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, an 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, an 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 percent of the current penalty. Ensuing guidance from OMB identifies the appropriate inflation multiplier for agencies to use to calculate the subsequent annual adjustments.[10]

The 2015 Act also gives agencies discretion to adjust the amount of a civil monetary penalty by less than otherwise required for the initial catch-up adjustment if an agency determines that increasing the civil monetary penalty by the otherwise required amount will have either a negative economic impact or if the social costs of the increased civil monetary penalty will outweigh the benefits.[11] In either instance, the agency must publish a notice, take and consider comments on this finding, and receive concurrence on this determination from the Director of OMB prior to finalizing a lower civil penalty amount.

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

1. Interim Final Rule

On July 5, 2016, NHTSA published an interim final rule, adopting inflation adjustments for civil penalties under its administration, following the procedure and the formula in the 2015 Act. NHTSA did not analyze at that time whether the 2015 Act applied to all of its civil penalties, instead applying the inflation multiplier to increase all amounts found in its penalty schemes as a rote matter. One of the adjustments NHTSA made at the time was raising the civil penalty rate for CAFE non-compliance from $5.50 to $14 starting with model year 2015.[12] NHTSA also indicated in that interim final rule that the maximum penalty rate that the Secretary is permitted to establish for such violations would increase from $10 to $25, but did not codify this change in the regulatory text. NHTSA also raised the maximum civil penalty for other violations of EPCA, as amended, to $40,000.[13]

2. Initial Petition for Reconsideration and Response

The then-Alliance of Automobile Manufacturers and the Association of Global Automakers (since combined to form the Alliance for Automotive Innovation) jointly petitioned NHTSA for reconsideration of the CAFE penalty provisions issued in the interim final rule.[14] This petition raised concerns with the significant impact that the increased penalty rate would have on CAFE compliance costs, which they estimated to be at least $1 billion annually. Specifically, this petition identified 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.''

In response to the joint petition, NHTSA issued a final rule on December 28, 2016.[15] 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 and that doing so could not deter non-compliance, incentivize compliance, or lead to any improvements in fuel economy. NHTSA also agreed that raising the rate for model years for which product changes were infeasible due to lack of lead time did not seem consistent with Congress' intent that the CAFE program be responsive to consumer demand. Accordingly, NHTSA 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 reasonably be made in response to the higher penalty rate.

3. NHTSA Reconsideration

Beginning in January 2017, NHTSA took a series of actions to delay the effective date of the December 2016 final rule as it, for the first time, assessed whether the CAFE civil penalty rate was subject to the 2015 Act.[16] As a result of a subsequent decision of the United States Court of Appeals for the Second Circuit, however, that December 2016 final rule was considered to be in force.[17] That decision by the Second Circuit did not affect NHTSA's authority to reconsider the applicability of the 2015 Act to the EPCA CAFE civil penalty provision through notice-and-

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

[11] Public Law 114–74, sec. 701(c).

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

[13] 81 FR 43524 (July 5, 2016).

[14] Jaguar Land Rover North America, LLC also filed a petition for reconsideration in response to the July 5, 2016, interim final rule raising the same concerns as those raised in the joint petition. Both petitions, along with a supplement to the joint petition, can be found in Docket ID NHTSA–2016–0075 at *www.regulations.gov.*

[15] 81 FR 95489 (December 28, 2016).

[16] 82 FR 8694 (January 30, 2017); 82 FR 15302 (March 28, 2017); 82 FR 29009 (June 27, 2017); 82 FR 32139 (July 12, 2017).

[17] 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.'').

comment rulemaking. Absent any further action, the rate would have increased beginning with model year 2019.[18]

In July 2019, NHTSA finalized a rule determining that the 2015 Act did not apply to the CAFE civil penalty rate. In line with its statutory role and pursuant to its previous guidance to all Federal Agencies, OMB provided guidance to NHTSA agreeing with this statutory interpretation.[19] The July 2019 rule also stated that, in the alternative, even if the 2015 Act applied, increasing the CAFE civil penalty rate would have a negative economic impact. As discussed in the July 2019 rule, OMB concurred with this negative economic impact determination, as required by the 2015 Act.[20] In either case, NHTSA concluded that the current CAFE civil penalty rate of $5.50 should be retained, instead of increasing to $14 beginning with model year 2019.

On August 31, 2020, the United States Court of Appeals for the Second Circuit issued a ruling vacating the July 2019 rule and announcing that the December 2016 rule is back in force. The Second Circuit denied panel rehearing on November 2, 2020. NHTSA stands by the reasoning set forth in its July 2019 rule, but recognizes that the Second Circuit's decision is currently binding and remains in effect absent a Supreme Court decision to the contrary.

E. IPI Petition for Reconsideration

On September 9, 2019, the Institute for Policy Integrity at New York University School of Law (IPI) submitted a petition for reconsideration of NHTSA's July 2019 final rule. IPI argued that the rule was unreasonable and not in the public interest for ignoring and improperly weighing the costs and benefits.[21] IPI also alleged that the OMB letters NHTSA relied on were not presented for public comment, contained factual misstatements, and contradicted NHTSA's reasoning. Lastly, IPI challenged NHTSA's statutory interpretations.

F. The Alliance Petition for Rulemaking

On October 2, 2020, the Alliance for Automotive Innovation (the Alliance) submitted a petition for rulemaking (Alliance Petition) to delay the applicability of the increased $14 CAFE civil penalty rate until model year 2022 for largely the same reasons NHTSA relied on in the December 2016 rule.[22] According to the Alliance Petition, ''Model Years 2019 and 2020 are effectively lapsed now,'' and ''[m]anufacturers are unable to change MY 2021 plans at this point.'' [23] The Alliance argued that applying the increased penalty to any non-compliances that are temporally impossible to avoid or cannot practically be remedied does not serve the statutory purposes of deterring prohibited conduct or incentivizing favored conduct. Doing so would effectively be punishing violators retroactively.

In addition to relying on the reasoning of the December 2016 rule, the Alliance Petition notes the significant economic impact suffered by the industry due to COVID–19. Accordingly, the Alliance Petition also cites Executive Order 13924, requiring Federal Agencies to take appropriate action, consistent with applicable law, to combat the economic emergency caused by COVID–19.[24] Several individual vehicle manufacturers submitted supplemental information to NHTSA further articulating the negative economic position they are in due to COVID–19 and the potential and significant adverse economic consequences of the increased civil penalty rate, particularly during this time of stress on the industry.

G. NHTSA Response to Petitions

NHTSA granted the Alliance Petition and commenced this rulemaking action. Having carefully considered the issues raised by the petitioner and other available information, NHTSA issues this interim final rule and requests comment. If the August 31, 2020 decision of the United States Court of Appeals for the Second Circuit in Case No. 19–2395 is vacated, NHTSA's July 2019 rule keeping the CAFE civil penalty rate at $5.50 will be reinstated. If that decision is not vacated, however, the CAFE civil penalty rate will increase to $14 beginning with model year 2022, pursuant to the 2015 Act. NHTSA will make any subsequent annual adjustments as necessary and appropriate.[25]

Prior to granting the petition, NHTSA had to determine whether it had authority to issue the requested rule as a threshold matter. NHTSA notes first that it has authority to administer the CAFE program.[26] It is common practice for agencies—including NHTSA—to exercise their authority to administer programs they oversee.[27] NHTSA also

[18] *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 for the previous model year's non-compliance. *See* 77 FR 62624, 63126 (Oct. 15, 2012).

[19] 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).

[20] 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).

[21] IPI Petition, at 1–2.

[22] The Alliance also submitted a supplement to its petition on October 22, 2020 (Alliance Supplement).

[23] Alliance Petition, at 4.

[24] ''Executive Order on Regulatory Relief to Support Economic Recovery,'' E.O. 13924 (May 19, 2020).

[25] None of the annual inflation adjustment multipliers since the initial catch-up adjustment has been high enough to require a subsequent adjustment of the CAFE civil penalty rate. That is, if the catch-up adjustment to $14 had applied beginning in 2016, the rate would still be $14 through at least 2021.

[26] *See 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.''); *see also 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.''); *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)); *Fla. Cellular Mobil Commc'ns Corp.* v. *F.C.C.,* 28 F.3d 191, 196 (D.C. Cir. 1994) (''If an agency is to function effectively, however, it must have some opportunity to amend its rules and regulations in light of its experience.''); *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.''); *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.'').

[27] 76 FR 22565, 22578 (Apr. 21, 2011) (''[A]n 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.'').