

NHTSA's determination in the July 2019 rule that the CAFE civil penalty rate is not a "civil monetary penalty" under the 2015 Act is not restored, NHTSA expects to make subsequent annual adjustments to the rate as appropriate, pursuant to the 2015 Act and in accordance with EPCA and EISA.<sup>68</sup> As it did in the December 2016 rule, "NHTSA believes this approach appropriately harmonizes the two congressional directives of adjusting civil penalties to account for inflation and maintaining attribute-based, consumer-demand-focused standards, applied in the context of the presumption against retroactive application of statutes" and particularly "in the unique context of multi-year vehicle product cycles."<sup>69</sup>

Either the Second Circuit's vacatur of the July 2019 final rule or the promulgation of this interim final rule is sufficient to render IPI's petition for reconsideration of the July 2019 final rule moot, since NHTSA's July 2019 final rule is no longer operative. To the extent that the petition is not moot, it is denied. As IPI noted, many of the arguments raised in its petition were already presented to NHTSA in its comments to the April 2018 NPRM.<sup>70</sup> NHTSA adequately responded to these comments in the July 2019 final rule and reaffirms those points here.<sup>71</sup> In accord with OMB's government-wide guidance on implementing the statute, NHTSA sought clarifying guidance from OMB and, as required by the 2015 Act, NHTSA requested OMB's concurrence in its "negative economic impact" determination. OMB's interpretations were consistent with those presented in NHTSA's NPRM, on which IPI commented. And OMB's guidance did not contain any material misstatements that undercut NHTSA's determinations in the July 2019 final rule.

#### H. Interim Final Rule and Public Comment

Pursuant to the 2015 Act and 5 U.S.C. 553(b)(3)(B), NHTSA finds that good cause exists for immediate implementation of this interim final rule without prior notice and comment because it would be impracticable to delay publication of this rule for notice and comment, public comment is unnecessary, and doing so is in the public interest. As explained above, manufacturers have a compelling need

for ample advance notice of an increase to the CAFE civil penalty rate in order to modify their design, development, and production plans accordingly, in order for the inflation adjustment to have its statutorily-intended effect, and as a matter of fairness. It would be impracticable to follow notice-and-comment procedures, further delaying a decision on when the rate should be adjusted. That would leave in place an increased rate applicable to model years 2019 and 2020, which are complete, as well as model year 2021, which is underway. To the extent any manufacturers would have been able to adjust their production volumes in response to an increased penalty rate, NHTSA cannot effectively compel them to do so because it would disregard consumer demand, in contravention of NHTSA's statutory duties. Thus, there is good cause for an immediate effective date to avoid any retroactive application of an increased rate to model years for which manufacturers could not plan to accommodate.

Public comment is also unnecessary. The 2015 Act provides that the first adjustment shall be made through an interim final rulemaking. Because this action is establishing the parameters of NHTSA's first adjustment of the CAFE civil penalty rate, NHTSA is utilizing the process provided by the 2015 Act. NHTSA also notes that pursuant to the 2015 Act, its initial catch-up adjustment was promulgated through an interim final rule without public comment and, more significantly, the December 2016 rule on which this action is largely based was also promulgated without public comment.

The public interest also counsels towards NHTSA's issuance of an interim final rule. As discussed above, the automotive industry has faced unprecedented economic challenges arising from the COVID-19 national emergency situation.<sup>72</sup> The entire manufacturing base was effectively shut down mere months ago, and the industry still faces severe supply chain constraints that have reduced automobile production. Similarly, the general economic difficulties facing the nation have significantly reduced vehicle sales, reducing revenue for manufacturers. Applying the adjustment to the CAFE civil penalty rate beginning in model year 2019 will result in serious

harm, including increased penalties for manufacturers with no corresponding societal gain and could very well inhibit economic recovery by reducing the capital manufacturers would have to invest in their product. Applying the adjustment beginning in model year 2022 is an appropriate action to take to avoid serious harm and "for the purpose of promoting job creation and economic growth."<sup>73</sup>

Issuing an interim final rule now while the COVID-19 emergency is ongoing is particularly in the public interest, and consistent with the Executive order to promote the economic recovery. For these reasons, NHTSA finds that notice-and-comment before the interim final rule is promulgated would be impracticable, is unnecessary in this situation, and is contrary to the public interest. NHTSA is nonetheless providing an opportunity for interested parties to comment on the interim final rule.<sup>74</sup>

For these reasons, the Agency has also determined that it has good cause under 5 U.S.C. 553(d)(3) and 5 U.S.C. 808(2) to issue this rule with an immediate effective date. In addition, a delayed effective date is not required under 5 U.S.C. 553(d)(2) because it "relieves a restriction" by allowing additional time before the higher penalty rate begins to apply.

#### I. 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 also believes that this rulemaking is "economically significant," as the Agency believes that the difference in the amount of penalties received by the government as a result of this rule, classified as "transfers," are likely to exceed \$100 million in at least one of the years affected by this rulemaking. As noted above, the Agency believes this rule will have a limited effect, in any, on the composition of the fleet, as model years 2019 and 2020 are complete and model year 2021 is

<sup>68</sup> See Public Law 114-74, Sec. 701(b)(2).

<sup>69</sup> 81 FR 95489, 95491 (Dec. 28, 2016).

<sup>70</sup> IPI Petition, at 2.

<sup>71</sup> See, e.g., 84 FR 36007, 36016, 36023, 36030 (July 26, 2019); see also 49 CFR 553.35(c) ("The Administrator does not consider repetitious petitions.").

<sup>72</sup> See "Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak," Presidential Proclamation 9994 (Mar. 13, 2020), available online at <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

<sup>73</sup> 85 FR 31353, 31354 (May 22, 2020).

<sup>74</sup> Shortly prior to publication of this interim final rule, NHTSA received two letters regarding this rulemaking. Both letters are included in the docket for this matter and will be treated as comments for appropriate consideration.

already well under way.<sup>75</sup> If the August 31, 2020 decision of the United States Court of Appeals for the Second Circuit in Case No. 19–2395 is not vacated, NHTSA would have no discretion in whether to make the adjustment to \$14 and thus no regulatory impact analysis is required. 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, and as noted in that rule, it has no economic impact because it merely maintains the existing penalty rate.

## 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). Because this is an interim final rule, no regulatory flexibility analysis is required. In any event, 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.

Even though this is an interim final rule for which no regulatory flexibility analysis is required, NHTSA has considered the impacts of this notice under the Regulatory Flexibility Act and does not believe that this rule would have a significant economic impact on a substantial number of small entities. NHTSA requests comment on the economic impact of this interim final rule on small entities.

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 [N]ational [G]overnment and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, the Agency may not issue a regulation with federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal Government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132.

The reason is that this rule will generally apply to motor vehicle manufacturers. Thus, the requirements of Section 6 of the Executive order do not apply.

## 4. Unfunded Mandates Reform Act of 1995

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

## 5. National Environmental Policy Act

The National Environmental Policy Act of 1969 (NEPA)<sup>76</sup> directs that Federal agencies proposing "major Federal actions significantly affecting the quality of the human environment" must, "to the fullest extent possible," prepare "a detailed statement" on the environmental impacts of the proposed action (including alternatives to the proposed action).<sup>77</sup> However, as a threshold question, Federal agencies must assess whether NEPA applies to a particular proposed activity or decision.<sup>78</sup> If an agency determines that NEPA is inapplicable, no further analysis is required pursuant to NEPA or the Council on Environmental Quality's (CEQ) NEPA implementing regulations.<sup>79</sup>

In assessing whether NEPA applies, NHTSA has considered "[w]hether compliance with NEPA would be inconsistent with Congressional intent expressed in another statute."<sup>80</sup> In particular, NHTSA has considered the Congressional intent with regard to both EPCA (as amended by EISA) and the 2015 Act. As quoted above from the December 2016 rule, "the purpose of civil penalties for non-compliance is to encourage manufacturers to comply with the CAFE standards."<sup>81</sup> And more

<sup>76</sup> 42 U.S.C. 4321–4347.

<sup>77</sup> 42 U.S.C. 4332.

<sup>78</sup> 40 CFR 1501.1(a).

<sup>79</sup> 40 CFR parts 1500–1508. NHTSA has not yet revised its own NEPA implementing regulations (49 CFR part 520) to conform with CEQ's recently revised regulations. See 40 CFR 1507.3. However, where an agency's existing NEPA procedures are inconsistent with the CEQ's regulations, the CEQ regulations control. 40 CFR 1507.3(a). If NEPA is inapplicable under 40 CFR 1501.1(a), then NHTSA's own NEPA implementing regulations, promulgated pursuant to NEPA and CEQ guidelines, similarly do not apply.

<sup>80</sup> 40 CFR 1501.1(a)(3).

<sup>81</sup> 81 FR at 95490.

<sup>75</sup> NHTSA reaffirms the position on economic analysis taken its July 2019 rule. 84 FR 36007, 36030 (July 26, 2019).