ALLIANCE FOR AUTOMOTIVE INNOVATION

Alliance for Automotive Innovation

Comments on National Highway Traffic Safety Administration Supplemental Notice of Proposed Rulemaking, Civil Penalties

Docket ID No. NHTSA-2021-0001, 86 Fed. Reg. 46811 (Aug. 20, 2021)

September 20, 2021

Attention

Michael Kuppersmith
Office of the Chief Counsel

Comment

Introduction

The Alliance for Automotive Innovation ("Auto Innovators") appreciates the opportunity to provide the National Highway Traffic Safety Administration ("NHTSA") with comments on the Supplemental Notice of Proposed Rulemaking ("SNPRM") published in the Federal Register on August 20, 2021. *See* 86 Fed. Reg. 46811.

Formed in 2020, Auto Innovators is the singular, authoritative and respected voice of the automotive industry. Focused on creating a safe and transformative path for sustainable industry growth, Auto Innovators represents the manufacturers producing nearly 99 percent of cars and light trucks sold in the U.S. The organization, a combination of the Association of Global Automakers, Inc. and the Alliance of Automobile Manufacturers, is directly involved in regulatory and policy matters impacting the light-duty vehicle market across the country. Members include motor vehicle manufacturers, original equipment suppliers, technology and other automotive-related companies and trade associations. Auto Innovators is headquartered in Washington, DC, with offices in Detroit, MI and Sacramento, CA. For more information, visit our website http://www.autosinnovate.org.

Auto Innovators, and the Association of Global Automakers, Inc. and the Alliance of Automobile Manufacturers before it, have been involved throughout the regulatory and court proceedings giving rise to the instant SNPRM.

Auto Innovators urges NHTSA to apply the $14 Corporate Average Fuel Economy ("CAFE") civil penalty to CAFE fuel economy shortfalls beginning with MY 2022. This agency action is not precluded by the Second Circuit decisions referred to in the Federal Register notice, and it would comport with the deterrent purposes of the Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, Section 701, 129 Stat. 584, 599 (2015), codified at 28 U.S.C. § 2461 note. Auto Innovators takes no position on whether this result should be

reached through a decision leaving in place the Interim Final Rule promulgated in January 2021 (*see* 86 Fed. Reg. 3016 (Jan. 14, 2021)) or whether it should be implemented through the promulgation of a new rule.

Background

A. Regulatory Background and the July 2016 Interim Final Rule

The Energy Policy and Conservation Act of 1975 ("EPCA") requires NHTSA to establish CAFE standards for cars and light trucks in each model year. *See* 49 U.S.C. § 32902(a). Auto manufacturers that produce vehicles for sale in the United States and do not meet the standards are subject to a civil penalty, calculated by multiplying the applicable "penalty rate" times the number of tenths of a mile per gallon that their vehicle fleet falls short of the applicable CAFE standard, times the number of vehicles in the fleet. *See* 49 U.S.C. § 32912(b). EPCA set the applicable penalty rate at $5 per tenth of a mile per gallon. *See id*. For many years, the applicable penalty rate was $5.50 per tenth of a mile per gallon. *See* Civil Penalties, 81 Fed. Reg. 43524, 43526 (July 5, 2016).

Unlike typical statutory penalties, the "civil penalty" provided by EPCA is not simply a punishment for failing to meet a federal requirement. Instead, EPCA permits manufacturers to address a compliance shortfall in a number of different ways. Each year, a number of manufacturers routinely discharge their CAFE obligations by electing to pay civil penalties. Indeed, NHTSA itself has characterized the option of paying the civil penalty as one of several "compliance flexibilities" under the law.[1] Subject to restrictions discussed below, other ways to address a shortfall include applying credits earned in prior years or carried back from future years, trading credits with other manufacturers, or transferring credits from one manufacturer's compliance fleet to another of its compliance fleets. Thus, unlike most federal civil penalties, CAFE "civil penalties" can be paid as a legitimate compliance option.

In 2015, Congress enacted the Federal Civil Penalties Inflation Adjustment Act Improvements Act (the "Improvements Act"), which replaced the Inflation Adjustment Act and adopted a new methodology for making inflationary adjustments to civil penalties enforced by federal agencies. The Improvements Act required agencies to make an initial "catch-up" adjustment to regulatory penalties in an interim final rule issued by July 1, 2016, and thereafter to make annual adjustments for inflation. *See* Pub. L. 114-74, § 701(b), 129 Stat. 584, 599 (2015), codified at 28 U.S.C. § 2461 note. The catch-up adjustment was to be based on the Consumer Price Index and was capped at 150 percent of the previous penalty. 28 U.S.C. § 2461 note, § 5(b)(2)(C). The law allowed the head of an agency to make the "catch-up" adjustment smaller than the amount that the statutory formula would otherwise dictate if the agency concluded that "increasing the civil monetary penalty by the otherwise required amount will have a negative economic impact," or would impose social costs that exceed the benefits. 28 U.S.C. § 2461 note, § 4(c)(1)(A). The Improvements Act was intended principally to "maintain

---

[1] NHTSA, *PIC FAQs (final).pdf*, at https://one.nhtsa.gov/cafe_pic/PIC%20FAQs%20(final).pdf.

the *deterrent* effect of civil monetary penalties and promote compliance with the law." 28 U.S.C. § 2461, note, § 2(b)(2) (emphasis added).

Following passage of the Improvements Act, NHTSA issued an interim final rule on July 5, 2016, adjusting the penalty rate for violations of the CAFE standards from $5.50 per tenth of a mile per gallon to $14 per tenth of a mile per gallon—the maximum 150 percent increase permitted by the Improvements Act. *See* 81 Fed. Reg. at 43526 (July 15, 2016). NHTSA purported to consider the impact of the penalty increase on the economy, as required by Executive Orders 12866 and 13563. It observed that "[o]ver the last five model years, NHTSA has collected an average of $20 million per model year in civil penalties" and concluded that increasing the penalty rate by 150 percent "would not result in an annual effect on the economy of $100 million or more"—a threshold that would trigger review of the rule by the Office of Information and Regulatory Affairs. *Id*. at 43527.

B. The Industry Petition for Partial Reconsideration

The Alliance of Automobile Manufacturers and the Association of Global Automakers. Inc.—Auto Innovators' predecessor associations—petitioned NHTSA for partial reconsideration of the July 2016 interim final rule. *See* Letter from Chris Nevers, VP of Energy & Env't, All. of Auto. Mfrs., and Julia Rege, Dir., Env't & Energy Affairs, Ass'n of Global Automakers, Inc. to Mark Rosekind, Adm'r, NHTSA (Aug. 1, 2016). The petition expressed "serious concerns about the effects of the [interim final rule's] significant adjustment to the CAFE penalty." *Id*. at 1.

In particular, the petition argued that the July 2016 interim final rule had substantially underestimated the economic impact of nearly tripling the CAFE penalty rate. The petition noted that, under the model typically used by NHTSA to calculate the costs of CAFE rules, the economic costs of the proposed hike in the penalty rate would be approximately $1 billion annually—far more than the roughly $50 million in costs that NHTSA appeared to have estimated. *Id*. at 7.

The petition also expressed concern that NHTSA would apply the new proposed penalty rate retroactively to model years that had already been completed or for which manufacturers had already set compliance plans. *Id*. at 3.

C. The December 2016 Final Rule

On December 28, 2016, NHTSA issued a final rule granting in part and denying in part the industry petition for reconsideration. NHTSA acknowledged the force of the petition's concerns about retroactive penalties and thus decided to apply the new penalty rate only beginning in MY 2019. *See* Civil Penalties, 81 Fed. Reg. 95489, 95491 (Dec. 28, 2016) ("December 2016 Final Rule"). NHTSA did not, however, address the other concerns raised by the industry petition, but rather left the $14 civil penalty amount in place.

The December 2016 final rule was not challenged in court, and NHTSA's analysis of the retroactivity issue was *not put in issue* in court challenges to subsequent NHTSA actions on the CAFE civil penalty rate.

D. NHTSA's Delay of the December 2016 Final Rule Pending Reconsideration, and the Resulting Litigation

Subsequently, on its own initiative, NHTSA determined that it should seek public comment on whether and how NHTSA should consider the economic effects of the penalty increase. To that end, on July 12, 2017, NHTSA issued a final rule *indefinitely* delaying the effective date of the December 2016 Final Rule. *See* Civil Penalties, 82 Fed. Reg. 32139 (July 12, 2017). NHTSA explained that the December 2016 Final Rule "did not give adequate consideration to all of the relevant issues"—including the economic consequences detailed in the petition for reconsideration. *Id*. at 31139. In a separate notice issued that same day, NHTSA sought public comment on the economic effects of increasing the penalty rate and whether the previously proposed $14 per tenth of a mile per gallon penalty rate was the appropriate penalty in light of questions about the correct baseline year for computing the inflation adjustment. *See* Civil Penalties, 82 Fed. Reg. 32140, 32142-43 (July 12, 2017).

A number of organizational and state government petitioners challenged the July 12, 2017 delay rule in the United States Court of Appeals for the Second Circuit. Auto Innovators' predecessor associations (The Alliance of Automobile Manufacturers and the Association of Global Automakers, Inc.) intervened in support of NHTSA. On the merits, the court vacated the delay rule, holding that NHTSA exceeded its statutory authority and that it violated the Administrative Procedure Act by imposing the indefinite delay without notice and comment. *See Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 113, 115 (2d Cir. 2018) ("*NRDC*"). As a result of its decision, the court stated, the December 2016 Final Rule "is now in force." *Id*. at 116.

E. The 2019 Final Rule, and the Resulting Litigation

In April 2018, NHTSA issued a notice and proposed rule in which it announced that it was reconsidering the December 2016 Final Rule and was proposing not to apply the Improvements Act to the CAFE civil penalty rate. *See* Civil Penalties, 83 Fed. Reg. 13904 (Apr. 2, 2018). In July 2019, after considering the comments that it had received, NHTSA announced that it had reconsidered the December 2016 Final Rule and would not apply the Improvements Act to CAFE's civil penalty rate, leaving the current ($5.50) rate in place. *See* Civil Penalties, 84 Fed. Reg. 36007 (July 26, 2019) ("2019 Final Rule").

NHTSA's decision to reconsider the December 2016 Final Rule rested on two grounds. First, NHTSA concluded—with the concurrence of the Office of Management & Budget—that the Improvements Act, by its terms, does not apply to the CAFE civil penalty rate. NHTSA based this conclusion on the fact that the Improvements Act applies only to penalties that are "for a specific monetary amount as provided by Federal law" or have "a maximum amount provided for by federal law" (28 U.S.C. § 2461 note)—features that, in NHTSA's view, are absent from the CAFE penalty rate. Second, citing the economic concerns raised by the automotive industry associations, NHTSA concluded that allowing the CAFE penalty rate to increase to the level prescribed by the 2016 Final Rule would have a "negative economic impact," as provided in Section 4(c)(1)(A) of the Improvements Act.

The 2019 Final Rule was challenged in the Second Circuit. In *New York v. National Highway Traffic Safety Administration*, 974 F.3d 87 (2d Cir. 2020) ("*New York*"), the court vacated it.

F. Auto Innovators' Petition for Rulemaking and the 2021 Final Rule

On October 2, 2020, Auto Innovators filed a petition for rulemaking, asking NHTSA to apply the $14 CAFE civil penalty rate no sooner than MY 2022 for largely the same reasons that NHTSA relied on in the Obama Administration's December 2016 Final Rule. Auto Innovators pointed out that MYs 2019 to 2020 were effectively lapsed—having been planned, designed, produced, and, in many cases, sold by that point in time—and that manufacturers were not able to change their MY 2021 plans at that point, either.

Thus, Auto Innovators argued, the application of the increased penalty rate to MYs 2019 to 2021 would not serve the Improvement Act's express statutory purposes of deterring prohibited conduct or incentivizing desired conduct because—at the time of Auto Innovators' petition (and of the Second Circuit's *New York* decision on August 31, 2020)—it would be impossible to avoid or remedy the non-compliances that would be the subjects of the increased penalty rate.

In addition to relying on the reasoning of the December 2016 Final Rule, Auto Innovators' petition noted the significant economic impact suffered by the industry due to COVID-19. Several individual vehicle manufacturers submitted supplemental information to NHTSA further substantiating 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.

Based on its analysis of the issues raised by Auto Innovators and individual vehicle manufacturers, as well as a careful review of the Second Circuit's prior decisions about the CAFE civil penalty rate, NHTSA granted Auto Innovators' petition, and, finding good cause, NHTSA issued an interim final rule ("2021 IFR") providing that the $14 civil penalty rate—unless subsequently vacated—would first be applied to MY 2022 vehicles. *See* 86 Fed. Reg. 3016, 3016, 3022-3023, 3026 (Jan. 14, 2021). NHTSA also sought comment on its decision and on whether the $14 rate should first be applied to MY 2023 vehicles. *See* 86 Fed. Reg. at 3025.

Soon after NHTSA issued the 2021 IFR, petitions for review challenging it were filed in the Second Circuit. Based on the new Administration's decision to reconsider the 2021 IFR, NHTSA moved to hold the Second Circuit proceedings in abeyance. The court granted NHTSA's motion, and the proceedings remain in abeyance at this time.

Argument

I. The Deterrence Purposes of the Improvements Act and the Reasonable Expectations of Vehicle Manufacturers Support Applying the $14 Penalty Purely Prospectively.

As the Improvements Act itself states, the purposes of the inflation adjustment are primarily deterrent. *See* 28 U.S.C. § 2461, note, § 2(b)(2); *see also id.*, § 2(a)(2). The Second Circuit acknowledged this fact in *NRDC*. *See* 894 F.3d at 109.

Deterrence is essentially forward looking. Past conduct cannot be deterred.

MYs 2019 to 2021 have effectively lapsed. Manufacturers developed and implemented their MYs 2019 to 2021 product plans and CAFE compliance programs based upon the CAFE civil penalty rate of $5.50, as published by NHTSA for those years.

The imposition of a $14 civil penalty rate to punish conduct that cannot be altered by the penalty—because the conduct already has occurred—is fundamentally inconsistent with deterrence. It also conflicts with the basic principle of law that a party should have advance knowledge of the penalty to which its conduct could subject it *before* engaging in the conduct.[2] Furthermore, the unique nature of the CAFE program, in which paying a civil penalty is a lawful compliance strategy, makes it particularly inappropriate to apply a higher penalty to a manufacturer for CAFE shortfalls in MYs 2019 to 2021.

That manufacturers knew there was a possibility that the $14 civil penalty rate might be applied to MYs 2019 to 2021 vehicles does not undermine this conclusion. When manufacturers designed and marketed their mix of vehicle offerings for MYs 2019 to MY 2021, the Code of Federal Regulations provided for a $5.50 civil penalty. During the run-up to MY 2021, the first of the Second Circuit's decisions (*NRDC*) signaled the possibility that a $14 rate might apply, but because many of the manufacturers participated in the Second Circuit *NRDC* litigation through their trade associations, they also knew that what was at issue in *NRDC* was whether NHTSA had the authority to *indefinitely* delay the adjustment of the CAFE civil penalty rate, and that no party had opposed, or even raised for consideration, the propriety of NHTSA's invocation of a non-retroactivity principle in the Obama Administration's December 2016 Final Rule. Because a subsequent rulemaking would be required to actually implement the $14 civil penalty rate (since the Code of Federal Regulations provided for a $5.50 penalty rate), there was ample ground to assume that NHTSA's response to the Second Circuit's *NRDC* decision would incorporate an (updated) retroactivity principle that would first apply the $14 civil penalty rate to a model year *later* than MY 2020, since by the time of the *NRDC* decision in 2018, manufacturers no longer were in a position to modify their CAFE compliance plans for MYs 2019 and 2020 (if not a later year, as well).

The vehicle manufacturers' confidence that NHTSA would invoke the same non-retroactivity principle as was applied by the Obama Administration in the December 2016 Final Rule also was buttressed by the fact that in the December 2016 Final Rule, NHTSA recognized the need for lead time (and in fact used the 18-month CAFE statutory lead time as a proxy) when initially delaying applicability of the $14 civil penalty rate to MY 2019.

The Second Circuit's subsequent *New York* decision did not fundamentally alter the reasonable expectations of the vehicle manufacturers. Once again, many of the manufacturers

---

[2] *See*, *e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571-574 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose.").

participated in the court proceeding through their trade associations, and they knew that no party to the proceeding had challenged the anti-retroactivity principle of the Obama Administration's December 2016 Final Rule. Accordingly, they had every reason to assume that, if the rule under review in the *New York* case were vacated, NHTSA would have the authority to undertake the same non-retroactivity analysis that the Obama Administration Department of Transportation undertook in the December 2016 Final Rule. They also had every reason to assume that NHTSA was likely to opt for a first model year later than MY 2019 for the application of the $14 civil penalty rate and was not precluded by either Second Circuit decision from doing so: the retroactivity issue was never raised in the *NRDC* and *New York* cases, and neither decision forecloses the option by necessary implication.

The court in *NRDC* held that NHTSA did not have the authority to delay, indefinitely and without undertaking notice and comment rulemaking, the CAFE civil penalty adjustment set forth in the December 2016 Final Rule. *See NRDC*, 894 F.3d at 115. *New York* held that NHTSA did not act in accordance with law when it determined that the Improvements Act did not apply to the CAFE civil penalty and that NHTSA did not conform to statutory time limits in reducing the initial catch-up inflation adjustment to the CAFE civil penalty based on negative economic impacts. *See New York*, 974 F.3d at 101. Auto Innovators is not seeking—and NHTSA does not appear to be considering—indefinitely delaying, not applying, or rolling back the $14 CAFE civil penalty rate. Hence, the errors identified by the Second Circuit have been cured.

Although both cases held that the December 2016 Final Rule is "now in force" (*New York*, 974 F.3d at 101; *NRDC*, 894 F.3d at 116), that conclusion—in the context of the issues raised and addressed in the cases—does not preclude NHTSA from determining that the $14 civil penalty rate should be applied beginning with MY 2022, in conformity with the deterrence principles upon which the Improvements Act is grounded. In declaring the December 2016 Final Rule to be "in force," the court was plainly focusing on the amount of the penalty rate in that rule—$14 per tenth of a mile per gallon—which NHTSA first tried to delay indefinitely without notice and comment and then tried to rescind entirely (on the grounds that the Improvements Act did not apply or that the $14 civil penalty rate would have negative economic effects). Auto Innovators is not requesting that NHTSA revisit the $14 civil penalty rate yet again.

To the contrary, the $14 rate is "in force" even now, and, presumably, is having effects on manufacturers' decisions with regard to future model-year fuel economy decisions. And, as noted above, NHTSA has cured the problems with its prior rulemakings that the court identified in its decisions. Thus, the Second Circuit decisions do not preclude NHTSA from first applying the $14 civil penalty rate to MY 2022. *Cf. Heartland Regional Med. Ctr. v. Leavitt*, 415 F.3d 24, 29-30 (D.C. Cir. 2005) (considering the terms of the prior court decision and stating that "the usual rule is that, with or without vacatur, an agency that cures a problem identified by a court is free to reinstate the original result on remand").

"When a court vacates a rule, the vacatur require[es] the agency to initiate another rulemaking proceeding if it would seek to confront the problem anew. In the new rulemaking, the agency complie[s] with the judgment ... by filling the analytical gap identified in that opinion. That is the "only obligation" imposed by the remand." *Oceana Inc. v. Ross*, 275 F. Supp. 3d 270, 288 (D.D.C. 2017) (internal quotation marks and citations omitted; alterations in

original). A new rulemaking that adopts MY 2022 as the first year for the application of the $14 civil penalty would correct the analytical gaps and errors in NHTSA's previous actions, without running afoul of the Second Circuit's decisions.

Accordingly, the deterrence principles of the Improvements Act and the reasonable expectations of the vehicle manufacturers support applying the $14 civil penalty rate to a model year no earlier than MY 2022, and nothing in the Second Circuit decisions precludes NHTSA from doing so.

II. The Application of the $14 Civil Penalty Rate to MYs 2019 to 2021 Would Cause Economic Injury to an Industry Still Reeling from COVID-19-Related Declines in Sales and Production.

Due largely to pandemic related supply chain issues, the consumer vehicle sector has underperformed significantly in 2021. "US auto sales continued their descent for a fourth consecutive month in August (-10.9% m/m, sa) as inventory shortages overwhelmed other drivers."[3] "U.S. vehicle sales declined by 10.7% month-on-month (m/m) in August, falling to 13.1 million (SAAR) units. The reading came in well below market expectations, which called for a more modest pullback to 14.3 million."[4]

As a TD vehicle sales analyst noted, "Vehicle sales continued to slide in August, marking the fourth consecutive month of declines since peaking in April at 18.3 million. Sales have now fallen back to levels consistent with the early stages of the economic recovery that began last Spring once lockdown measures were eased. Outside of the pandemic, you would have to look all the way back to September 2011 to find another time when sales have been at such low levels."[5]

Moreover, according to the Bank of Nova Scotia, consumer sentiment turned "sour in August with a 1.8 ppt pull-back in auto purchase intentions, according to the Conference Board.

---

[3] Scotiabank, "Canadian and US Vehicle Sales (August 2021): Auto News Flash," https://www.scotiabank.com/ca/en/about/economics/economics-publications/post.other-publications.autos.auto-news-flash.september-2--2021.html (Sept. 2, 2021).

[4] *See* TD, "U.S. Vehicle Sales (August 2021)," https://economics.td.com/us-vehicle-sales (Sept. 2, 2021).

[5] *Id.*; *see also* J. Szczesny, Executive Editor, The Detroit Bureau, "New Vehicle Sales Falling in August as Automakers Struggle with Demand," https://www.thedetroitbureau.com/2021/08/new-vehicle-sales-falling-in-august-as-automakers-struggle-with-demand/ (August sales decline significantly, mainly as a result of low inventories caused by semiconductor shortages); MarkLines, "U.S. Auto Sales Dive 17.2% in August affected by production cuts, availability," https://www.marklines.com/en/statistics/flash_sales/automotive-sales-in-usa-by-month.

This may have been, in part, a function of higher pricing (+6.4% y/y, CPI new vehicles for July) and less selection."[6]

The supply chain issues faced by the industry have affected not only vehicle sales but also vehicle inventories and production. In August, WardsIntelligence noted that:

> U.S. light-vehicle inventory fell 19.4% from June, finishing July at 1.12 million units, 56% below the same year-ago period.
>
> The decline continues a trend of sharply falling inventory due to supply disruptions caused mostly by the global microchip [semiconductor] shortage that have sharply curtailed production for the U.S. market in North America and overseas plants. The downward slide has been ongoing since January, with declines accelerating in 02.
>
> July 31 days' supply totaled 24, down from like-2020's 54 and well below the 60-65 range normal for the month.[7]

Similarly, a TD analysis notes that "[m]icrochip shortages continue to be a major constraint for North American automakers. Additional supply chain disruptions including increased COVID-19 restrictions in countries along the supply chain, port delays and even labor shortages have only made the recent production issues worse, leading to further inventory drawdowns in an already tightly supplied market. To give some context, our estimates suggest that new vehicle inventory in the US was around 1M units in August, well below the 3M-3.5M range where it hovered prior to the pandemic."[8]

Vehicle production has been seriously affected by these supply-chain issues, which have forced a number of manufacturers to shut down or reduce production at their plants. As WardsIntelligence has noted, "supply-chain disruptions could continue to push future production totals below expectations, mainly from the microchip shortage - and there already is planned factory downtime as far ahead as October due to the chip shortage - but existing bottlenecks in shipments via water, rail and truck also loom large."[9] This lost production imposes enormous costs upon vehicle manufacturers and their employees.

---

[6] Scotiabank, "Canadian and US Vehicle Sales (August 2021): Auto News Flash."

[7] Haig Stoddard, "July U.S. Light-Vehicle Inventory Falls 19%; 2021 Sales Outlook Chopped," WardsIntelligence, 8/4/21.

[8] TD, "U.S. Vehicle Sales (August 2021)."

[9] Haig Stoddard, "July U.S. Light-Vehicle Inventory Falls 19%; 2021 Sales Outlook Chopped," WardsIntelligence, 8/4/21.

On top of all this, the delta variant of COVID-19 threatens to imperil the industry's recovery by further disrupting already fragile supply chains and production capacity and practices. In light of these trends, even if the supply chain issues begin to resolve in the near future, industry members can ill afford the imposition of penalties for CAFE shortfalls that they cannot correct. As the National Automobile Dealers Association ("NADA") noted in its comments (NHTSA-2021-0001-0016), the enhanced penalty rate will be passed on to consumers in the form of higher prices.[10] As the Bank of Scotia has indicated (see above), higher prices already may be dampening demand for new vehicles. In any event, an increase in vehicle prices will suppress recovering demand and production, harming manufacturers, their employees, and vehicle dealers.

Moreover, the imposition of the $14 civil penalty rate to MYs 2019 to 2021 vehicles actually could have deleterious environmental impacts: penalties that lead to increases in the prices of newer vehicles could discourage consumers from purchasing more efficient, cleaner vehicles.

III. Predictions About the Usage of CAFE Credits Do Not Support Applying the $14 Civil Penalty Rate Beginning in MY 2019.

NHTSA appears to give significant credence to various comments that suggest that delaying the application of the $14 civil penalty rate until MY 2022 would encourage manufacturers to delay implementing fuel economy improvements. According to this argument, vehicle manufacturers would opt to pay a $5.50 penalty rate for MYs 2019 to 2021 fuel economy shortfalls, allowing them not to make improvements in fuel economy for MY 2022 and later because they could carry-forward CAFE credits to cover a $14 CAFE civil penalty rate in MY 2022 and later years—credits they allegedly would have used for MYs 2019 to MY 2021 shortfalls if those model years were subject to a $14 penalty rate. In addition, the argument asserts that if vehicles in MYs 2019 to 2021were subject to a $5.50 penalty rate, the vehicle manufacturers that do not currently have credits sufficient to pay penalties for those years would not be adequately encouraged to implement fuel economy innovations in MY 2022 and later that could generate credits that they could carry back to MYs 2019 to 2021. This argument is misguided.

First, manufacturers' strategies to bank and trade credits, and/or to pay civil penalties are complex and are principally driven by the need to offer products that respond to consumer demand while incorporating the best available technologies to maximize fuel economy. Fuel savings adjustment factors and credit transfer caps further limit and complicate an assessment such as this.

Second, to the extent that general rules of thumb about credit usage may be formulated, they suggest that the scenario portrayed by the commenters, and tentatively accepted by NHTSA, does not accurately reflect the way manufacturers plan compliance. As NHTSA notes, carry-

---

[10] NADA Comments (NHTSA-2021-0001-0016) at 2.

forward credits expire after 5 years. *See* 86 Fed. Reg. 45813.[11] This means that if manufacturers have MY 2019 shortfalls in fuel economy, the ones that have available credits—and not all manufacturers do—are going to first use credits earned in MYs 2014, 2015, and 2016 to satisfy those shortfalls. They cannot opt to pay the penalties and save the MYs 2014, 2015, and 2016 credits for MY 2022, because those credits will already have expired by then. In fact, the earliest credits that could be applied to satisfy a MY 2022 shortfall are credits earned for MY 2017.

Past experience confirms this pattern of credit usage. In MYs 2011 to 2015, most fleets readily exceeded their standard and earned credits that were saved for later use. The relatively few compliance shortfalls in this time frame were resolved with credits carried forward from MYs 2008–2010, although a few manufacturers paid penalties before the credit market developed.

Going into MY 2016, this left a large bank of MY 2011-15 credits available to be carried forward. Rather than letting credits expire, manufacturers would always use or sell the old credits first. This meant that MY 2011 credits would be used to cover MY 2016 deficits, MY 2012 credits for MY 2017 deficits, and so on.

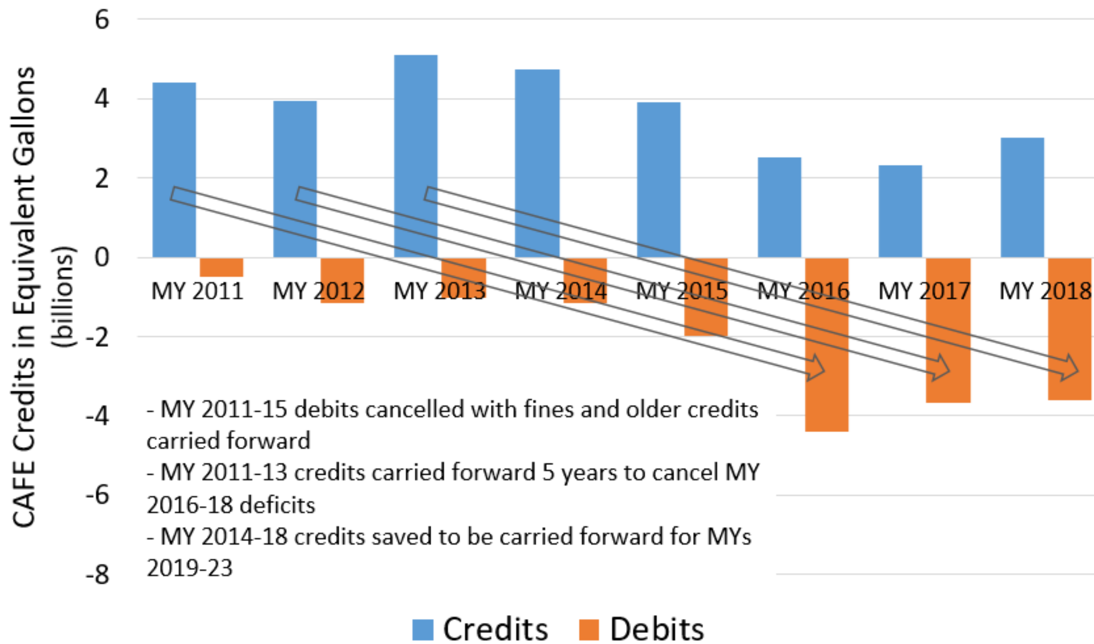
We expect this trend to continue with older credits near expiration being used to cover recent deficits, while the recent credits are banked for future use up to 5 years later. Under this usage scenario, there is no need to use MY 2017 credits to cover MY 2019–21 deficits to the extent older credits could be used and that would otherwise expire.

The following chart is a graphical example of this scenario.[12] It shows, in aggregate, the total credits and debits of the 15 largest manufacturers by model year. Each manufacturer is a unique entity with its own decisionmaking process for buying and selling credits, but there has been enough activity in the credit market to suggest that this aggregated view is representative of the group. The vertical axis of the chart is in gallons since that puts all credits on an equivalent, adjusted basis as required to maintain oil savings. The analysis is based on NHTSA PIC site data through MY 2018.[13] Note that MY 2018 data is estimated Mid-Model data for some companies.

[11] Manufacturers have always had the option to carry credits forward. Originally this came with a 3-year carry-forward limit but, for MY 2008 and later, it was extended to 5 years. The option to transfer between fleets and trade between manufactures became available in MY 2011. 49 C.F.R. §536.6.

[12] This aggregate data should not be interpreted as suggesting that sufficient credits from model years 2014 to 2016 exist to fully cover shortfalls in MY 2019-2021, particularly on a manufacturer-specific basis and after considering that carry-forward credits not traded or transferred lose value relative to the oil savings they represent over time.

[13] https://one.nhtsa.gov/cafe_pic/CAFE_PIC_Home.htm.



Thus, as noted above, the earliest credits that could be used to satisfy MY 2022 shortfalls are MY 2017 credits, and MY 2017 credits are unlikely to be used to satisfy MYs 2019-2021 shortfalls, because earlier years' credits are both available to use for MYs 2019-2021, and they must be used before they expire. This logic extends every year through MY 2021, whereby older credits will be used to mostly, if not completely, cancel any shortfalls. For this reason, delaying the application of a $14 civil penalty rate to MY 2022 is highly unlikely to affect manufacturers' compliance strategies by allowing them to delay the use of 2017 or later credits to MY 2022. Moreover, because of the significant lead-time required for determining and locking in CAFE compliance strategies, the fuel efficiency strategies for MY 2022 have largely been determined already.

Independent of the penalty rate, NHTSA should recognize that carrying credits forward within a fleet (without an adjustment factor) represents a fuel savings. More actual fuel savings are required to generate an early credit when standards are lower than are represented by a later shortfall that is being offset.

To illustrate this, consider a savings of one mile per gallon when the fuel economy standard is 25 mpg versus a one mile per gallon deficit when the fuel economy standard is 40 mpg. A one mile per gallon savings when the fuel economy standard is 25 mpg represents a fuel savings of 1/25 of a gallon (4% of a gallon), whereas a one mile per gallon deficit when the fuel economy standard is 40 mpg represents a fuel savings of 1/40 of a gallon (2.5% of a gallon). Thus, the later use of a credit earned earlier (when the fuel economy standard was 25 mpg) is beneficial because that credit reflects a savings 4% of a gallon, rather than 2.5% of a gallon. Therefore,even if the speculation about manufacturers carrying forward credits is correct, there would actually be a positive effect to overall fuel savings by doing so.

In the case of traded or transferred credits (as opposed to unadjusted carry-forward credits), NHTSA already has regulations that require the adjustment of credits to reflect actual

fuel savings benefits associated with them. Therefore, a credit used later in this scenario simply reflects fuel savings already achieved and the effect is neutral.

Finally, any concerns that manufacturers would have lower average fuel economy in a later year as a result of carried-forward credit are misplaced. Eventually the manufacturer must either catch back up to the standard (within a relatively small window) and/or purchase credit from other manufacturers that are achieving greater fuel savings than are required (or continue to pay penalties at a higher future rate). In any case, at worst, net fuel savings would remain the same.

Thus, the concerns raised by commenters, and provisionally embraced by NHTSA in the SNPRM, about the effects on CAFE credit usage if a $5.50 civil penalty rate is applied to MYs 2019 to 2021 are speculative, unlikely, and misplaced.[14]

IV. Any Procedural Defects in the Promulgation of the IFR that the Commenters Have Identified Can be Corrected through this Rulemaking.

According to the SNPRM, comments on the IFR claimed that it suffered from a number of procedural defects relating to compliance with the National Environmental Policy Act of 1969 ("NEPA"), NHTSA's invocation of the good cause exception to notice-and-comment rulemaking, and the ten-day period afforded for comments on the IFR.[15]

NHTSA did address NEPA issues in promulgating the IFR, concluding that "[c]onsideration of environmental impacts is inconsistent with" its obligations under EPCA, the Improvements Act, an Executive Order on COVID-19, and fundamental legal doctrines. Thus, "no further analysis pursuant to NEPA is required." 86 Fed. Reg. at 3025. Nevertheless, NHTSA noted that even though a NEPA analysis "is not required, this section [of the preamble to the IFR] may serve as the Agency's Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) for this interim final rule." *Id.* Contrary to the commenters' contentions, NHTSA's NEPA analysis was adequate.

However, to the extent that NHTSA is concerned about the NEPA issue or any of the other procedural issues raised by commenters, this SNPRM proceeding provides the opportunity to promulgate a rule in accordance with applicable procedural standards. Such a rule should mandate that the $14 civil penalty rate should be applied beginning with MY 2022 vehicles.

---

[14] Thus, the environmental and GHG policies reflected in Executive Order 13990 would not be impeded by applying the $14 civil penalty rate beginning in MY 2022. To the contrary, those policies might be advanced, especially if fuel economy standards continue to increase.

[15] Some commenters also asserted that the Second Circuit's *NRDC* and *New York* decisions deprived NHTSA of authority to issue the IFR and that the IFR is arbitrary and capricious. We have rebutted those assertions in Argument sections I-III, above.

CONCLUSION

NHTSA has the authority to apply the $14 CAFE civil penalty rate beginning with model year 2022. Nothing in the Second Circuit decisions on the CAFE civil penalty rate precludes it from doing so. No party in those court proceedings put in issue NHTSA's authority to apply a non-retroactivity principle in the December 2016 Final Rule, and the court did not address the issue in the *NRDC* or *New York* decisions. The application of the $14 civil penalty rate no earlier than MY 2022 would be consistent with the deterrence policy of the Improvements Act. An earlier application of that rate would undercut the policy of deterrence.

Economic considerations support applying the $14 civil penalty rate no earlier than MY 2022, and the concerns raised by commenters and NHTSA about the effects on credit usage of first applying the $14 civil penalty rate to MY 2022 vehicles are speculative, unlikely, and misplaced. Finally, to the extent that the IFR was issued without adequate observance of procedural requirements, this proceeding provides NHTSA ample opportunities to promulgate a new rule that applies the $14 civil penalty rate beginning with MY 2022 and that does not suffer from those procedural infirmities, if any.

For the foregoing reasons, Auto Innovators requests that NHTSA apply the $14 CAFE civil penalty rate to vehicles beginning with the 2022 model year.