast this constraint with the broad, discretionary authority delegated by Congress for NHTSA's other civil penalties: "The Secretary of Transportation may compromise the amount of a civil penalty imposed under this section." 49 U.S.C. 30165(b)(1).

[113] *See, e.g.*, 49 U.S.C. 30165(c). Statutory schemes that allow for mitigation, as pointed out by commenters, are not comparable because those are for maximum penalties, and thus subject to inflationary adjustment. Moreover, it is up to the agency to determine the appropriate mitigation. Under the CAFE penalty, it is the violator who determines how much to pay, based on use of credits, not the agency.

[114] *See* 49 U.S.C. 32912(b)(3).

[115] 49 U.S.C. 32903(f), (g), (h); 32912(b).

[116] IPI Comment, at 5.

[117] *See, e.g.*, *Nunes-Correia* v. *Haig*, 543 F. Supp. 812, 815 (D.D.C. 1982) ("[T]he Congressional Budget Office ('CBO') cost estimates . . . demonstrate that Congress clearly intended the Act to apply retroactively.")

[118] 83 FR 13904, 13911 (Apr. 2, 2018). CARB and the co-signatories to its comment similarly failed to provide such evidence when they asserted that "the costs estimated by the automakers are not just the cost of facing an adjusted penalty but also include technology costs and other costs such as insurance, financing, and taxes—with the latter two (technology and other costs) making up the bulk of the estimated costs." CARB Comment, at 11–12.

[119] OMB Negative Economic Impact Letter, at 5.

the 2015 Act is not applicable to the CAFE civil penalty rate; rather, it served as additional evidence—on top of the plain language of the statute, the unique complexity of the CAFE civil penalty scheme, the legislative history of EPCA, and other indicators—further justifying NHTSA's determination.

NHTSA also received some comments about the rounding rule in the 2015 Act, which provides that "[a]ny increase determined under this subsection shall be rounded to the nearest multiple of $1." [120] NHTSA observed in the NPRM that 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). [121]

One commenter argued that this interpretation "ignores basic math because applying the [2015] Act results in more than a *de minimis* increase from $5.50." [122] This misconstrues NHTSA's point: NHTSA was referring to subsequent annual inflationary increases after the initial catch-up adjustment. For example, if the CAFE civil penalty rate was adjusted to $14 in the initial catch-up adjustment, the rate would not have been adjusted applying either the 2017, 2018, or 2019 multipliers (1.01636, 1.02041, and 1.02522, respectively) and rounding to the nearest dollar. If the original rate was $6, the last time the multiplier would have allowed an inflation adjustment to $7 under the rounding rule was 1981, during a time of significant inflation. [123]

Another commenter conceded that "such rounding may prevent some annual inflationary adjustment for small penalties," but nonetheless observed that "[i]f Congress had wanted small penalties to be excluded . . . , it would have explicitly said so." [124] But statutes must be read to avoid rendering provisions "insignificant, if not wholly superfluous." [125] As NHTSA has shown, having to apply the statute's rounding rule to such a small rate would violate that principle, particularly when the rounding rule is viewed, as NHTSA must, in "context" and in line with the "overall statutory scheme." [126]

The same commenter also asserted that even "if the rounding rule does trap small penalties at their catch-up adjustment level, agencies can always adjust them through their own penalty adjustment procedures." [127] True enough, but the commenter went on to claim that in this specific case, "this would just be an inflation adjustment, [so] NHTSA should not have difficulty with satisfying [the EPCA] factors." [128] This heavily underestimates the burden required by statute to increase the CAFE civil penalty rate, [129] discussed in more detail in the NPRM and below. And this burden is there for a reason: Given that the CAFE civil penalty rate serves as one element in a formula that yields an actual potential penalty, rounding the rate to the nearest dollar has outsized impacts that must be carefully considered. For instance, rounding the current $5.50 rate to $6.00 is not merely a $0.50 increase in a penalty, but a 9% increase. An automaker who sells 100,000 vehicles of a single model that fails to meet its target fuel economy standard by one mile per gallon would face a potential penalty of $6,000,000 instead of $5,500,000. This is not a minor difference.

Because NHTSA is not "increas[ing]" the CAFE civil penalty rate—because the 2015 Act does not apply or because doing so would have a negative economic impact—the rounding rule is inapplicable. [130]

*3. Harmonizing the 2015 Act and EPCA*

In the alternative, even if the 2015 Act did apply, the "negative economic impact" exception of the 2015 Act is best read in harmony with EPCA to ensure both statutes are given meaning. A few commenters argued that the 2015 Act and EPCA should not be read together because they have different purposes. [131] NHTSA agrees that the overarching purposes of the two statutes are different. But that does not obviate the need to harmonize the statutes. Indeed, both statutes recognize the importance of limiting increases to penalties to avoid damaging the economy. Although the statutes may have different ultimate objectives, they share that motivating concern and should be read together, as part of a unified code of Federal law, with the goal of upholding that common principle. NHTSA believes its interpretation achieves that goal.

Relatedly, NHTSA is mindful of the comments that argued that the *in pari materia* canon of statutory interpretation may not be the perfect tool for the interpretive question here. [132] But as NHTSA noted in the NPRM, the "principles underlying" this canon—most notably, that the statutes enacted by Congress should be read as a whole and interpreted harmoniously—provided further support for NHTSA's proposed position, which it now adopts. [133] None of the comments objected to NHTSA's point that "[t]his approach to statutory interpretation is consistent with NHTSA's past practice." [134]

Here, NHTSA is interpreting a statutory provision about whether increasing a civil monetary penalty by the otherwise required amount will have a negative economic impact. Even statutes that apply broadly across agencies must be interpreted and reconciled with other Federal laws. NHTSA must presume that Congress knew each agency would have to determine what "negative economic impact" meant and whether raising any of its civil monetary penalties by the otherwise required amount would cause one. And NHTSA must also presume that in passing the 2015 Act, Congress was aware of the longstanding CAFE civil penalty scheme it had previously enacted, including the constraints it imposed on raising the penalty rate if doing so would have a substantial deleterious impact on the economy. [135] Congress established these specific

[120] 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 5(a).

[121] 83 FR 13904, 13911 (Apr. 2, 2018).

[122] IPI Comment, at 5.

[123] Data available at *https://data.bls.gov/pdq/SurveyOutputServlet*.

[124] CARB Comment, at 12.

[125] *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001); *see also Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 509 (1989) (rejecting an interpretation that "would compel an odd result").

[126] *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) (citing *United States* v. *Morton*, 467 U.S. 822, 828 (1984)).

[127] CARB Comment, at 12.

[128] CARB Comment, at 13.

[129] *See* 49 U.S.C. 32912(c).

[130] *See* Alliance and Global Comment, at 16–17. If the 2015 Act applies to the CAFE civil penalty rate, rounding up to the nearest dollar would constitute an increase in the rate that would be permissible only if NHTSA made the requisite findings—and followed the congressionally-mandated procedure—under EPCA, discussed further below.

[131] *See, e.g.*, CAP Comment, at 4; Attorneys General Comment, at 11; IPI Comment, at 4.

[132] *See, e.g.*, CARB Comment, at 15; Attorneys General Comment, at 11.

[133] 83 FR 13904, 13912 (Apr. 2, 2018).

[134] 83 FR 13904, 13912 (Apr. 2, 2018) (citing 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")).

[135] As NHTSA noted in the NPRM, the CAFE civil penalty structure is also constrained by NHTSA's exceptionally—and atypically—limited ability to compromise or remit CAFE civil penalties. 83 FR 13904, 13912 (Apr. 2, 2018). One commenter sought to minimize the effect of this constraint by noting "the CAFE program's numerous built-in compliance flexibility mechanisms which soften the sting of the penalties." Attorneys General Comment, at 11–12. But the "compliance flexibility mechanisms" described by the commenter are all actions taken by the manufacturer, not NHTSA.

constraints for a reason, and without any evidence that Congress intended to override those constraints, NHTSA cannot do so unilaterally. Most importantly, no commenter provided persuasive argument or evidence that NHTSA's interpretation was contrary to the plain meaning of the 2015 Act or Congress' intent.

One comment challenged NHTSA's position that a broad interpretation of the 2015 Act would be "punitive," instead characterizing CAFE civil penalties as "safety valves, because they allow the car manufacturers to avoid the requirements imposed by vehicle standards in case compliance costs are too high." [136] But whether or not the effect is properly understood as punitive, if compliance costs and the calculated levels of civil penalties are both "too high," then the "safety valve" is not so "safe": Either option would impose a "negative economic impact." With respect to the CAFE civil penalty rate specifically, the statutory civil penalty formula already provides for increases over time, as described above. Construing "negative economic impact" to require a full inflation adjustment to the CAFE civil penalty rate—on top of the built-in adjustment to the standards themselves—would subject manufacturers to unduly harsh levels of civil penalties (before accounting for credits). As discussed in the NPRM, it is particularly important to avoid a punitive interpretation 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." [137] EPCA itself imposes a similar "one-way ratchet" constraint.[138]

One comment argued that "Congress . . . intended the Inflation Adjustment Act to apply broadly and uniformly to federal civil monetary penalties across all agencies unless specifically exempted, regardless of how the subject penalty programs are structured." [139] Even though Congress did not "specifically exempt[]" CAFE by name in the 2015 Act, Congress unquestionably recognized that some penalty schemes would not be covered: For example, it defined "civil monetary penalty" to exclude some penalties, fines, and other sanctions.[140] Nonetheless, NHTSA agrees that Congress intended the 2015 Act to apply "broadly"—and in practice, the 2015 Act has applied broadly, across other penalties administered by NHTSA and across a wide swath of Federal agencies. But the unique nature of the CAFE program commands a different result. Indeed, as NHTSA explained in the NPRM, the "broad" scope of the 2015 Act reinforces NHTSA's determination that 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. This approach to statutory interpretation is consistent with NHTSA's past practice.[141]

The same reasoning responds to those commenters that argued the 2015 Act controls because it was passed more recently than EPCA and EISA.[142] Indeed, the sole case cited by one of the commenters purportedly to support its point makes this clear: The more recent act can only constitute an implied repeal if the intent of the legislature to repeal is "clear and manifest." [143] No such intention is apparent here at all.

*4. "Negative Economic Impact"*

Some comments noted that NHTSA did not previously invoke the "negative economic impact" exception before the deadline to complete the initial catch-up adjustment expressed in the 2015 Act or by the date suggested in OMB's initial guidance on the statute.[144] But the passage of that deadline does not deprive an agency of its statutory authority to act under the statute, including its authority to reconsider its initial decision to issue an interim final rule and to seek public comment on complex legal, factual, and policy questions related to that action. An agency would not be prohibited from making an otherwise required initial catch-up adjustment simply because it did not meet the statutory deadline: It would still need to complete the process.[145] And there is no separate statutory deadline for when agencies needed to invoke the "negative economic impact" exception: It is part of making the initial catch-up adjustment. Congress could have established a separate deadline for invoking the exception prior to the deadline for making the initial catch-up adjustment if it deemed it necessary, but it did not. Instead, Congress impliedly linked the determination of the initial catch-up adjustment and exercise of the "negative economic impact" exception, and it established a procedure through which the OMB Director would be required to concur with NHTSA's assessment that adjusting the penalty the otherwise required amount would have a negative economic impact before the agency could rely on the exception. As the docketed opinion indicates, OMB has concurred with NHTSA's assessment here.[146] Notably, OMB staff indicated to the Government Accountability Office that "[b]ecause of the complex nature of the initial catch-up inflation adjustments, . . . its preference was for federal agencies to take the necessary time to publish accurate and complete initial catch-up inflation adjustments . . . even if agencies were not able to meet the Inflation Adjustment Act publication deadline." [147]

Moreover, nothing in the 2015 Act prohibits the head of an agency from reconsidering its initial decision about the economic impact of making the otherwise required initial adjustment to a civil monetary penalty. To the contrary, Congress committed the authority to make such a determination—with no substantive constraints—to the head of each agency, provided that the agency head publishes an NPRM, provides an opportunity for comment, and obtains concurrence from

[136] IPI Comment, at 15–16.

[137] 83 FR 13904, 13913 (Apr. 2, 2018).

[138] H.R. Rep. No. 95–1751, at 113 (1978) (Conf. Rep.) ("No provision [in EPCA] is made for lowering the penalty.").

[139] Attorneys General Comment, at 11–12.

[140] 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 3(2).

[141] 83 FR 13904, 13912 (Apr. 2, 2018).

[142] *See, e.g.*, Workhorse Comment, at 1 ("Because the Inflation Adjustment Act was enacted more recently than EPCA and EISA, the Inflation Adjustment Act controls."); Attorneys General Comment, at 9 ("[B]ecause the penalty adjustments in the 2015 Act are both mandatory and were enacted more recently than EPCA, they should be given controlling effect.") (citing *Kremer* v. *Chem. Constr. Corp.*, 456 U.S. 461, 468 (1982)).

[143] *Kremer* v. *Chem. Constr. Corp.*, 456 U.S. 461, 468 (1982) (cleaned up).

[144] *See, e.g.*, CARB Comment, at 14; Attorneys General Comment, at 10, 14.

[145] Multiple agencies were unable to complete their initial catch-up adjustments by the deadline identified in the 2015 Act, but later completed those adjustments. U.S. Gov. Accountability Office, GAO–17–634, "Certain Federal Agencies Need to Improve Efforts to Comply with Inflation Adjustment Requirements, at 6 (2017).

[146] OMB Negative Economic Impact Letter. Nothing about OMB's concurrence with NHTSA's determination here calls into question OMB's guidance that it "expects determination concurrences to be rare." 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, at 3 (Feb. 24, 2016), available online at *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2016/m-16-06.pdf* (last accessed May 22, 2018). NHTSA is not aware of any other agency that even sought such a concurrence determination. Thus, while OMB's concurrence here is "rare," it is appropriate given the uniqueness of the CAFE civil penalty scheme.

[147] U.S. Gov. Accountability Office, GAO–17–634, "Certain Federal Agencies Need to Improve Efforts to Comply with Inflation Adjustment Requirements, at 6 (2017).

the OMB Director.[148] NHTSA has satisfied those procedural steps in this rulemaking. As noted in the NPRM, "[p]ursuant 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." [149] To the extent that NHTSA's interpretation of "negative economic impact" represents a change in position, the agency has explained the reasons for that change, and its position in this final rule is well-supported by the record and by careful legal analysis.[150]

The OMB Director's concurrence in NHTSA's determination not only resolves the comments about NHTSA not meeting OMB's deadline, but also carries considerable weight in establishing that NHTSA acted appropriately with regards to the 2015 Act's deadline. Congress not only provided the OMB Director with the authority to determine whether a negative economic impact exists, but also expressly authorized the OMB Director to issue guidance to agencies on implementing the 2015 Act, both of which establish that Congress conferred significant deference to OMB's interpretation of the statute.[151]

Some comments stated or implied that the $14 rate is currently in effect.[152] That is wrong and misunderstands the effect of prior agency actions. As a result of a recent decision by the United States Court of Appeals for the Second Circuit, NHTSA's December 28, 2016 final rule is now in force.[153] Pursuant to that rule, the current CAFE civil penalty rate is $5.50 for model years before model year 2019 and, but for NHTSA's reconsideration, would not increase to $14 until penalties are assessed for MY 2019.[154] Thus, this final rule—which maintains the $5.50 rate through model year 2019 and beyond—does not serve as a reduction as applied to any shortfalls for vehicles fleets in those model years.[155] Although NHTSA's December 2016 final rule had set a $14 CAFE civil penalty rate that—but for NHTSA's reconsideration—would go into effect beginning with MY 2019, that announcement had no practical effect before 2020—the earliest that CAFE civil penalties could be assessed for noncompliance in MY 2019.[156] Nothing in the CAFE statute or the 2015 Act precludes the agency from reconsidering its earlier decision before that decision has any practical significance. Indeed, NHTSA's earlier reconsideration decision in December 2016, which recently took effect, did just that.[157]

A few commenters critiqued NHTSA's proposed interpretation of the 2015 Act in light of EPCA as "invert[ing] the burden of proof" required by the 2015 Act.[158] These comments misconstrued NHTSA's interpretation. 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 interpret the term "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.[159] Instead, Congress expressly delegated the authority to determine whether adjusting the amount of any given civil monetary penalty by the otherwise required amount would have a negative economic impact to the head of each agency. Without further guidance about what constitutes a "negative economic impact," each agency has to make an independent determination of what constitutes a "negative economic impact" and whether one would result from making each adjustment within its purview.

For NHTSA to determine whether increasing the CAFE civil penalty rate by the otherwise required amount would have a "negative economic impact," it considered what Congress had previously identified for it in EPCA—in the context of establishing the statutory standard required to raise the CAFE civil penalty rate—as constituting a "substantial deleterious impact on the economy." Specifically, Congress had decreed—unchanged for decades before the 2015 Act—that (i) a significant increase in unemployment in a State or a region of a State, (ii) an adverse effect on competition, or (iii) a significant increase in automobile imports would represent "a substantial deleterious impact on the economy."

Additionally, Congress established in EPCA that, by requiring such a substantial showing, the burden to increase the CAFE civil penalty rate is heavy. NHTSA determined, as explained in the NPRM, that it is reasonable to expect that, taking the EPCA factors into account, increasing the CAFE civil penalty rate to $14 would result in a "negative economic impact." Without sufficient data to the contrary, NHTSA's determination remains unchanged: The likely effects raising the CAFE civil penalty rate to $14 would have on unemployment, competition, and automobile imports lead NHTSA to conclude that increasing the CAFE civil penalty rate by the otherwise required amount would have a negative economic impact.[160]

[148] 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 4(c).

[149] 83 FR 13904, 13908 (Apr. 2, 2018).

[150] Alliance and Global Comment, at 5 (citing *FCC* v. *Fox Television Stations*, 556 U.S. 502, 515–16 (2009); *Philip Morris USA* v. *Vilsack*, 736 F.3d 284, 290 (4th Cir. 2013)).

[151] 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 7(a).

[152] *See, e.g.*, CAP Comment, at 2 (describing NHTSA's proposed action as "reducing the penalty below the statutorily-mandated rate"); CARB Comment, at 6, 14, 16 ("NHTSA's NPRM, therefore, is improperly characterized as 'retaining' the $5.50 penalty per tenth of a mpg when in fact NHTSA would be decreasing from $14 back to $5.50. . . ."; "NHTSA's adjustment to $14 in its interim final rule in July 2016 is already in effect anyway."; characterizing "what NHTSA is attempting to do here" as "a CAFE penalty decrease . . . to lower the penalty from $14 to $5.50").

[153] Order, ECF No. 196, *NRDC* v. *NHTSA*, Case No. 17–2780 (2d Cir., Apr. 24, 2018); Opinion, ECF No. 205, *NRDC* v. *NHTSA*, Case No. 17–2780, at 44 (2d Cir., June 29, 2018) ("The Civil Penalties Rule, 81 FR 95,489, 95,489–92 (December 28, 2016), no longer suspended, is now in force.").

[154] 81 FR 95489, 95492 (Dec. 28, 2016).

[155] Because this final rule does not prescribe "a higher amount" for the CAFE civil penalty rate, 49 U.S.C. 32912(c)(1)(D), NHTSA does not need to give 18 months' lead time before it becomes effective.

[156] 82 FR 32139, 32140 (July 12, 2017).

[157] 81 FR 95489, 95491 (Dec. 28, 2016).

[158] CBD Comment, at 12; *see also* CARB Comment, at 15–16 ("[T]he statutes build in opposing presumptions and require opposite findings. . . ."); Attorneys General Comment, at 12–13 ("NHTSA impermissibly inverts the presumption Congress built into the 2015 Act . . . .").

[159] 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.*

[160] One commenter asserted, without any citations or reasoning, that to keep the CAFE civil penalty rate at $5.50, the "negative economic impact" exception of the 2015 Act requires NHTSA to show that *any* upward adjustment to the CAFE civil penalty rate will have a negative economic impact and that NHTSA failed to meet this burden. CBD Comment, at 23; *see also* Attorneys General Comment, at 16 (arguing that, if necessary, NHTSA should "reduce the catch-up inflation adjustment by as little as possible . . . based on an analysis of the relevant factors, including but not limited to an estimate of compliance costs, the number and types of vehicles affected, the average increased cost to consumers, and how that cost compares to fuel cost savings"). No such showing is required. The 2015 Act authorizes the head of each agency to "adjust the amount of a civil monetary penalty by less than the otherwise required amount" if the "negative economic impact" exception is satisfied (with the OMB Director's concurrence). But neither the statute nor OMB guidance establish any standards that the agency must use in determining how much less than the otherwise required amount to make the adjustment. As NHTSA stated in the NPRM, "[w]ithout any statutory direction or OMB guidance

Some commenters contended that NHTSA's interpretation would make it "impossible" for the CAFE civil penalty to ever be increased.[161] NHTSA acknowledges that it may be difficult to meet the high standard Congress established in EPCA. In fact, NHTSA has never been able to make the findings required to increase the rate before. However, nothing in the 2015 Act relieves NHTSA of its statutory obligation to make those findings as a prerequisite for increasing the CAFE civil penalty rate.

One commenter argued that EPCA's specific definitions of "substantial deleterious impact on the economy" should not be carried over to the 2015 Act's term "negative economic impact" because the 2015 Act is "is intended for broad application across a range of regulatory schemes" and the EPCA factors "may simply be irrelevant in enforcing compliance with other regulatory systems."[162] The fact that the EPCA factors are irrelevant to determinations by other agencies (which do not administer the same statutory program) does not make them irrelevant to NHTSA's determination, which requires the agency to reconcile multiple statutory provisions. And both the 2015 Act and EPCA address the effect on the economy as part of their respective statutory standards for determining the appropriateness of an increase in a penalty rate.

Although the 2015 Act applies across all agencies, it is up to the head of agency to determine whether "increasing the civil monetary penalty by the otherwise required amount will have a negative economic impact." Each agency head must determine how to interpret that statutory standard in light of other statutory constraints and any other factors that may be appropriate for each agency to consider.[163]

Regardless, the concern about the possibility of inconsistent interpretations of "negative economic impact" is purely hypothetical: As far as NHTSA is aware, no other agency has invoked the "negative economic impact" exception. Moreover, NHTSA's interpretation has now gone through the notice-and-comment process, as required by the 2015 Act, and comports with the interpretation provided by OMB—the agency that Congress vested with the authority to issue guidance on implementing the statute.[164] OMB has also concurred with NHTSA's ultimate determination regarding the "negative economic impact" of increasing the CAFE civil penalty rate for the reasons explained in its opinion included in the docket for this rulemaking.[165]

One commenter challenged NHTSA's proposed interpretation that "'negative economic impact,' as used in the Inflation Adjustment Act, need not mean 'net negative economic impact,'"[166] arguing that the exception must be read to account for a net weighing of the positive and negative impacts and that it would be arbitrary and capricious for NHTSA to ignore the benefits of a regulatory action.[167] NHTSA disagrees. As NHTSA noted in the NPRM, the very next provision of the 2015 Act—the other exception to conducting the otherwise required initial catch-up adjustment—depends upon a determination of whether "the social costs of increasing the civil monetary penalty by the otherwise required amount outweigh the benefits."[168] Congress could have stated the "negative economic impact" exception using similar phrasing: "the negative economic impact of increasing the civil monetary penalty by the otherwise required amount outweighs the positive economic impact." But it did not do so, implying that it must mean something different. The commenter asserted that Congress' use of the term "negative" "must entail some analysis of what it means to be 'negative,'" and "the only rational way of understanding that term is to look at it in comparison to the benefits."[169] NHTSA did analyze what "negative" means, thoroughly explaining its reasoning in the NPRM and in this final rule. The agency can readily consider the economic harms that would likely be caused by increasing the CAFE civil penalty rate to $14—such as those identified in the EPCA factors—without needing to compare them to any potential benefits.

a. EPCA Factors

i. Unemployment

Some commenters provided data purporting to show that increasing the CAFE civil penalty rate will not increase unemployment.[170] These comments omitted the larger employment context: employment across the entire U.S. economy has grown over the period in question as the economy recovered from the recession. Employment in the automobile industry sector had plummeted during the recession, as new

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." 83 FR 13904, 13916 (Apr. 2, 2018) (citing *Nat'l Shooting Sports Found., Inc.* v. *Jones*, 716 F.3d 200, 214–15 (D.C. Cir. 2013)); *see also* Alliance and Global Comment, at 15 & n.63. Nonetheless, NHTSA believes it has made an adequate showing that any increase in the CAFE civil penalty rate would have a "negative economic impact" for the reasons detailed in the NPRM and throughout this final rule. *See, e.g.*, 83 FR 13904, 13916 (Apr. 2, 2018) ("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 concludes that retaining the $5.50 rate would avoid the 'negative economic impact' caused by any adjustment upwards.").

[161] Workhorse Comment, at 4; *see also* CARB Comment, at 18.

[162] CBD Comment, at 13.

[163] *See Sutton* v. *United States*, 65 Fed. Cl. 800, 806 (2005) (deferring to the Army's interpretation of a statute that is administered on a shared basis with the other military services because "there is no inconsistency" between its interpretation and that of another military branch and because the statutory language "confers plenary discretion on each individual service secretary to develop whatever procedures he or she deems appropriate"); *Bd. of Trade of City of Chicago* v. *SEC.*, 187 F.3d 713, 719 (7th Cir. 1999) ("[I]t is possible to defer simultaneously to two incompatible agency positions."); *see also F.T.C.* v. *Ken Roberts Co.*, 276 F.3d 583, 593 (D.C. Cir. 2001) ("Because we live in 'an age of overlapping and concurring regulatory jurisdiction,' a court must proceed with the utmost caution before concluding that one agency may not regulate merely because another may." (quoting *Thompson Med. Co.* v. *FTC*, 791 F.2d 189, 192 (D.C. Cir. 1986))); *National Ass'n of Cas. & Sur. Agents* v. *Bd. of Governors of Fed. Reserve Sys.*, 856 F.2d 282, 287 (D.C. Cir. 1988) (upholding different agency interpretations of the same phrase because of "their different economic impact"); *cf. Citizens Awareness Network, Inc.* v. *United States*, 391 F.3d 338, 349 (1st Cir. 2004) ("The APA lays out only the most skeletal framework for conducting agency adjudications, leaving broad discretion to the affected agencies in formulating detailed procedural rules.") (citation omitted). The Second Circuit asserted in its opinion on the indefinite delay rule that NHTSA's interpretation of the 2015 Act is entitled to no deference because "the [2015] Act applies to all federal agencies, meaning NHTSA has no special expertise in interpreting its language." Opinion, ECF No. 205, *NRDC.* v. *NHTSA*, Case No. 17–2780, at 34 n.10 (2d Cir., June 29, 2018) (citations omitted). To support this dictum, the Court cited only *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), which predates all of the cases just cited. The issue was not briefed to the Second Circuit, which gave no indication that it considered NHTSA's position.

[164] *See generally* OMB Negative Economic Impact Letter.

[165] *Id.*

[166] 83 FR 13904, 13913 (Apr. 2, 2018).

[167] IPI Comment, at 11–12; *see also id.* at 5–10 (arguing that "NHTSA has caused forgone benefits" and its "failure to address the forgone benefits is arbitrary and capricious"); *cf.* Workhorse Comment, at 2–3 (arguing that setting the CAFE civil penalty rate at $5.50 would have a negative economic impact on companies in the electric vehicle industry and that NHTSA must quantify the economic impact on all businesses, including manufacturers that will be selling credits).

[168] 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 4(c)(1)(B). NHTSA has not invoked this social costs exception, so comments that discussed a social cost-benefit analysis are irrelevant and do not merit a response. *See, e.g.*, CBD Comment, at 20–23; IPI Comment, at 6–10.

[169] IPI Comment, at 12.

[170] *See, e.g.*, Workhorse Comment, at 1; CBD Comment, at 14; CARB Comment, at 17.

vehicle sales dropped. After the economy recovered, automobile sales and industry employment nearly doubled relative to the recession, but are only marginally higher than historical levels.[171]

The data provided also should be viewed cautiously. For example, the Synapse Energy Economics study cited acknowledges that positive employment impacts it identifies that will result from implementation of federal and state fuel economy standards "are not large in the context of the national economy"—"less than 0.2 percent of current U.S. employment levels." [172] But the study only discusses the net employment effect on the United States as a whole; it does not discuss unemployment in every state or every region of a state at all, as NHTSA is required to consider under EPCA.[173] As NHTSA explained in the NPRM, job losses resulting from an increase in the CAFE civil penalty rate "may be concentrated in particular States and regions within those States where automobile manufacturing plants are located [such as those] located in the Midwest and Southeastern U.S." [174] The Synapse study does nothing to disprove this point.[175]

Another commenter argued that "the $14 penalty has been in effect since August 2016 . . . , and there is no evidence that this has caused an increase in the national unemployment rate or the unemployment rate in any State or region of a State." [176] The premise is faulty: NHTSA disputes that "the $14 penalty has been in effect since August 2016," as explained above.

Furthermore, the comment only cited as evidence the national unemployment rate for one month and a single state's unemployment rate for one month, "both of which are comparatively low and reflect a robust economy." [177] "[C]omparatively low" compared to what? The comment provided no evidence of what the unemployment rates it cites would be with a different CAFE civil penalty rate in effect.

Another commenter offered that "a recent survey of Tier 1 automotive suppliers conducted by Ricardo concluded that the increased stringency of the CAFE Standards encouraged job growth at their companies." [178] In fact, the survey question did not specifically ask about "the increased stringency of the CAFE standards." Rather, the survey question asked, "[i]n general, do US policies that encourage or force the uptake of new technologies also encourage job growth for your company in the US?" [179] Only 23 respondents answered out of the 143 potential participants who received the survey, including two that believed "[a]dapting to such policies does not change the number of jobs at our company." [180] The suppliers were not asked to and did not provide any empirical data supporting their opinions nor were they asked to quantify the level of job growth they believed was encouraged by the increased stringency. Additionally, the geographical breakdown of the respondents was not provided. Without any sense of magnitude or location, there is no way to evaluate the economic impact on the United States, any State, or any region of a State.

Note also that economic harms suffered by suppliers may be different from those suffered by OEMs. In fact, a separate survey question did ask specifically about the CAFE standards in connection to the effect on employment nationally: "Will the current 2025 standards help encourage job growth in the wider US economy?" [181] In response to this question, less than half of the respondents agreed that "such policies tend to encourage job growth in the industry overall." [182]

In any event, the data provided conflicts with other available studies, such as the peer-reviewed Indiana University study, which shows the planned vehicle standards will result in short-term macroeconomic losses, including job losses.[183] Specifically, the study concludes that "the vehicle price effects, which increase as standards become more stringent, cause significant losses of employment, GDP, and disposable income through a decline in new vehicle sales and higher vehicle prices for consumers, which in turn curbs spending on other goods and services," potentially for more than a decade.[184] The study indicates that the negative economic effects hit Illinois, Indiana, Michigan, Ohio, and Wisconsin particularly hard, with the region taking longer than the national average to recover, and that Arkansas, Louisiana, Oklahoma, and Texas never fully recover.[185] Without a clearer picture, NHTSA does not have the evidence needed to make the determination required under EPCA to raise the CAFE civil penalty rate.

One commenter quoted EPA as projecting "job growth in the automotive manufacturing sector and automotive parts manufacturing sector due specifically to the need to increase expenditures for the vehicle technologies needed to meet the standards." [186] EPA's employment projection came with a number of caveats that the commenter omitted. EPA was unable to "quantitatively estimate the total effects of the standards on the automobile industry, due to the significant uncertainties underlying any estimate of the impacts of the standards on vehicle sales." [187] EPA also could not "quantitatively estimate the total effects on employment at the national level, because such effects depend heavily on the state of overall employment in the economy," but noted that, under conditions of full employment, any changes in employment in the regulated sector would primarily be offset by changes in

[171] Employment and sales data available at *https://fred.stlouisfed.org/series/N4222C0A173NBEA* and *https://fred.stlouisfed.org/series/ALTSALES.*

[172] Synapse Energy Economics, *Cleaner Cars and Job Creation: Macroeconomic Impacts of Federal and State Vehicle Standards,* at 17 (Mar. 27, 2018), available at *http://www.synapseenergy.com/sites/default/files/Cleaner-Cars-and%20Job-Creation-17-072.pdf.* The study also acknowledges that its results "are necessarily uncertain, especially farther out in the modeling period."

[173] The EPCA requirement to consider the impact on the economy of states and regions of states also demonstrates why the comment arguing that NHTSA must "us[e] an economy-wide analysis" to measure employment effects is misplaced. IPI Comment, at 17. By statute, NHTSA is prohibited from only considering the impact of raising the CAFE civil penalty rate on national unemployment. Moreover, as noted in the NPRM, 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"—an impact that the Synapse study also fails to discuss. 83 FR 13904, 13913 (Apr. 2, 2018).

[174] 83 FR 13904, 13914 (Apr. 2, 2018).

[175] The reports from the Blue Green Alliance cited in a couple of comments suffers from similar shortcomings.

[176] CARB Comment, at 17.

[177] CARB Comment, at 17 n.64.

[178] Workhorse Comment, at 1 (citing Ricardo Energy & Environment, *Survey of Tier 1 automotive suppliers with respect to the US 2025 LDV GHG emissions standards* (Feb. 21, 2018), available at *http://www.calstart.org/Libraries/CALSTART_Press_Releases/CALSTART_Report_Supplier_Survey_Final_for_Web.sflb.ashx*) (Ricardo Report).

[179] Ricardo Report, at 20.

[180] Ricardo Report, at 2, 40.

[181] Ricardo Report, at 20.

[182] Ricardo Report, at 41.

[183] Sanya Carley, Denvil Duncan, John D. Graham, Saba Siddiki & Nikolaos Zirogiannis, *A Macroeconomic Study of Federal and State Automotive Regulations* (Mar. 2017) ("IU Study"). Revised/corrected versions of this report that ultimately come to the same conclusions are also available at *https://spea.indiana.edu/doc/research/working-groups/comet-2018.pdf* (Jan. 2018), and *https://spea.indiana.edu/doc/research/working-groups/comet-022018.pdf* (Feb. 2018).

[184] IU Study, at 3.

[185] IU Study, at 3, 103.

[186] CBD Comment, at 14 (quoting "Final Determination on the Appropriateness of the Model Year 2022–2025 Light-Duty Vehicle Greenhouse Gas Emissions Standards under the Midterm Evaluation," available at *https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100QQ91.pdf* (Final Determination), at 26).

[187] Final Determination, at 26.

employment in other sectors.[188] Ultimately, EPA concluded that it would be unable to distinguish the effect of the standards on employment "from other factors affecting employment, especially macroeconomic conditions and their effect on vehicle sales."[189]

Regardless, since that projection, EPA—in reconsidering the emission standards for model year 2022–2025 light-duty vehicles that were "based on outdated information"—has concluded that "a more rigorous analysis of job gains and losses is needed to determine the net effects of alternate levels of the standards on employment and believes this is an important factor to consider in adopting appropriate standards."[190]

The same commenter also highlighted that "industry groups like the Motor and Equipment Manufacturers Association, and the Manufacturers of Emissions Controls have expressed grave concerns about potential rollbacks of federal standards, which would threaten the technological and manufacturing investments they have already made."[191] Notably, neither of these industry groups submitted a comment on the NPRM. Regardless, this rulemaking does not involve "rollbacks of federal standards." It relates to civil penalties for those who violate the standards.

ii. Competition

As a threshold matter, one commenter contested NHTSA's understanding of the competition factor in EPCA: "EPCA *does not* inquire into competitive effects among manufacturers. To the contrary, EPCA expressly acknowledges that CAFE standards will treat different manufacturers differently."[192] EPCA does not define "competition," and Congress gave sole discretion to the Secretary of Transportation to decide whether it is likely that an increase in the CAFE civil penalty rate would adversely affect competition, along with the determinations of the other EPCA factors.[193] In applying EPCA, "NHTSA has consistently evaluated risks to competition, including the potential effects on individual automakers."[194] NHTSA has adopted and followed this approach for decades. Accordingly, NHTSA believes that it is appropriate for it to continue analyzing the potential effect of its regulations on competition in this "broad manner."[195]

In any event, NHTSA also explained in the NPRM how increasing the CAFE civil penalty rate could also adversely affect competition through "an impact on the market itself by limiting consumer choice involving vehicles and vehicle configurations that would otherwise be produced with penalties at their current values."[196] The same commenter disputed this effect on consumer choice, declaring—without evidence—that having the CAFE civil penalty rate at $5.50 "disadvantages consumers by reducing the number of more fuel-efficient vehicle choices in the marketplace."[197] NHTSA disagrees. The CAFE standards—and the natural competitive incentive for manufacturers to design vehicles that allow consumers to pay less for fuel—already ensure a significant variety of fuel efficient vehicles in the marketplace, and those manufacturers are unlikely to change a course if that CAFE civil penalty rate is not increased. As NHTSA described in the NPRM, increasing the CAFE civil penalty rate could actually have the opposite effect of that described by the commenter, for example if a manufacturer "decide[s] that it makes financial sense to shift resources from its planned investments in capital towards payment of possible future penalties," or "[i]f the possibility of paying penalties looms too large," driving the manufacturer out of business entirely.[198]

Another commenter argued that "[a]llowing the penalty to remain indexed to inflation as mandated by Congress does not adversely affect competition, but actively changing the rate to a lower value does," by "express[ing] a preference for companies that have failed or will fail to comply with the standards and disrupt[ing] the normal market competition by effectively subsidizing these companies."[199] As explained above, NHTSA is not "actively changing the rate to a lower value"; the rate was $5.50 during reconsideration, the rate is currently $5.50, and the rate will continue to be $5.50 as a result of this final rule, rather than increasing to $14 beginning with MY 2019. But NHTSA agrees with the general principle that "actively changing the rate" would "disrupt[ ] the normal market competition." For the reasons described in the NPRM, NHTSA believes 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."[200] Thus, to avoid adversely affecting competition by interfering, NHTSA will not increase the CAFE civil penalty rate.

Relatedly, one commenter argued that polling, reinforced by sales data, shows that "consumers value access to fuel-efficient vehicles."[201] If true, then normal market competition will incentivize non-compliant manufacturers to invest in increasingly efficient technology and increasing compliance with the standards. NHTSA would have no need to increase the CAFE civil penalty rate if it would never be applied because market forces would ensure compliance.

The same commenter also argued that increasing the CAFE civil penalty rate "enhances the competitiveness of U.S.-made vehicles in domestic and global markets."[202] Specifically, the commenter maintained that "more U.S. fuel-efficient vehicles means fewer consumer and production shifts when gas prices are volatile, and more efficient fleets have increased chances of competing with the tighter standards set in Europe and Asia, allowing automakers to build global vehicle platforms and significantly reduce their costs." For similar reasons as described above, automakers are already naturally incentivized to "reduce their costs." If becoming increasingly efficient would

[188] Final Determination, at 26.

[189] Final Determination, at 26.

[190] 83 FR 16077, 16077, 16086 (Apr. 13, 2018).

[191] CBD Comment, at 14.

[192] CBD Comment, at 15 (citing, as an example, 49 U.S.C. 32903, "providing for credit trading, and allowing manufacturers who have over-complied with standards to trade credits with manufacturers who have failed to meet fuel economy requirements").

[193] 49 U.S.C. 32912(c)(1)(C)(ii).

[194] 83 FR 13904, 13914 (Apr. 2, 2018).

[195] 83 FR 13904, 13914 (Apr. 2, 2018).

[196] 83 FR 13904, 13915 (Apr. 2, 2018).

[197] CBD Comment, at 23.

[198] 83 FR 13904, 13915 (Apr. 2, 2018); *see also* Comment by Jaguar Land Rover North America LLC, NHTSA–2018–0017–0016, at 1 ("A significant increase in the CAFE penalty rate would fundamentally change the dynamics of how companies may make investment decisions, and would force IVM specialist manufacturers to disregard consumer demand by restricting the availability of vehicles that consumers want."). The commenter noted that EPA has previously stated that under the standards, "consumers can continue to have a full range of vehicle choices that meet their needs." CBD Comment, at 16 (quoting Final Determination, at 9). But EPA has since reconsidered the emission standards for model year 2022–2025 light-duty vehicles, which were "based on outdated information." 83 FR 16077, 16077 (Apr. 13, 2018). Accordingly, EPA cannot be held to its earlier forecast regarding choices available to consumers.

[199] CAP Comment, at 4; *see also* CBD Comment, at 15 (reasoning that keeping the rate "artificially low" would "create an unfair market environment," in which less established, innovative companies that have invested in technology to meet the standards would find themselves at a competitive disadvantage to more established, larger companies that may be more willing to pay penalties, rather than comply).

[200] 83 FR 13904, 13914 (Apr. 2, 2018).

[201] CBD Comment, at 16.

[202] CBD Comment, at 15–16. This argument overlaps to some extent with the imports EPCA factor.

allow them to do so—and sell more vehicles in Europe and Asia—they will do so. As explained in more detail below, domestic manufacturers already must overcome hurdles that foreign manufacturers do not face, such as a separate minimum standard for domestically-manufactured passenger automobiles and prohibiting manufacturers from using traded credits to satisfy a shortfall of passenger automobiles manufactured domestically.

Another commenter challenged NHTSA's rationale on the competition factor, arguing that "if the stringency of the penalty is not maintained over time . . . , then manufacturers increasingly have the incentive merely to pay the penalty and not further invest in greater fuel efficiency." [203] This is a moot point because the stringency of CAFE civil penalties is maintained over time, just not through inflation adjustments. As explained above, Congress chose an alternative mechanism for ensuring that the CAFE stringency retains its salience over time, by requiring the fuel economy standards to be set at the maximum feasible level for each model year, rather than requiring adjustments for inflation of the penalty rate alone. Consequently, increasing the penalty rate would serve to "adversely impact the affected manufacturers through higher prices for their products (without corresponding benefits to consumers), restricted product offerings, and reduced profitability"—*i.e.*, adversely affecting competition.[204]

iii. Imports

One commenter argued that "if anything, the proper inflation adjustment would aid domestic manufacturing," rather than cause a significant increase in automobile imports.[205] Specifically, the comment noted that "historically, the only manufacturers to pay fines for non-compliance have been those who import a large fraction (and, in many cases, all) of the vehicles sold in the United States." [206] This misses a key part of the picture. In the NPRM, NHTSA noted that "[f]inal model year fuel economy performance reports published by NHTSA indicate import passenger car fleets are performing better than domestic passenger car fleets." Since then, the model year 2016 fleet performance report has been made available, indicating that the performance of the import passenger car fleet again has an advantage over the domestic passenger car fleet, now almost a full mile per gallon difference.[207] Although the magnitude of the advantage has varied, the import passenger car fleet has consistently had a superior fuel economy performance to the domestic passenger car fleet for over ten years. Because of that existing advantage, increasing the CAFE civil penalty rate would likely have a harsher impact on domestic manufacturers, who would need to invest more to reduce fuel economy shortfalls. As those increased investments get translated into higher prices for vehicles, relatively cheaper imported vehicles become more attractive to consumers. The comment seemed to grasp this point in its very next paragraph, describing a situation in which "a higher fine is going to either push a manufacturer to deploy more technology to comply . . . or ensure that domestic production of more efficient cars is sufficient to offset the shortfall of its domestically produced" vehicles—both of which must be paid for somehow.[208]

Moreover, the comment fails to mention that domestic manufacturers face some heavier statutory burdens. For example, manufacturers are barred by statute from using traded credits to satisfy a shortfall for "the category of passenger automobiles manufactured domestically." [209] Passenger automobiles manufactured internationally are not subject to the same limitation, affording foreign manufacturers a competitive advantage. Domestically-manufactured passenger automobiles are also subject to a minimum standard, beyond the general average fuel economy standards: 27.5 miles per gallon or "92 percent of the average fuel economy projected by the Secretary for the combined domestic and non-domestic passenger automobile fleets manufactured for sale in the United States by all manufacturers in the model year," whichever is greater.[210] In fact, this statutory domestic passenger vehicle requirement has already resulted in the imposition of record penalties for model year 2016. As noted in NHTSA's MY 2011–2018 Industry CAFE Compliance report, one manufacturer paid over $77 million in civil penalties for failing to meet or exceed the minimum domestic passenger car standard for MY 2016—the single highest civil penalty assessed in the history of the CAFE program. NHTSA anticipates that such penalties will increase as stringency levels continue to rise. These disparities against the domestic passenger automobile industry increase the likelihood that an upward adjustment to the CAFE civil penalty rate will create greater incentives for manufacturers to shift their production of passenger vehicles overseas to avoid such penalties, and that would have a negative economic impact on the United States—one that is likely to hit particularly hard on states and regions of states where domestic passenger automobile manufacturing is concentrated.

The comment also cited the "history of Detroit manufacturing" as another illustration for how "adjusting the fine upward acts to pull manufacture of more efficient vehicles into domestic production as opposed to overseas production and imported." [211] The comment's portrayal of history, however, omitted that many of the most efficient vehicles already had thin margins and production had been moved, at least in part, to plants in Mexico to reduce costs. Moreover, the strength of the connection between the civil penalty rate and domestic production is tenuous. An alternative explanation is that higher fuel prices allow manufacturers to charge more for fuel efficient vehicles. Consequently, manufacturers can spend more on production domestically without having to shift production abroad for cheaper.

b. Other Economic Considerations

Even if the EPCA factors do not apply, NHTSA concludes that raising the CAFE civil penalty rate to $14 would have a "negative economic impact" for the reasons explained in the NPRM.[212] One comment asserted that NHTSA "has not identified any facts or analysis that would support its belated invocation of the 'negative economic impact' provision." [213] This comment ignores that the NPRM expressly stated that it was relying on "the estimate provided by industry showing annual costs of at least one billion dollars." [214]

[203] CARB Comment, at 18.

[204] 83 FR 13904, 13914 (Apr. 2, 2018).

[205] CBD Comment, at 18–19.

[206] CBD Comment, at 18 (citing CAFE Public Information Center, available at *https://one.nhtsa.gov/cafe_pic/CAFE_PIC_Fines_LIVE.html*).

[207] Available at *https://one.nhtsa.gov/cafe_pic/CAFE_PIC_fleet_LIVE.html* (last accessed May 22, 2018).

[208] CBD Comment, at 18.

[209] 49 U.S.C. 32903(f)(2); *see also* 49 CFR 536.9(c).

[210] 49 U.S.C. 32902(b)(4). Since the minimum standard for domestically-produced passenger automobiles was promulgated, the "92 percent" has always been greater than 27.5 mpg. For model year 2016, the most recent year for which data is publicly available, some manufacturers were unable to meet the domestic passenger car fleet standard. CAFE Public Information Center, *https://one.nhtsa.gov/cafe_pic/CAFE_PIC_Mfr_LIVE.html.*

[211] CBD Comment, at 18–19.

[212] 83 FR 13904, 13916 (Apr. 2, 2018).

[213] Attorneys General Comment, at 14.

[214] 83 FR 13904, 13916 (Apr. 2, 2018).

Some commenters challenged NHTSA's reliance on the Alliance and Global's estimate of annual costs of at least one billion dollars under NHTSA's augural standards for MY 2022 to 2025, largely relying on the Union of Concerned Scientists' (UCS's) critique of the estimate.[215] The Alliance and Global addressed UCS's criticisms in their comment.[216] Specifically, the Alliance and Global observed that "UCS did not factor in the costs of CAFE penalties in their analysis," as NHTSA has in its analyses of the economic impact of CAFE standards.[217] Consistent with NHTSA's past methodology and in light of the particular question at issue here, NHTSA continues to agree that it was appropriate to incorporate the costs of civil penalties in an analysis to determine whether raising the CAFE civil penalty rate would have a "negative economic impact."

One commenter argued, relying on the July 2016 Draft Technical Assessment Report (TAR), that because "the model year 2022–25 greenhouse gas/CAFE standards were technologically feasible at reasonable cost for auto manufacturers . . . the industry's $1 billion penalty estimates are unreasonable since any 'massive' increase would be the result of the manufacturers' deliberate non-compliance rather than any inability to comply." [218] Since the draft TAR, however, the EPA Administrator has reconsidered the emission standards for model year 2022–2025 light-duty vehicles and determined that they "are based on outdated information, and that more recent information suggests that the current standards may be too stringent." [219] Accordingly, EPA announced that it "will initiate a notice and comment rulemaking in a forthcoming **Federal Register** notice to further consider appropriate standards for model year 2022–2025 light-duty vehicles, as appropriate," in partnership with NHTSA.[220] In particular, EPA observed that due to a variety of challenges of feasibility and practicability, many companies have already started to rely on banked credits to remain in compliance, which may be increasingly difficult to continue as the stringency standards tighten.[221] To the extent that the draft TAR expressed that "the model year 2022–25 greenhouse gas/CAFE standards were technologically feasible at reasonable cost for auto manufacturers," that conclusion is no longer operative.

Another commenter identified purported "substantial shortcomings" with the CAFE model used by the Alliance and Global to formulate generate its cost estimates, which it claimed "will tend to overestimate fuel economy costs." [222] NHTSA disagrees strongly with that statement. As the comment itself noted, "the [CAFE] model is one of the best publicly available tools for analyzing the effects of fuel economy regulation and offers substantial transparency and comparability for the analyses." [223] Further, the CAFE model has been used in numerous fuel economy rulemakings. Finally, the commenter did not provide an alternative calculation of what it believes the additional costs associated with increasing the CAFE civil penalty rate would be. As such, NHTSA's reliance on the CAFE model is eminently reasonable, and the agency continues to believe that "the estimate provided by the Alliance and Global showing annual costs of at least one billion dollars is a reasonable estimate" of what would occur if the CAFE civil penalty rate was increased to $14 under the agency's augural standards and that this would constitute a "negative economic impact" under the 2015 Act.[224]

Some commenters argued that even assuming the Alliance and Global's analysis was accurate, the impact of the additional costs it calculates is minimal when spread across the industry.[225] These arguments gloss over the fact that if the Alliance and Global's analysis is correct, there is a "negative economic impact." Instead, these comments seem to be directed towards the irrelevant question of how "negative" the "economic impact" would be.[226]

Other commenters criticized NHTSA for purportedly not conducting a sufficiently thorough analysis of the negative economic impact of the increased penalty rate, asserting that NHTSA must consider factors, such as "which vehicles would be subject to penalties, how much of the costs would be passed through to consumers, and whether the average per vehicle cost would have any impact at all on consumer demand for vehicles." [227] The 2015 Act does not require such an analysis to determine whether making an otherwise required adjustment would have a "negative economic impact." As NHTSA explained in the NPRM and above, because the term "negative economic impact" is not defined nor any guidance provided by Congress or OMB, NHTSA has broad discretion to determine how to determine whether a "negative economic impact" would result from such an adjustment.[228]

Contrast the "negative economic impact" exception in the 2015 Act with the statutory provision describing the relevant factors that Congress requires NHTSA to consider in determining the amount of a civil penalty imposed for a variety of violations of the Safety Act.[229] Congress has demonstrated that it can, and will, delineate specific factors agencies should consider in making comparable determinations. It chose not to do so in the 2015 Act, affording agencies the ability to determine what would be most appropriate for each.

Imposing an additional billion dollars in costs to the automobile industry—

[215] *See, e.g.*, CBD Comment, at 19; Attorneys General Comment, at 10; IPI Comment, at 13–14. UCS's critique of the Alliance and Global's analysis is available at *https://www.regulations.gov/document?D=NHTSA-2017-0059-0019.*

[216] Alliance and Global Comment, at 17–18.

[217] Alliance and Global Comment, at 17–18 (citing 77 FR 62624, 63047 (Oct. 15, 2012)). Contrary to one comment's critique, Attorneys General Comment, at 15; *cf.* IPI Comment, at 16 ("[A]ny negative effects of higher penalties on profits would be experienced only by those firms that, in the absence of the inflation adjustment, would not comply with the standards. . . ."), the Alliance and Global's analysis did account for the increased costs to manufacturers that would comply with the fuel economy standards.

[218] Attorneys General Comment, at 10.

[219] 83 FR 16077, 16077 (Apr. 13, 2018).

[220] 83 FR 16077, 16077 (Apr. 13, 2018). As part of this reconsideration, "NHTSA is obligated to conduct a *de novo* rulemaking, with fresh inputs and a fresh consideration and balancing of all relevant factors, to establish final CAFE standards for [MYs 2022–2025]." 82 FR 34740, 34741 (July 26, 2017).

[221] 83 FR 16077, 16079 (Apr. 13, 2018).

[222] IPI Comment, at 13–14.

[223] IPI Comment, at 13.

[224] 83 FR 13904, 13916 (Apr. 2, 2018).

[225] *See, e.g.*, Comment by Kendl Kobbervig, NHTSA–2018–0017–0009, at 1; Attorneys General Comment, at 14–15; IPI Comment, at 15; *cf.* IPI Comment, at 16 (arguing that "the increase in costs should not be thought of as severe" because the total additional costs due to an increase in the CAFE civil penalty "will occur mostly for luxurious and sports cars").

[226] This question is irrelevant for the reasons discussed in footnote 160: once NHTSA determines that increasing the civil penalty to $14 would have a negative economic impact, it has broad discretion to determine how much less than the otherwise required amount the adjustment, if any, should be.

[227] Attorneys General Comment, at 13–14; *see also* CARB Comment, at 19 (commenting that NHTSA did "not provide an estimate of the increased compliance costs, the number and types of vehicles affected, the average increased costs that consumers would bear, the price sensitivity of consumers of the affected vehicles, or how the cost increase compares to fuel cost savings and other benefits to consumers resulting from increased compliance").

[228] *See* 83 FR 13904, 13916 (Apr. 2, 2018) (citing *Nat'l Shooting Sports Found., Inc.* v. *Jones*, 716 F.3d 200, 214–15 (D.C. Cir. 2013)); Alliance and Global Comment, at 15 & n.63.

[229] *See* 49 U.S.C. 30165(c) (requiring the Secretary to "consider the nature, circumstances, extent, and gravity of the violation" in determining the amount of a civil penalty under that section and detailing specific factors the Secretary must include, as appropriate, in making such determination).

every year—would have the type of "negative economic impact" envisioned by Congress when it provided this exception, and this negative economic impact is magnified by the statutory domestic minimum standard for passenger vehicles, whose penalties cannot be avoided with credits. In fact, in other instances when Congress has imposed additional procedural requirements on agencies, it has drawn the line at economic impacts around $100 million.[230] It appears reasonable that a projected economic impact ten times the amount required for a rule to be considered "major" under the Congressional Review Act would be more than enough to reach this threshold. Furthermore, as noted above, it is apparent that a significant part of the negative impact would occur within the United States—and specifically within regions of the United States where traditional automobile manufacturing is concentrated—because raising the penalty rate would not only harm manufacturers generally. It would also create a specific incentive for manufacturers to shift domestic production of small, low-profit-margin passenger vehicles either to Mexico (where production costs are lower) or outside of North America (because those vehicles would not be subject to the domestic minimum standard).

Another commenter alleged that NHTSA did "not analyze the obvious alternative available to manufacturers who want to avoid the higher penalty: compliance with the fuel economy standards" and "entirely fail[ed] to address" how increasing the CAFE civil penalty rate to $14 would raise the value of credits, "making violations more expensive for those manufacturers that voluntarily choose not to comply with the CAFE standards." [231] This comment is wrong: In the NPRM, NHTSA expressly acknowledged manufacturers' option to comply with the applicable fuel economy standards, the resulting effect on the value of credits, and the economic impact.[232] Further, the $1 billion estimate was for total costs, including technology costs, not just increased penalty payments.

Therefore, the agency continues to believe that the estimate provided by the Alliance and Global is a reasonable estimate of the economic impact of increasing the penalty rate under the augural standards—perhaps even be understated—and that this impact is sufficient for the agency to conclude that the CAFE civil penalty rate statute falls within the "negative economic impact" exception to the 2015 Act.

In addition, two recent NHTSA publications—NHTSA and EPA's Safer Affordable Fuel-Efficient (SAFE) Vehicles proposed rule as well as the MY 2011–2018 Industry CAFE Compliance Report—provide further confirmation for NHTSA's conclusion that increasing the CAFE civil penalty rate pursuant to the 2015 Act would have a "negative economic impact." [233] The SAFE Vehicles rule proposed CAFE and greenhouse gas (GHG) standards for model years 2020 through 2026 and used the most recent version of the CAFE model. As discussed in greater detail in that rulemaking, at a high level, the CAFE model is the tool the agencies use to determine how the industry could respond to potential standards. It includes a wide range of assumptions on the cost, effectiveness, and availability of different technologies, and then a decision-making tool to determine how each manufacturer could apply technologies, while accounting for various considerations that manufacturers typically evaluate when establishing, choosing, and incorporating the technologies. In the case of the CAFE standards, the model also estimates when a manufacturer is likely to use existing credits or pay penalties in lieu of meeting the required standards. Using the same publicly-available modeling and underlying data as that relied upon in the SAFE Vehicles NPRM, the negative economic impact of increasing the CAFE civil penalty rate to $14 remains apparent. Analyses conducted for the SAFE Vehicles NPRM to determine the effect of other inputs—in this case, the CAFE civil penalty rate—on the sensitivity of results show that, as seen in Table 1 in Appendix A, under the augural standards, manufacturers are projected to face more than $500 million in additional civil penalty liability before accounting for credits every year through at least MY 2026 if the rate is increased to $14 in MY 2019, as compared to retaining the rate at $5.50—with the added burden exceeding $1 billion for some model years.[234] Even under the proposed standards,[235] which were the least stringent option analyzed in that rule, the additional projected penalty liability before accounting for credits from an increase in the rate to $14 would be substantial: Over $750 million in the first model year for which the increase would be in effect and over $100 million every year through model year 2025, as shown in Table 2 in Appendix A. These additional penalties are on top of any increased costs manufacturers would incur in making technological or design changes to reduce their shortfalls—costs that would likely be passed along to consumers. It is important to note that, as described above, these added potential penalties could be offset through the application

[230] *See, e.g.*, 5 U.S.C. 804(2)(A).

[231] Attorneys General Comment, at 15–16.

[232] *See, e.g.*, 83 FR 13904, 13916 (Apr. 2, 2018) ("[I]ncreasing 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 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.").

[233] 83 FR 42986 (Aug. 24, 2018). Although the SAFE Vehicles NPRM and the CAFE Compliance Report were published after the comment period in this rulemaking had closed, "an agency may use supplementary data, unavailable during the notice and comment period, that expands on and confirms information contained in the proposed rulemaking and addresses alleged deficiencies in the pre-existing data, so long as no prejudice is shown." *Solite Corp.* v. *U.S. E.P.A.*, 952 F.2d 473, 484 (D.C. Cir. 1991) (cleaned up) (citing *Cmty. Nutrition Inst.* v. *Block*, 749 F.2d 50, 57–58 (D.C. Cir. 1984)). Moreover, since the SAFE rule was published, NHTSA has not received any additional comments on—or any requests to re-open the comment period for—this CAFE civil penalty rate rulemaking. Pursuant to NHTSA's regulations, "[l]ate filed comments will be considered to the extent practicable." 49 CFR 553.23.

[234] A description of the modeling assumptions and parameters for the SAFE NPRM are located at 83 FR 43000- 43188 (Aug. 24, 2018) ("Technical Foundation for NPRM Analysis"). The data supporting the calculations presented here are available at *https://www.nhtsa.gov/corporate-average-fuel-economy/compliance-and-effects-modeling-system* in the "Central Analysis" and "Sensitivity Analysis" for the "2018 NPRM for Model Years 2021–2026 Passenger Cars and Light Trucks." The data utilized are the same data presented in the SAFE Vehicles NPRM "Sensitivity Analysis" section (beginning at 83 FR 43352), but tabulated to show the impacts of this particular action. The calculations here specifically compare the total projected fines across all manufacturers and all fleets, both under the augural standards and the proposed standards, in the central analysis that assumes the rate will remain at $5.50 and the sensitivity analysis that, holding all else in the central analysis the same, assumes the rate would be increased to $14. The numbers presented here are based on the "unconstrained" analysis of the CAFE model—which allows for the possibility that credits may be earned, transferred, and applied to CAFE shortfalls—rather than the standard-setting analysis—which assumes that each fleet must comply with the CAFE standard separately in each year because of the statutory limitation in EPCA and EISA that prohibits NHTSA from considering the availability of credits when setting standards—but the magnitudes of the amounts and the trends are similar under both analyses. For additional information about the assumptions underlying this data, please refer to the Preliminary Regulatory Impact Analysis (PRIA) and the NPRM for the SAFE Vehicles rulemaking, both available at *https://www.nhtsa.gov/corporate-average-fuel-economy/safe*.

[235] The analysis provided by the Alliance and Global was conducted and submitted before the proposed standards were publicly available.

of credits earned, transferred, or traded in ways the model cannot predict—subject to the limitations on domestic fleets described above—but NHTSA expects that if the civil penalty rate was increased, the price of credits would increase as well.

Moreover, the MY 2011–2018 Industry CAFE Compliance report recently published by NHTSA shows that the number of fleets with credit shortfalls has substantially increased since 2011, while the number of fleets generating credit surpluses has decreased, leading to the MY 2018 estimate of 28 fleets with projected shortfalls and only 11 with projected surpluses.[236] While most manufacturers have so far avoided making civil penalty payments by using earned and traded credits, more manufacturers are expected to need to pay penalties going forward because credit surpluses across the entire fleet are diminishing;[237] manufacturers will no longer be able to use their own credits or purchase credits from other entities to fully satisfy their shortfalls. The shrinking credit surplus is particularly challenging for domestic fleets: The MY 2011–2018 Industry CAFE Compliance report shows that the remaining surplus credits for domestically-produced vehicles were cut nearly in half from MY 2014 to MY 2016.[238] In addition, since non-compliance with the domestic passenger car minimum standard required by 49 U.S.C. 32903(g)(3) and 49 CFR 536.9 cannot be covered with credits acquired by another automaker or transferred from another fleet, shortfalls for domestic vehicles must be covered by penalty payments when a manufacturer's domestic surplus credits run out. Manufacturers are already beginning to realize this impact: As noted above, one manufacturer paid over $77 million in civil penalties for failing to meet the minimum domestic passenger car standard for MY 2016, which is the single highest civil penalty assessed in the history of the CAFE program. These facts show that the estimate provided by the Alliance and Global is supported by the actual behavior of the industry in the face of increasing standards, which bears out the conclusions already reached by NHTSA in this rulemaking.

*5. $10 Cap*

Two comments claimed that NHTSA failed to provide a "reasoned explanation" for why it departed from its previous position that the $10 cap for the CAFE civil penalty rate, established by Congress in 1978 in 49 U.S.C. 32912(c)(1)(B), needs to be adjusted pursuant to the 2015 Act.[239] As explained above, NHTSA is permitted to change its views. And in doing so here, NHTSA provided a "reasoned explanation" in its NPRM: The $10 cap is not "assessed or enforced" and thus is not a "civil monetary penalty" that requires adjustment under the 2015 Act.

Multiple commenters disagreed with NHTSA's proposed determination in the alternative that any potential adjustment NHTSA makes to the CAFE civil penalty rate be capped by the $10 limit, without adjusting the cap to $25.[240] These comments—including those that had argued that NHTSA's adjustment in 1997 from $5 to $5.50 constitutes evidence that an adjustment is warranted here—almost unanimously ignored that this cap was not adjusted when the previous inflation adjustment was made in 1997. These comments also failed to reconcile the fact the $10 cap was left intact when Congress amended the civil penalty provision by enacting EISA in 2007.

Instead, the comments focused largely on the "maximum amount" provision of definition of "civil monetary penalty" in the 2015 Act. One comment observed that the statutory language establishing the $10 cap is "virtually identical" to the statutory language establishing the general EPCA penalty of $10,000, which NHTSA adjusted, only identifying the shared phrase "not more than" to indicate that they are both maximum amounts.[241] But NHTSA did not, and still does not, dispute that the $10 cap is a "maximum amount." Rather, NHTSA tentatively determined, and today finalizes, that the $10 cap is not "assessed or enforced" as required to be a "civil monetary penalty" under the 2015 Act.[242] Other penalties that have a maximum amount, such as the general EPCA penalty, can actually be "assessed or enforced": A violator could theoretically be assessed a civil penalty of the now-adjusted maximum amount.

Only two comments provided any argument on this specific point.[243] One of those comments conceded that the cap "is not being assessed or enforced now."[244] Nonetheless, that comment maintained that the cap "may" be assessed or enforced "in the future if [NHTSA] exercises its discretionary authority to increase the penalty to further energy conservation."[245] Similarly, the other comment asserted that "the condition of contemporaneous enforceability of the statutory maximum amount is not a condition precedent in order to qualify as a 'civil monetary penalty.' . . . [T]he maximum itself does not need to be actively assessed or enforced."[246] Even setting aside the hypothetical circumstances that NHTSA would need to establish to raise the EPCA rate all the way to the cap (discussed above), it is not the cap that is ever "assessed or enforced"; it is the "civil penalty," as defined in 49 U.S.C. 32912(b). The statutory cap merely sets a limit to which the $5.50 multiplier—which is used to calculate the "civil penalty"—can be raised.

Other commenters discussed how the $10 cap must be adjusted to avoid undermining the purpose of the 2015 Act.[247] As discussed above, NHTSA disagrees that retaining the CAFE civil penalty rate runs counter to the purposes of the 2015 Act, even if the 2015 Act applies to the CAFE civil penalty rate. Congress chose means other than inflation adjustments to maintain the deterrent effect of the CAFE civil penalty formula over time (and to incentivize energy conservation under EPCA). Regardless, the purpose of the statute would not justify completing an adjustment unauthorized by Congress. The $10 cap does not satisfy the definition of a "civil monetary penalty" required by Congress to be

[236] NHTSA, "MY 2011–2018 Industry CAFE Compliance," *https://one.nhtsa.gov/cafe_pic/MY%202011%20-%20MY%202018%20Credit%20Shortfall%20Report.pdf* (Dec. 21, 2018).

[237] *Id.*

[238] *Id.*

[239] CBD Comment, at 23; Attorneys General Comment, at 17. The Attorneys General comment also claimed that NHTSA adjusted the cap from $10 to $25 in its interim final rule and that this adjustment "has never been suspended or reversed, and remains in effect." Attorneys General Comment, at 16. As NHTSA noted in its NPRM, however, while NHTSA did announce in the interim final rule that the adjusted maximum civil penalty would be increased from $10 to $25, 81 FR 43524, 43526 (July 5, 2016), "this change was never formally codified in the Code of Federal Regulations nor adopted by Congress." 83 FR 13904, 13916 n.96 (Apr. 2, 2018). Regardless, NHTSA gave notice that "[e]ven if the adjustment is considered to have been adopted, however, NHTSA is now reconsidering that decision for the reasons explained" in the notice. 83 FR 13904, 13916 n.96 (Apr. 2, 2018).

[240] *See, e.g.*, CAP Comment, at 3; CBD Comment, at 23.

[241] CARB Comment, 9.

[242] 28 U.S.C. 2461 note, Federal Civil Penalties Inflation Adjustment 3(2)(B), (C).

[243] CARB Comment, at 9; Attorneys General Comment, at 17.

[244] Attorneys General Comment, at 17.

[245] Attorneys General Comment, at 17.

[246] CARB Comment, at 9.

[247] *See, e.g.*, CARB Comment, at 19–20 (Not adjusting the $10 cap "would completely defeat the purpose of the 2015 Act in avoiding the eroded value and deterrence of penalties by inflation."); Attorneys General Comment, at 17 ("[T]o read the 2015 Act as *not* applying to the CAFE standards' statutory maximum would undermine the purpose of both the 2015 Act *and* EPCA."); IPI Comment, at 4 ("[I]f the $10 maximum were a permanent cap never subject to inflation, that would defeat Congress's stated purposes for the 2015 Act. . . .").

adjusted, and therefore, the 2015 Act is not a basis for NHTSA to adjust the $10 cap.

One commenter proposed the $10 cap be subject to an inflationary adjustment calculated from 2007.[248] Because NHTSA has concluded that the $10 cap should not be adjusted at all under the 2015 Act, it is unnecessary for NHTSA to determine what the appropriate base year would be if such an adjustment were required, and NHTSA declines to do so.

## E. Rulemaking Analyses and Notices

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

NHTSA has considered the impact of this rulemaking action under Executive Order 12866, Executive Order 13563, and the Department of Transportation's regulatory policies and procedures. This rulemaking document has been considered a "significant regulatory action" under Executive Order 12866. NHTSA believes that this rulemaking is "economically significant" because this rule avoids imposing a future economic impact of $100 million or more annually.

Certain commenters criticized the agency's decision to not include a separate economic analysis. The agency notes first that nothing in either the 2015 Act or EPCA require that NHTSA conduct a cost-benefit analysis when determining issues related to CAFE penalties. Further, the agency's first argument in this final rule that these penalties are not "civil monetary penalties" under the 2015 Act would not be affected by any cost-benefit analysis, as it relies on purely legal reasoning, not on any economic finding. Similarly, although one could argue that other arguments relied on in this final rule require some degree of analysis, the relevant statutes expressly identify specific factors the agency must consider, and the agency made the appropriate considerations of substantial deleterious harm under EPCA and negative economic impact under the 2015 Act. In addition, since this rule merely maintains the existing penalty rate, it has no economic impact. Certainly, some alternatives, particularly raising it to $14 or even just $10, would have had economic impacts, but analyzing the impacts of alternatives that would have changed the status quo is different than analyzing an actual rule that does so. In some ways, this compares to an agency's decision to deny a petition rulemaking, where the denial does not ordinarily include a thorough economic analysis, but any regulatory action in response granting a petition would likely benefit from some an analysis the reflects the impacts of any change. Finally, Executive Order 12866 by its own terms does not, "does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person." Therefore, whether the agency complies with the Order is not grounds for legal challenge. To the extent there is any ambiguity as to what analysis is required, OMB not only reviewed both the NPRM and final rule, but also affirmatively concurred with NHTSA's economic determination and the interpretations of the 2015 Act in this final rule.[249]

### *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 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 (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 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

[248] Workhorse Comment, at 3.

[249] OMB Non-Applicability Letter; OMB Negative Economic Impact Letter.

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*

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 does not 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.[250] 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."[251] Based on the environmental assessment, the agency must "make its determination whether to prepare an environmental impact statement" and "prepare a finding of no significant impact . . . if the agency determines on the basis of the environmental assessment not to prepare a statement."[252] NHTSA prepared a Draft Environmental Assessment (Draft EA), which was included in the preamble of the NPRM. This section serves as the agency's Final Environmental Assessment (Final EA) and Finding of No Significant Impact (FONSI).

[250] 42 U.S.C. 4332(2)(C).

[251] 40 CFR 1508.9(b).

[252] 40 CFR 1501.4(c) & (e).

i. Purpose and Need

This final rule sets forth the purpose of and need for this action. NHTSA considered whether it is appropriate, pursuant to the Inflation Adjustment Act, to make an initial "catch-up" adjustment to the civil monetary penalties it administers for the CAFE program. Further, if the Inflation Adjustment Act does apply, it has considered the appropriate approach to undertake pursuant to the legislation and consistent with the agency's responsibilities under EPCA (as amended by EISA). NHTSA has considered the findings of this Final EA prior to selecting the $5.50 rate in this final rule.

ii. Alternatives

NHTSA considered a range of alternatives for this action, including a civil penalty amount of $5.50 per each tenth of a mile per gallon [253] and a civil penalty amount of $14.00 per each tenth of a mile per gallon.[254] NHTSA also considered a civil penalty amount of $6.00 per each tenth of a mile per gallon (rounding to the nearest dollar pursuant to the 2015 Act) and whether the civil penalty amount is capped at $10.00 per each tenth of a mile per gallon (pursuant to EPCA). This allowed the agency to consider selecting any value along this range of alternatives, including any civil penalty amount between $5.50 and $14.00. In consideration of the information presented in this Final EA, NHTSA is selecting a civil penalty rate of $5.50 per each tenth of a mile per gallon as its final rule. NHTSA is also increasing the "general penalty" to a maximum penalty of $42,530,[255] pursuant to the requirements of the Inflation Adjustment Act.

In the Draft EA, NHTSA identified $5.50 as the agency's No Action Alternative. Two commenters noted that, as a result of the U.S. Court Appeals for the Second Circuit decision, the $14 rate should be considered the agency's No Action Alternative.[256] NHTSA believes this notice adequately explains the complicated factual and legal circumstances that apply to this rulemaking. This Final EA considers the environmental impacts associated with the $5.50 and $14 rates in comparison with each other, thus allowing a reasoned consideration of the greatest potential environmental impacts regardless of which is appropriately considered the No Action Alternative.

iii. Environmental Impacts of the Proposed Action and Alternatives

NHTSA considered a range of alternatives from a rate of $5.50 to a rate of $14 as 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 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

[253] As previously noted, the rate was $5.50 during reconsideration, the rate is currently $5.50, and the rate will continue to be $5.50 as a result of this final rule, rather than increasing to $14 beginning with MY 2019. Manufacturers would at no time be responsible for paying a higher civil penalty rate.

[254] Absent this final rule, the $14 rate would have gone into effect beginning with model year 2019.

[255] 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 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. Applying the multiplier for 2019 of 1.02522, as specified in OMB's December 14, 2018, results in an adjusted maximum penalty of $42,530.

[256] IPI Comment, at 10; Attorneys General Comment, at 19.

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 the levels of compliance with the applicable fuel economy targets for each of the alternatives under consideration in this notice could result, at most, in relatively small differences in 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 other environmental impact areas.[257] The analyses assumed a civil monetary penalty of $5.50 per each tenth of a mile per gallon. The agency has considered the information and trends presented in those Final Environmental Impact Statements (Final EISs). 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 those fuel economy standards resulting in modest 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. In fact, one commenter used NHTSA's CAFE Model from its most recent CAFE stringency rulemaking to approximate the potential impact on compliance.[258] That commenter concluded that, compared to a $14 rate, the $5.50 rate would "cause average passenger car fuel economy to drop almost 5 mpg [in the year 2032], from a baseline scenario of 54.75 mpg to 49.75 mpg. . . . For the total fleet, the expected increased fuel consumption amounts to 54 billion gallons between 2017 and 2032." [259] In the MY 2017–2025 CAFE EIS, the final rule was associated with reductions in fuel consumption for calendar years 2017 through 2060 ranging from 585 billion gallons to 1,508 billion gallons, depending on the analysis. Thus, the commenter's analysis confirms that a civil penalty rate of $5.50, as compared to $14, would result in environmental impacts that are a fraction of those shown in the MY 2017–2025 CAFE EIS. Such impacts would mean global mean surface temperature increases even less than 0.016 °C by 2100, and criteria and toxic pollutant emissions changes well less than those reported in that EIS. Therefore, NHTSA anticipates that the environmental impacts resulting from any of the alternatives would be very small and consistent with, but to a much smaller degree than, the trends reported in the Final EISs associated with its stringency rulemakings.

As stated in the NPRM, NHTSA believes that the environmental impact trends reported in its recent Final EISs remain adequate and valid for purposes of this Final EA even if the particular values reported are no longer replicable due to updated assumptions and new information obtained since their publication. In fact, since the NPRM, NHTSA prepared a Draft EIS for its proposal for new CAFE standards, called the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule.[260] The Draft EIS affirms NHTSA's reliance in this Final EA on its prior Final EISs as it reported similar environmental impact trends and values at a similar scale to those reported in those prior documents. NHTSA received public comments associated with the Draft EIS and is currently reviewing those comments in anticipation of issuing a Final EIS. The agency does not believe the civil penalty rate being finalized in this rulemaking 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.

NHTSA is also finalizing an increase to 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.

iv. Agencies and Persons Consulted

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

v. Conclusion

NHTSA has reviewed the information presented in this Final EA and concludes that the final rule and alternatives would have minimal impacts on the quality of the human environment. Regardless of whether a rate of $5.50 is considered no change, as compared to current law, or a reduction from a rate of $14, the environmental impacts are anticipated to be very small. Further, the change to the "general penalty" is not anticipated to affect on-road emissions.

vi. Finding of No Significant Impact

I have reviewed this Final EA. In determining whether this action "significantly" affects the quality of the human environment, I have considered 40 CFR 1508.27, in which CEQ explains that "significantly . . . requires consideration of both context and intensity." In this action, the context for the environmental impacts includes localities for issues such as air pollutant emissions and the world as a whole for issues such as GHG emissions. In terms of intensity, the impacts of this rule would be spread across the entire nation or the entire world, depending on the particular environmental impact. Viewed in light of recent CAFE

[257] *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).

[258] IPI comment, at 11.

[259] *Id.*

[260] The Draft EIS is available on *http://www.regulations.gov*, Docket No. NHTSA–2017–0069–0178 and on NHTSA's website at *http://www.nhtsa.gov/safe*.

stringency rulemakings, the potential environmental impacts of this rule are expected to be small. Based on the Final EA, I conclude that implementation of any of the action alternatives (including the final rule) will not have a significant effect on the human environment and that a "finding of no significant impact" (*see* 40 CFR 1501.4(e)(1) and 1508.13) is appropriate. This statement constitutes the agency's "finding of no significant impact," and an environmental impact statement will not be prepared.

*6. Executive Order 12778 (Civil Justice Reform)*

This rule does not have a retroactive or preemptive effect. Even if some MY 2019 vehicles are already being sold, compliance determinations will not be made until 2020 at the earliest, after this rule has gone into effect. Moreover, compliance determinations and penalty calculations are based on the average fuel economy of the fleet, not individual vehicles that have been sold prior to the rule going into effect. Judicial review of this rule may be obtained pursuant to 5 U.S.C. 702.

*7. Paperwork Reduction Act*

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

*8. Privacy Act*

Please note that anyone is able to search the electronic form of all submissions received into any of DOT's dockets by the name of the individual submitting the document (or signing the document, 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 final rule is a deregulatory action under Executive Order 13771. Potential economic impacts are reported in Appendix A.

**Appendix A**

TABLE 1—PROJECTED ADDITIONAL PENALTIES UNDER AUGURAL STANDARDS IF RATE IS INCREASED

| Model year | Projected penalties under $5.50 rate, central analysis (augural standards) | Projected penalties under $14 rate, sensitivity analysis (augural standards) | Difference (projected additional penalties if rate is increased) |
|---|---|---|---|
| 2019 | $402,661,295.97 | $979,857,995.69 | $577,196,699.71 |
| 2020 | 424,626,535.48 | 1,074,571,984.97 | 649,945,449.49 |
| 2021 | 296,664,715.42 | 858,535,520.00 | 561,870,804.58 |
| 2022 | 435,761,242.00 | 1,161,920,853.58 | 726,159,611.58 |
| 2023 | 493,426,421.72 | 1,323,396,714.35 | 829,970,292.63 |
| 2024 | 806,729,507.15 | 2,108,481,177.18 | 1,301,751,670.03 |
| 2025 | 1,038,128,818.83 | 2,695,259,330.77 | 1,657,130,511.93 |
| 2026 | 674,517,279.88 | 1,541,685,503.03 | 867,168,223.15 |
| Total | 4,572,515,816.46 | 11,743,709,079.56 | 7,171,193,263.09 |

**Note:** Projected penalties could be offset by the application of credits.

TABLE 2—PROJECTED ADDITIONAL PENALTIES UNDER PROPOSED STANDARDS IF RATE IS INCREASED

| Model year | Projected penalties under $5.50 rate, central analysis (proposed standards) | Projected penalties under $14 rate, sensitivity analysis (proposed standards) | Difference (projected additional penalties if rate is increased) |
|---|---|---|---|
| 2019 | $505,612,917.19 | $1,269,742,039.02 | $764,129,121.83 |
| 2020 | 455,216,572.77 | 1,131,135,706.97 | 675,919,134.20 |
| 2021 | 302,262,154.89 | 704,833,149.24 | 402,570,994.35 |
| 2022 | 257,659,098.79 | 575,460,915.48 | 317,801,816.69 |
| 2023 | 188,672,069.76 | 384,423,537.48 | 195,751,467.72 |
| 2024 | 183,904,369.42 | 355,182,994.82 | 171,278,625.40 |
| 2025 | 165,483,877.30 | 312,608,273.21 | 147,124,395.91 |
| 2026 | 103,265,737.66 | 188,049,420.14 | 84,783,682.48 |
| Total | 2,162,076,797.79 | 4,921,436,036.37 | 2,759,359,238.58 |

**Note:** Projected penalties could be offset by the application of credits.

**List of Subjects in 49 CFR Part 578**

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

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

## PART 578—CIVIL AND CRIMINAL PENALTIES

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

**Authority:** Pub. L. 101–410, 104 Stat. 890; Pub. L. 104–134, 110 Stat. 1321; Pub. L. 109–

59, 119 Stat. 1144; Pub. L. 114–74, 129 Stat. 584; Pub. L. 114–94, 129 Stat. 1312; 49 U.S.C. 30165, 30170, 30505, 32308, 32309, 32507, 32709, 32710, 32902, 32912, and 33115; delegation of authority at 49 CFR 1.81, 1.95.

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

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

* * * * *

(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 $42,530 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.

* * * * *

Issued in Washington, DC, under authority delegated in 49 CFR 1.81, 1.95, and 501.5.

**Heidi R. King,**

*Deputy Administrator.*

[FR Doc. 2019–15259 Filed 7–25–19; 8:45 am]

BILLING CODE 4910–59–P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 660

[Docket No. 151116999493–03]

RIN 0648–BF52

## Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; Electronic Monitoring Program; Correction

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

**ACTION:** Final rule; correction.

**SUMMARY:** NMFS published a final rule on June 28, 2019, to implement an electronic monitoring (EM) program for catcher vessels in the Pacific whiting fishery and fixed gear vessels in the shorebased groundfish Individual Fishing Quota (IFQ) fishery. The final rule established an application process for interested vessel owners; performance standards for EM systems; requirements for vessel operators; a permitting process and standards for EM service providers; and requirements for processors (first receivers) for receiving and disposing of prohibited and protected species from EM trips. This action corrects the numbering of two paragraphs in the Code of Federal Regulations. These corrections are necessary so that the implementing regulations are accurate and implement the action as intended by the Pacific Fishery Management Council (Council).

**DATES:** This correction is effective on July 29, 2019.

**FOR FURTHER INFORMATION CONTACT:** Melissa Hooper, Permits and Monitoring Branch Chief, NMFS West Coast Region, phone: 206–526–4353, fax: 206–526–4461, or email: *Melissa.Hooper@noaa.gov.*

**SUPPLEMENTARY INFORMATION:** NMFS published a final rule on June 28, 2019 (84 FR 31146), that established an EM program for the Pacific Coast groundfish fishery. That final rule is effective July 29, 2019.

### Need for Correction

The June 28, 2019, final rule implemented an EM program in the Pacific Coast groundfish fishery, specifically for catcher vessels in the Pacific whiting fishery and fixed gear vessels in the shorebased groundfish IFQ fishery, and established requirements for service providers, vessel owners, vessel operators, and processors, to apply to and participate in the program. Two paragraphs in the requirements for vessel owners and operators were incorrectly numbered.

Section 660.604(h) lays out the effective dates and situations in which an EM Authorization may expire or become invalid, and how a vessel owner may apply for a new Authorization. The subordinate paragraphs should have followed in order (h)(1), (2), and (3). But paragraph (h)(3) was inadvertently numbered (h)(2)(iii). In order to clarify the order of the paragraphs, paragraph (h)(2)(iii) will be renumbered to (h)(3).

Section 660.604(p) lists the exceptions to the full retention requirement for Pacific whiting vessels while using EM. Two of the subordinate paragraphs were inadvertently numbered the same (p)(1)(iv). To clarify the order of the paragraphs, the final paragraph will be renumbered to (p)(1)(v).

All of these corrections are consistent with the Council action for the regulatory amendment to implement an EM program for the Pacific Coast groundfish fishery and are minor corrections necessary to correctly implement the Council's intent in their final action from April 2016.

### Classification

Pursuant to 5 U.S.C. 553(b)(B), the Assistant Administrator for Fisheries (AA) finds there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be unnecessary and contrary to the public interest. Notice and comment are unnecessary and contrary to the public interest because this action corrects minor and non-substantive errors in the June 28, 2019, final rule. Immediate notice of the errors and correction is necessary to prevent confusion among participants in the fishery that could result in issues with implementation of the requirements of the EM program. To effectively correct the errors, the changes in this action must be effective on July 29, 2019, which is the effective date of the June 28, 2019, final rule. Thus, there is not sufficient time for notice and comment due to the imminent effective date of the June 28, 2019, final rule. In addition, notice and comment is unnecessary because this document makes only minor changes to correct the final rule and does not change the substance of the rule. These corrections will not affect the results of analyses conducted to support management decisions in the Pacific Coast groundfish fishery.

For the same reasons stated above, the AA has determined that good cause exists to waive the 30-day delay in effectiveness pursuant to 5 U.S.C. 553(d). This document makes only minor corrections to the final rule which will be effective July 29, 2019. Delaying effectiveness of these corrections would result in conflicts in the regulations and confusion among fishery participants. Because prior notice and an opportunity for public comment are not required to be provided for this rule by 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, are not applicable. Accordingly, no Regulatory Flexibility Analysis is required for this rule and none has been prepared.