relying on alert originators to repeat (re-originate) alerts they deem significant enough to warrant such treatment. Significantly, the Commission raises as alternatives for comment whether FEMA's proposal on keeping the alert information or notification persistent is more appropriately configured in a next generation EAS, and whether FEMA's recommendation is more appropriately addressed in the Notice of Inquiry in this proceeding (seeking comment on internet related updates and improvements to the EAS).

Throughout the *FNPRM,* the Commission has raised and requested comment on various issues relating to the technical feasibility, costs, benefits and the potential impact of implementing FEMA's proposed EAS rule changes. This information will assist with the Commission's evaluation of the economic impact on small entities, and to determine if the proposed FEMA rule changes are adopted, how to minimize any significant economic for small entities and will help identify potential alternatives not already considered. The Commission expects to more fully consider the economic impact and alternatives for small entities following the review of comments and reply comments filed in response to the *FNPRM.* Moreover, the Commission's evaluation of the comments will shape the final alternatives it considers, the final conclusions it reaches, and the actions it ultimately takes in this proceeding to minimize any significant economic impact that may occur on small entities, if any of the proposed FEMA recommendations are adopted.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

None.

Ordering Clauses

Accordingly, *it is ordered,* pursuant to sections 1, 2, 4(i), 4(o), 301, 303(r), 303(v), 307, 309, 335, 403, 624(g), 706, and 713 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 154(o), 301, 303(r), 303(v), 307, 309, 335, 403, 544(g), and 606, as well as by sections 602(a), (b), (c), (f), 603, 604 and 606 of the WARN Act, 47 U.S.C. 1202(a), (b), (c), (f), 1203, 1204 and 1206, Section 202 of the Twenty-First Century Communications and Video Accessibility Act of 2010, as amended, 47 U.S.C. 613, and the National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283, 134 Stat. 3388, section 9201, 47 U.S.C. 1201, 1206, that this Report and Order and Further Notice of Proposed Rulemaking in PS Docket Nos. 15–94 and 15–91 *is hereby adopted.*

It is further ordered that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2021–15174 Filed 8–19–21; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 578

[Docket No. NHTSA–2021–0001]

RIN 2127–AM32

Civil Penalties

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

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: On January 14, 2021, NHTSA published an interim final rule in response to a petition for rulemaking from the Alliance for Automotive Innovation (Alliance). The interim final rule provided that an inflation adjustment to the civil penalty rate applicable to automobile manufacturers that violate applicable corporate average fuel economy (CAFE) standards would apply beginning with vehicle Model Year 2022. The interim final rule also requested comment. In light of a subsequent Executive Order and the agency's review of comments, NHTSA is reviewing and reconsidering that interim final rule. Accordingly, NHTSA is issuing this supplemental notice of proposed rulemaking (SNPRM) to consider the appropriate path forward and to allow interested parties sufficient time to provide comments.

DATES: *Comments:* Comments must be received by September 20, 2021.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, M–30, U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery or Courier:* U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m. Eastern time, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.
- *Instructions:* NHTSA has established a docket for this action. Direct your comments to Docket ID No. NHTSA–2021–0001. See the **SUPPLEMENTARY INFORMATION** section on ''Public Participation'' for more information about submitting written comments.
- *Docket:* All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the following location: Docket Management Facility, M–30, U.S. Department of Transportation, West Building, Ground Floor, Rm. W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590. The telephone number for the docket management facility is (202) 366–9324. The docket management facility is open between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Michael Kuppersmith, Office of Chief Counsel, NHTSA, email *michael.kuppersmith@dot.gov,* telephone (202) 366–2992, facsimile (202) 366–3820, 1200 New Jersey Ave. SE, Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

Table of Contents

A. Public Participation

This section describes how you can participate in the commenting process.

(1) How do I prepare and submit comments?

Your comments must be written. To ensure that your comments are correctly filed in the docket, please include the docket number NHTSA–2021–0001 in your comments. If you are submitting comments electronically as a PDF (Adobe) file, we ask that the documents submitted be scanned using the Optical Character Recognition (OCR) process, thus allowing NHTSA to search and copy certain portions of your submissions.[1] Please note that pursuant to the Data Quality Act, in order for the substantive data to be relied upon and used by NHTSA, it must meet the information quality standards set forth in the Office of Management and Budget (OMB) and Department of Transportation (DOT) Data Quality Act guidelines. Accordingly, we encourage you to consult the guidelines in preparing your comments. OMB's guidelines may be accessed at *https://www.whitehouse.gov/omb/information-regulatory-affairs/information-policy/.* DOT's guidelines may be accessed at *https://www.transportation.gov/dot-information-dissemination-quality-guidelines.*

(2) Tips for Preparing Your Comments

When submitting comments, please remember to:

• Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

• Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.

• Describe any assumptions and provide any technical information and/or data that you used.

• If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

• Provide specific examples to illustrate your concerns, and suggest alternatives.

• Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

• Make sure to submit your comments by the comment period deadline identified in the **DATES** section above.

(3) How can I be sure that my comments were received?

If you submit your comments by mail and wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail. If you submit information through email under a claim of confidentiality, as discussed below, you may request a delivery receipt.

(4) How do I submit confidential business information?

If you wish to submit any information under a claim of confidentiality, you should submit your complete submission, including the information you claim to be confidential business information (CBI), to the NHTSA Chief Counsel. When you send a comment containing CBI, you should include a cover letter setting forth the information specified in our CBI regulation.[2] In addition, you should submit a copy from which you have deleted the claimed CBI to the docket by one of the methods set forth above.

To facilitate social distancing due to COVID–19, NHTSA is treating electronic submission as an acceptable method for submitting CBI to NHTSA under 49 CFR part 512. Any CBI submissions sent via email should be sent to an attorney in the Office of Chief Counsel at the address given above under **FOR FURTHER INFORMATION CONTACT**. Likewise, for CBI submissions via a secure file transfer application, an attorney in the Office of Chief Counsel must be set to receive a notification when files are submitted and have access to retrieve the submitted files. At this time, regulated entities should not send a duplicate hardcopy of their electronic CBI submissions to DOT headquarters.

Please note that these modified submission procedures are only to facilitate continued operations while maintaining appropriate social distancing due to COVID–19. Regular procedures for Part 512 submissions will resume upon further notice, when NHTSA and regulated entities discontinue operating primarily in telework status.

If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

(5) How can I read the comments submitted by other people?

You may read the materials placed in the docket for this document (*e.g.,* the comments submitted in response to this document by other interested persons) at any time by going to *http://www.regulations.gov.* Follow the online instructions for accessing the dockets. You may also read the materials at the NHTSA Docket Management Facility by going to the street addresses given above under **ADDRESSES**.

B. CAFE Statutory and Regulatory Background

NHTSA sets[3] and enforces[4] corporate average fuel economy (CAFE) standards for the United States light-duty automobile fleet, and in doing so, assesses civil penalties against manufacturers that violate applicable standards and are unable to make up the shortfall with credits.[5] The civil penalty amount for CAFE violations was originally set by statute in 1975, and beginning in 1997, included a rate of $5.50 per each tenth of a mile per gallon (0.1) that a manufacturer's CAFE performance falls short of its compliance obligation. This shortfall amount is then multiplied by the number of vehicles in that manufacturer's fleet.[6] The basic equation for calculating a manufacturer's civil penalty amount, before accounting for credits, is as follows:

(penalty rate, in $ per 0.1 mpg per vehicle) × (amount of shortfall, in

[1] OCR is the process of converting an image of text, such as a scanned paper document or electronic fax file, into computer-editable text.

[2] *See* 49 CFR part 512.

[3] 49 U.S.C. 32902. The authorities vested in the Secretary under chapter 329 of Title 49, U.S.C., have been delegated to NHTSA. 49 CFR 1.95(a).

[4] 49 U.S.C. 32911, 32912.

[5] Within statutory constraints, 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.

[6] A manufacturer may have up to three fleets of vehicles, for CAFE compliance purposes, in any given model year—a domestic passenger car fleet, an imported passenger car fleet, and a light truck fleet. Each fleet belonging to each manufacturer has its own compliance obligation, with the potential for either over-compliance or under-compliance. There is no overarching CAFE requirement for a manufacturer's total production.

tenths of an mpg) × (# of vehicles in manufacturer's fleet).[7]

Starting with Model Year 2011, the Energy Independence and Security Act of 2007 (EISA) provided for credit transfers among a manufacturer's various fleets.[8] Starting with that model year, the law also provided for trading between vehicle manufacturers, which has allowed vehicle manufacturers the opportunity to acquire credits from competitors rather than paying civil penalties for violations. Manufacturers can choose to carry back credits to apply to any of three model years before they are earned or carry them forward to apply to any of the five model years after they are earned.

In complement to NHTSA's regulation of fuel economy, the Environmental Protection Agency (EPA) regulates the emissions of light-duty vehicles. These regulations include standards to regulate greenhouse gas emissions from the light-duty fleet. The Clean Air Act requires EPA to set greenhouse gas (GHG) emissions standards from light-duty vehicles since EPA has made an ''endangerment finding'' that greenhouse gases ''cause[s] or contribute[s] to air pollution which may reasonably be anticipated to endanger public health or welfare.'' [9] Although NHTSA and EPA have different roles and independent enforcement and compliance obligations, and operate under different statutory authority, the agencies work together to achieve the goals of their respective statutes. Since Model Year 2012, the agencies have issued joint rulemakings regulating fuel economy (NHTSA) and GHGs (EPA) from light-duty vehicles that have different requirements but are harmonized to the extent possible to work in tandem. The CAFE program is subject to various statutory requirements not applicable to the EPA GHG program. One such requirement, for example, requires automakers to meet a separate average fleet requirement for automobiles that are manufactured domestically.[10] The Clean Air Act does not include a similar requirement for EPA's GHG standards.

C. Civil Penalties Inflation Adjustment Act Improvements Act of 2015

On November 2, 2015, the Federal Civil Penalties Inflation Adjustment Act Improvements Act (Inflation Adjustment Act or 2015 Act), Public Law 114–74, Section 701, was signed into law. The 2015 Act required Federal agencies to promulgate an interim final rule to make an initial ''catch-up'' adjustment to the civil monetary penalties they administer, and then to make subsequent annual adjustments for inflation. The 2015 Act limited the initial inflation increase to 150 percent of the then-current penalty.

In a February 24, 2016 memorandum, the Director of the Office of Management and Budget (OMB) provided initial guidance to all Federal agencies on how to calculate the initial adjustment required by the 2015 Act.[11] The initial ''catch-up'' adjustment was 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 contained 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 multiplied 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. Ensuing guidance from OMB identifies the appropriate inflation multiplier for agencies to use to calculate the subsequent annual adjustments.[12]

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

1. Initial Interim Final Rule

On July 5, 2016, NHTSA published an interim final rule, adopting inflation adjustments for all civil penalties under its administration, following the procedure and the formula in the 2015 Act. One of the adjustments NHTSA made at the time was raising the civil penalty rate for CAFE violations from $5.50 to $14.[13] NHTSA also indicated in that notice that the maximum penalty rate that the Secretary is permitted to establish for such violations would similarly increase to reflect inflation from the statutory cap of $10 to $25, but did not codify this change in the regulatory text. That initial interim final rule became effective on August 4, 2016.

2. Initial Petition for Reconsideration and Response

On August 1, 2016, 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 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 several issues, including retroactivity. The petitioners were concerned that applying the penalty increase associated with model years that had already been completed or for which a company's compliance plan had already been ''set'' was a retroactive application of the inflation adjustment.

In response to the joint petition, NHTSA issued a final rule on December

[7] The process of determining civil penalties occurs after the end of a model year, following NHTSA's receipt of final reports from the Environmental Protection Agency (EPA). See 77 FR 62624, 63126 (Oct. 15, 2012).

[8] Public Law 110–140, 104.

[9] 42 U.S.C. 7521, *see also* 74 FR 66495 (Dec. 15, 2009) (''Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act'').

[10] 49 U.S.C. 32902(b)(4).

[11] 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.*

[12] 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.*

[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 No. NHTSA–2016–0075 at *www.regulations.gov.*

28, 2016.[15] In that rule, NHTSA agreed that raising the penalty rate for model years already fully complete at the time the 2015 Act was enacted would be inappropriate, given that courts generally disfavor the retroactive application of statutes, and that applying penalties to model years that were already completed 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 from the enactment of the 2015 Act 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 (plus any adjustments for inflation that occurred or may occur) until Model Year 2019, as the agency believed that 2019 would be the first year after the 2015 Act in which product changes could reasonably be made in response to the higher penalty rate. This final rule had an effective date of January 27, 2017.

3. NHTSA Reconsideration

Beginning in January 2017, NHTSA took a series of actions to delay the effective date of the December 2016 final rule, ultimately leading to a rule announcing that the effective date would be delayed indefinitely.[16] In April 2018, the United States Court of Appeals for the Second Circuit vacated NHTSA's indefinite delay of the rule's effective date, clarifying that the December 2016 rule was in force.[17]

In July 2019, NHTSA finalized a rule determining that the 2015 Act did not apply to the CAFE civil penalty rate. On August 31, 2020, the United States Court of Appeals for the Second Circuit vacated the July 2019 rule and ruled that the December 2016 rule was back in force. The Second Circuit denied panel rehearing on November 2, 2020.

4. Subsequent Petitions and Interim Final Rule

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 because it did not properly account for the associated costs and benefits. Additionally, IPI challenged NHTSA's statutory interpretations. NHTSA did not issue a decision on the petition prior to the Second Circuit's decision vacating the rule.

Following the Second Circuit's decision, on October 2, 2020, NHTSA received a petition for rulemaking from the Alliance for Automotive Innovation requesting that the adjustment to $14 not be applied until Model Year 2022.[18] 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.'' The Alliance argued that, as in the December 2016 rule, applying the increased penalty to any violations 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. According to the Alliance, doing so would effectively be punishing violators retroactively.

In addition to relying on the reasoning of the December 2016 rule as it applied to the increase based on the timing of the enactment of the 2015 Act, the Alliance Petition noted, but did not provide detailed evidence of, the significant economic impact suffered by the industry due to COVID–19. Accordingly, the Alliance Petition also cited the now-revoked Executive Order 13924,[19] requiring Federal agencies to take appropriate action, consistent with applicable law, to combat the economic emergency caused by COVID–19. Several individual vehicle manufacturers submitted supplemental information to NHTSA further articulating the negative economic position they were in due to the COVID–19 public health emergency and the potential and significant adverse economic consequences of the increased civil penalty rate.

After considering the issues raised, NHTSA granted the Alliance's petition and promulgated an interim final rule providing that the increase [20] will apply beginning with Model Year 2022. The interim final rule contended that applying the increased civil penalty rate to vehicles in Model Years 2019, 2020, and 2021 would not result in additional fuel savings and would impose higher penalties retroactively because those model years were already completed, or, for Model Year 2021, production plans were set prior to the Second Circuit's decision striking down the 2019 rule. The interim final rule relied in large part on the reasoning in the December 2016 final rule, though it did not discuss the extent to which the four years between the two rules should affect that reasoning. Additionally, the interim final rule attempted to account for the negative economic impact on the automotive sector caused by the global outbreak of COVID–19.[21] That interim final rule amended the relevant regulatory text accordingly—effective immediately and without having afforded prior notice or the ability to comment in advance—and requested comment within ten days. The interim final rule also noted that IPI's petition was moot, and, to the extent it was not moot, NHTSA denied it.

The interim final rule is currently the subject of legal challenges in the Second Circuit and Ninth Circuit.[22]

E. Summary of Comments Received

Before NHTSA's interim final rule was published but after the agency had announced, through the publication of the Fall 2020 Unified Agenda of Regulatory and Deregulatory Actions, that it had initiated a rulemaking in response to the Alliance's petition, NHTSA received two letters regarding the rulemaking: one jointly from the State of New York, the Natural Resources Defense Council, and the Sierra Club, and one from Tesla.[23] These letters raised concerns with NHTSA's rulemaking, particularly with the entities' inability to comment on the Alliance's petition for rulemaking in advance. NHTSA did not respond to these letters prior to the publication of the interim final rule, but included both letters in the docket when the interim final rule was published and noted that they ''will be treated as comments for appropriate consideration.'' [24]

After the interim final rule was published, NHTSA received eight substantive comments.[25] NHTSA received comments from:

[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.'').

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

[19] *See* Executive Order 14018, 86 FR 11855, ''Revocation of Certain Presidential Actions'' (Feb. 24, 2021).

[20] The rate is increasing to $14, plus any adjustments for inflation that occurred or may occur. 49 CFR 578.6(h)(2).

[21] The reasoning for the interim final rule is set forth more fully in the January 14, 2021 notice published at 86 FR 3016.

[22] *NRDC* v. *NHTSA,* No. 21–139 (2d Cir.); *New York* v. *NHTSA,* No. 21–339 (2d Cir.); *Tesla* v. *NHTSA,* No. 21–70367 (9th Cir.).

[23] NHTSA–2021–0001–0001; NHTSA–2021–0001–0009.

[24] 86 FR 3016, 3023 n.74 (Jan. 14, 2021).

[25] NHTSA received a ninth comment that simply said, ''Help.'' NHTSA–2021–0001–0018. Without

- The Attorneys General of California, New York, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, Oregon, Pennsylvania, Rhode Island, Washington, and Vermont; [26]
- American Council for an Energy-Efficient Economy, Center for Auto Safety, Center for Biological Diversity, Consumer Federation of America, Consumer Reports, The Ecology Center (Michigan), Environmental Law and Policy Center, Interfaith Power & Light, Sierra Club, Union of Concerned Scientists; [27]
- Natural Resources Defense Council and Sierra Club; [28]
- The Institute for Policy Integrity at New York University School of Law; [29]
- Tesla; [30]
- The Alliance for Automotive Innovation; [31]
- The National Automobile Dealers Association (NADA); [32] and
- An anonymous individual.[33]

Most of the comments opposed the interim final rule, raising serious procedural, legal, and substantive concerns. In general, these comments argued that NHTSA did not have the authority to delay the application of the inflation increase beyond Model Year 2019 and that, regardless, NHTSA would have to do so through notice-and-comment, not by an interim final rule that was effective immediately without prior notice and without the opportunity to comment in advance. In supporting these arguments, the commenters relied, in part, upon the two earlier decisions by the Second Circuit.

Most of these comments also challenged the interim final rule as arbitrary and capricious on multiple grounds. For example, the comments discussed that applying the increased rate before Model Year 2022 would not be retroactive because the increased rate was originally applied in 2016 when it was still prospective, and NHTSA's subsequent actions, which were all stricken down by the Second Circuit, did not change that fact. In these commenters' view, manufacturers have been on notice of the increase well before Model Year 2019, and any reliance to the contrary was undue.

any additional information, NHTSA cannot reasonably address or respond to this commenter's concern.

[26] NHTSA–2021–0001–0017.

[27] NHTSA–2021–0001–0015.

[28] NHTSA–2021–0001–0013.

[29] NHTSA–2021–0001–0011.

[30] NHTSA–2021–0001–0012.

[31] NHTSA–2021–0001–0014.

[32] NHTSA–2021–0001–0016.

[33] NHTSA–2021–0001–0019.

These comments argued that this was particularly true given the rulings from the Second Circuit litigation, in which many of these commenters and the Alliance were involved, with the Alliance being an intervening party. The comments further argued that delaying the application of the increased rate would affect future compliance because manufacturers may be incentivized to hold credits for model years when the higher rate will apply. The comments also argued that the interim final rule improperly analyzed the economic effects of the COVID–19 pandemic, for example, by not accounting for any positive economic data and disregarding that some of the relevant conduct occurred before the pandemic.

These comments also argued that the interim final rule violated the National Environmental Policy Act of 1969 (NEPA). Lastly, in response to NHTSA's request for comment about whether the adjustment should be delayed further until Model Year 2023, these comments opposed any additional delay. Some of these comments also expressed concern with the short ten-day comment period provided by the interim final rule—and only after the rule was already effective without any opportunity to comment beforehand.

Two comments supported the interim final rule. The Alliance reiterated the reasoning set forth in its petition, which NHTSA granted in the interim final rule. According to the Alliance, the interim final rule was consistent with NHTSA's December 2016 rule; appropriately accounted for the industry's production and design processes, including the unforeseen challenges of the COVID–19 public health emergency; and fairly implemented the Second Circuit's decision. The Alliance also noted that Model Year 2022 vehicles could have begun being produced as early as January 2, 2021—about two weeks before the interim final rule was published—but it believes NHTSA was reasonable to make the inflation adjustment applicable beginning in Model Year 2022, declining to request a further delay in the adjustment to Model Year 2023. NADA supported the Alliance's comment, adding that increased CAFE civil penalties before Model Year 2022 would lead to higher vehicle prices for consumers or manufacturer shifts in available offerings, without any associated environmental or safety benefits.

F. Supplemental Request for Public Comment

On January 20, 2021, the President issued Executive Order 13990, entitled ''Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.'' E.O. 13990 directs the heads of all agencies to immediately review all existing regulations, orders, guidance documents, policies, and any other similar agency actions promulgated, issued, or adopted between January 20, 2017 and January 20, 2021, that are or may be inconsistent with, or present obstacles to, the policy set forth in E.O. 13990: A policy ''to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritize both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals.'' [34] The Secretary of Transportation expressly identified the January 14, 2021 CAFE civil penalties interim final rule as one to be reviewed pursuant to E.O. 13990.[35]

In accord with E.O. 13990 and the Secretary's determination, and in light of the significant concerns raised by the commenters, NHTSA is reviewing and reconsidering the January 14, 2021 interim final rule. Specifically, NHTSA is considering withdrawing the interim final rule and reverting to the December 2016 final rule that would apply the inflation adjustment beginning with Model Year 2019—the rule that the Second Circuit has said twice is ''now in force.'' [36] The vast majority of comments submitted to date support returning to the December 2016 final rule. Upon further consideration, automakers were aware as of December 2016 that the inflation adjustment would apply beginning with Model Year 2019. It was not until Model Year 2019 was already nearly complete that the agency issued a final rule changing that, which the Second Circuit subsequently determined was legally invalid. The Alliance participated in that litigation as

[34] 86 FR 7037, 7037 (Jan. 25, 2021).

[35] Memorandum from the Acting General Counsel of DOT to the Chief Counsel and Acting Deputy Administrator of NHTSA and Special Advisor, ''Implementation of Executive Order 13990, entitled 'Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis' '' (Feb. 22, 2021). *https://www.transportation.gov/sites/dot.gov/files/2021-02/Memo-to-NHTSA.pdf.*

[36] *Nat. Res. Def. Council* v. *Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 116 (2d Cir. 2018); *New York* v. *Nat'l Highway Traffic Safety Admin.*, 974 F.3d 87, 101 (2d Cir. 2020).

an intervenor and was well aware of the possibility that the Second Circuit would restore the applicability of the inflation increase beginning with Model Year 2019. In fact, the Second Circuit did just that. NHTSA is therefore of the view that it would be appropriate to revisit the characterization of the application of the inflation adjustment beginning with Model Year 2019 as ''retroactive.'' Moreover, commenters have raised valid concerns regarding the procedures that the agency used in issuing the interim final rule, which did not proceed through a more typical notice-and-comment process and made the rule effective immediately upon publication. In addition, based upon further review and consideration of the Second Circuit's prior decisions and, in light of the ongoing litigation, the agency is assessing the legal risk of leaving the interim final rule in place, as the interim final rule was based on an assertion of discretion that NHTSA now tentatively believes is in conflict with the Inflation Adjustment Act and the Second Circuit's decisions.

For these reasons, the agency is now considering withdrawing the interim final rule and reverting to the December 2016 final rule.

That said, the agency has not yet reached any final determinations, and instead believes that an additional period of public comment would aid the agency in its reexamination of the issues involved in the interim final rule. Considering the importance of this rulemaking and the short comment period—ten days—previously provided to interested parties, NHTSA is issuing this notice to provide the public with an appropriate amount of time to comment and to enable NHTSA to more fully review and consider the issues. In doing so, NHTSA is expressly requesting comment on whether it should proceed to a final rule that withdraws the interim final rule and reverts to the December 2016 final rule, restoring the application of the increased CAFE civil penalty rate beginning with Model Year 2019. NHTSA will also accept comments on whether the inflation adjustment should apply beginning with a model year later than Model Year 2019. Commenters arguing for such a position should explain how it is consistent with the 2015 Act and the Second Circuit's decisions. NHTSA will also consider comments already submitted in response to the interim final rule as part of its ongoing review and the anticipated promulgation of a final rule following this comment period.

G. 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 will be ''economically significant,'' as NHTSA believes that the difference in the amount of penalties received by the government as a result of this rule are likely to exceed $100 million in at least one of the years affected by this rulemaking and that there may be some further economic effects as discussed below.

As a general matter, the civil penalty rate as adjusted for inflation will likely induce some degree of greater compliance. Manufacturers that are paying civil penalties for CAFE violations have likely calculated that it is less costly or otherwise preferable to pay the penalties than to meet the statutory and regulatory requirements. An increased penalty rate changes this calculation, as it likely raises either the costs of credits a noncompliant manufacturer may choose to purchase, the total penalty amount a manufacturer will pay, or both. However, the Second Circuit has made clear that the Inflation Adjustment Act applies to these penalties and, thus, the question over whether these penalties should be adjusted for inflation has been settled.

In this rule, NHTSA is proposing to remove the interim final rule, which delayed the inflation adjusted penalty rate by three model years, two of which are already complete and the last one which is considerably underway. An analysis here would be limited to estimating over this short time horizon: (1) Which manufacturers did not produce compliant fleets for Model Years 2019 and 2020 and are likely to not produce compliant fleets for Model Year 2021; (2) what the shortfalls will be for those non-compliant manufacturers; and (3) the extent to which those manufactures will choose to use credits (either their own or those purchased from over-compliant manufacturers) or pay penalties to address these shortfalls. Pointedly, this analysis does not have sufficient information to account for whether, and if so, how manufacturers will adjust the composition of the fleet for these model years in response to the penalty change.

Any analysis would estimate what the compliance shortfalls will be and whether manufacturers will pay penalties or use credits. These estimates could be used to estimate the effects on individual manufactures in the form of higher penalty payments, higher payments to other manufacturers for credits, or higher receipts for overcomplying manufacturers for credits sold to other manufacturers. However, NHTSA has only limited ability to estimate what strategies manufacturers will take either to use credits or pay penalties to deal with any noncompliance, as that is a decision that each manufacturer must take based on their unique circumstances. In the past, the vast majority of manufacturers pay no penalties, as only five manufacturers have paid civil penalties since Model Year 2011.[37] And only one of those manufacturers faced particularly heavy penalties—even before the $14 rate would have gone into effect—for failing to comply with the minimum domestic passenger car standard, which cannot be made up through the application of transferred or traded credits.[38]

Despite this uncertainty, NHTSA is confident that, based on the experience of recent model years, this rule would lead to at least $100 million difference in the amount of penalties in at least one model year. For example, based on mid-model year fuel economy performance data, NHTSA projected a shortfall of 1.3 miles per gallon across the U.S. fleet in Model Year 2019.[39] Assuming a similar magnitude of production from Model Year 2018 for Model Year 2019 would result in a nationwide fleet-wide net shortfall of approximately $115.4 million at the $5.50 rate or an approximately $293.9 million shortfall at the $14 rate—an approximately $178.5 million difference.[40] As noted, it is expected

[37] *See* ''Civil Penalties,'' available at *https://one.nhtsa.gov/cafe_pic/CAFE_PIC_Fines_LIVE.html.*

[38] 49 U.S.C. 32903(f)(2), (g)(4); 49 CFR 536.9(c).

[39] *See* ''MYs 2018 and 2019 Projected Fuel Economy Performance Report,'' available at *https://one.nhtsa.gov/cafe_pic/AdditionalInfo.htm.* This projection is based on information received from manufacturers' mid-model year reports required by 49 CFR part 537. The data from these reports has not been verified by EPA or NHTSA. NHTSA assesses manufacturers' compliance only using EPA-verified final model year data. The final model year data may differ from the mid-model year projections due to the mixture of vehicles actually produced throughout the model year.

[40] In looking at the total fleet performance across the country, manufacturers who over-complied with the standard may benefit from an expected increase in the value of credits as a result of an inflation increase in the penalty rate, while those that have made a business decision not to comply with the standards would likely have to pay more

that much of this increase would likely fall on a single automobile manufacturer and likely due to a failure to comply with the minimum domestic passenger car standard. NHTSA does not yet have enough information for Model Year 2020, which is now complete, or Model Year 2021, which is still underway, to make a similar estimate, but requests comment, data, or analysis on the potential compliance shortfalls, penalty payments, and effect on credit sales for those model years.

In addition, NHTSA believes that commenters have raised valid questions about further economic effects. These commenters have argued that, regardless of the impact of this rulemaking action on Model Year 2019 through 2021 vehicles, longer-term impacts may vary as a result of manufacturer multi-year planning, the transfer of credits across model years and between manufacturers, and the changing value of credits over time. According to these commenters, if such variation were to occur, applying the $14 penalty rate beginning in Model Year 2019 may result in manufacturers applying credit balances to Model Year 2019 through 2021 vehicles and being incentivized to make fuel economy improvements in their fleet beyond that timeframe. And for manufacturers that do not currently have credits or cannot transfer or trade for them to make up a shortfall of the minimum domestic passenger car standard, applying the inflation adjusted penalty rate beginning in Model Year 2019 places an even greater incentive on future compliance and fuel economy improvements to avoid additional higher penalties going forward.

A brief explanation of the statutory scheme that governs the use of credits is helpful in understanding how this could work. Manufacturers comply separately with the domestic passenger car, imported passenger car, and light truck standards. Thus, a manufacturer can comply (or over comply) with all standards, comply with some but not all standards, or fail to comply with all standards. To the extent that a manufacturer over-complies with the standard for a particular fleet, the manufacturer generates a credit for that over-compliance, which the manufacturer can hold-on to for future compliance for that standard, ''transfer'' from one fleet (*e.g.,* light trucks) to its other fleet (*e.g.,* imported passenger cars), or trade those credits to another manufacturer. Those manufacturers can either ''bank'' those credits for their own future use or sell them to non-compliant manufacturers, who seek the credit to make up for a shortfall. These earned credits can be ''carried forward'' to apply to any of the five model years after they are earned. Manufacturers can also choose to ''carry back'' credits to apply to any of three model years before they are earned. However, there are certain limitations on the use of credits, as manufacturers may not transfer more than 2.0 miles per gallon in credits from one of their fleets to another in a single model year and neither transferred nor traded credits may be used to meet the minimum domestic passenger car standard.

Consistent with these constraints, if the rate for civil penalties instead remained at the $5.50 rate for Model Years 2019 through 2021, some manufacturers might choose to pay the lower penalty earlier and save the credits that could either carry forward or carry back for future model years when they are valued more due to the inflation adjustment. For example, a credit earned in Model Year 2017 could be used for any year up to Model Year 2022, and, thus, if the adjusted rate applied in Model Year 2019, they may use that credit at that point, while they may have saved that credit for Model Year 2022 under the delay provided in the interim final rule. Likewise, credits earned in Model Years 2019 through 2021 may be used through Model Years 2024 and 2026, respectively. Thus, if the penalty rate remained $5.50 until Model Year 2022, a manufacturer with shortfalls in one fleet in Model Years 2019 through 2021 may choose to pay penalties and hold on to any transferred or traded credits until the years in which the penalty rate has been adjusted for inflation, rather than using the credits earlier and making design changes to increase its compliance in the later model years. Likewise, a manufacturer who has a shortfall in its domestic passenger fleet might take actions to over-comply with the standard in future years when the penalty is increased to generate credits to apply to earlier years rather than paying the higher penalty.[41] Finally, credits earned in Model Year 2022, which is not yet underway, could be applied back to Model Year 2019 shortfalls, which have not been assessed yet, which a manufacturer may be more likely to do if the penalty rate for Model Year 2019 is the rate as adjusted for inflation. The agency has tentatively determined that these actions are possible and, thus, may mean that the argument put forward in the interim final rule that no effects beyond increased penalty payments are possible may be incorrect. NHTSA requests further comments on such potential effects, particularly as industry commenters did not provide detail as to whether and the extent to which any such potential variations are actually likely to occur.

In any event, based on further consideration of the 2015 Act and the Second Circuit's decisions on this issue, NHTSA tentatively believes that that it does not have discretion over when the inflation adjustment should begin to take effect. Further, the Inflation Adjustment Act provided NHTSA no discretion over what the adjusted rate should be, as that is merely a function of the formula established by Congress and calculated by OMB, and mandated streamlined processes for making both the initial adjustment and any subsequent adjustments that do not require accompanying analyses or public comment.[42]

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, however, if the head of an agency certifies the proposal will not have a significant economic impact on a substantial number of small entities.

NHTSA has considered the impacts of this document under the Regulatory Flexibility Act and certifies that this rulemaking will 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).

for those credits. To the extent that a manufacturer cannot meet their shortfall with these credits or, in the case of the minimum domestic passenger car standard, are prohibited from doing so by law, they would need to pay penalties.

[41] Although manufacturers' design cycles vary, since they have been on notice since 2016 of an increase to the penalty beginning with Model Year 2019, they have had and will continue to have opportunities in the coming model years to make design choices to increase compliance.

[42] The 2015 Act, of course, did allow NHTSA one opportunity at the time of the initial catch-up to use the notice-and-comment process to adjust the rate ''less than the otherwise required amount'' under two conditions, but the Second Circuit rejected NHTSA's belated attempt to use this provision in its decision on the July 2019 final rule. *See New York,* 974 F.3d at 100–01.

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.

In the interim final rule, NHTSA stated that it did not believe that the rule would have a significant economic impact on a substantial number of small entities and requested comment on the issue. None of the comments NHTSA received discussed this issue.

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.

As noted previously, this rulemaking 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 rulemaking is expected to 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 rulemaking 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) [43] 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).[44] However, there are some instances where NEPA does not apply to a particular proposed One consideration is whether the action at issue is a non-discretionary action to which NEPA may not apply or for which NEPA may require less detailed analysis.[45] Under the 2015 Act, and as confirmed by the Second Circuit, NHTSA has no discretion in whether to adjust the CAFE civil penalty rate to $14, and NHTSA tentatively believes it has no discretion in when to do so. Further, the 2015 Act provides no basis for the consideration of environmental effects in making the required inflation adjustments, outside of an exception not applicable here.[46] Accordingly, in line with legal precedent concerning non-discretionary agency action, NHTSA believes that no further analysis pursuant to NEPA is required regarding increasing the CAFE civil penalty rate for inflation.

Although NHTSA does not have discretion on whether to increase the CAFE civil penalty rate for inflation, NHTSA has prepared this environmental assessment to evaluate the effects of the timing of such an increase on the environment. When a Federal agency prepares an environmental assessment, the CEQ NEPA implementing regulations require the agency to (1) ''[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact,'' and (2) ''[b]riefly discuss the purpose and need for the proposed action, alternatives . . . , and the environmental impacts of the proposed action and alternatives, and include a listing of [a]gencies and persons consulted.'' [47] Generally, based on the environmental assessment, the agency must make a determination to prepare an environmental impact statement or ''prepare a finding of no significant impact if the [a]gency determines, based on the environmental assessment, not to prepare an environmental impact statement because the proposed action will not have significant effects.'' [48]

The interim final rule included an Environmental Assessment (EA) and a Finding of No Significant Impact

[43] 42 U.S.C. 4321–4347.

[44] 42 U.S.C. 4332.

[45] *See Dept. of Transp.* v. *Public Citizen,* 541 U.S. 752, 768–69 (2014) (holding that the agency need not prepare an Environmental Impact Statement (EIS) or analyze certain environmental effects in its EA, and stating, ''[s]ince FMCSA has no ability categorically to prevent the cross-border operations of Mexican motor carriers, the environmental impact of the cross-border operations would have no effect on FMCSA's decisionmaking—FMCSA simply lacks the power to act on whatever information might be contained in the EIS.'').

[46] 28 U.S.C. 2461 note, 4(c) (allowing an agency to make the first adjustment of the amount of a civil monetary penalty by less than the otherwise required amount if increasing the civil monetary penalty by the otherwise required amount would have a negative economic impact; or the social costs of increasing the civil monetary penalty by the otherwise required amount outweighed the benefits). NHTSA's attempt to apply this exception through the ''negative economic impact'' prong was vacated by the Second Circuit as too late, and the statute provides that the exception could only be applied to the initial ''catch-up'' adjustment.

[47] 40 CFR 1501.5(c).

[48] 40 CFR 1501.6(a).

(FONSI) regarding the agency's decision to increase the CAFE civil penalty rate for inflation beginning with Model Year 2022. However, it sought comment on the environmental impacts of a longer delay to Model Year 2023. Two commenters alleged that the interim final rule violated NEPA because the agency did not consider the effect of CAFE penalties assessed in one year on manufacturers' compliance decisions in future years.[49] Like NHTSA's approach in the interim final rule, this section may serve as NHTSA's Draft Environmental Assessment (Draft EA). The issue raised by commenters on the EA presented in the interim final rule is addressed below. NHTSA invites public comments on the applicability of NEPA to this action and the contents and tentative conclusions of this Draft EA.

I. Purpose and Need

This SNPRM sets forth the purpose of and need for this action. Pursuant to the Inflation Adjustment Act and the Second Circuit's decision, NHTSA is required to make an initial ''catch-up'' adjustment to the civil monetary penalties it administers for the CAFE program. The purpose of this SNPRM is to consider the timing of the application of the adjustment to the CAFE civil penalty rate, consistent with the statutory requirements.

II. Alternatives

The first alternative is to restore the *status quo ante* prior to the interim final rule, which is adjusting the CAFE civil penalty rate from $5.50 to $14 beginning in Model Year 2019. This timing was originally established by the December 2016 final rule and was twice made effective by decisions of the Second Circuit. The second alternative is applying the adjustment beginning in Model Year 2022, which reflects the action taken in the interim final rule. NHTSA is no longer considering the alternative of applying the adjustment beginning in Model Year 2023. NHTSA is accepting comments on whether it should consider other alternatives of the inflation adjustment applying beginning with a model year later than Model Year 2019. Commenters arguing for such a position should explain how it is consistent with the 2015 Act and the Second Circuit's decisions.

III. Environmental Impacts of the Action and Alternatives

In the interim final rule, NHTSA asserted that it anticipated no differences in environmental impacts associated with the alternatives of applying the adjustment beginning in Model Years 2019, 2020, 2021, or 2022. NHTSA based this conclusion on the fact that vehicles for Model Years 2019 and 2020 had largely if not entirely been produced already, and many manufacturers were already selling Model Year 2021 vehicles.

After reviewing the comments received in response to the interim final rule, NHTSA has reconsidered whether this assessment is complete. Commenters have argued that, regardless of the impact of this rulemaking action on Model Year 2019 through 2021 vehicles, longer-term impacts may vary as a result of manufacturer multi-year planning, the transfer of credits across model years and between manufacturers, and the changing value of credits over time. If this is correct, applying the adjustment earlier could result in manufacturers applying credit balances to Model Year 2019 through 2021 vehicles and being incentivized to make fuel economy improvements in their fleet beyond that timeframe, rather than paying civil penalties at the $5.50 rate for Model Years 2019 through 2021 and saving the credits for future model years when they could be valued more due to the inflation adjustment. Additionally, for manufacturers without credit balances, the potential application of a significantly higher civil penalty for Model Years 2019 through 2021 may spur more rapid implementation of fuel-saving technology in order to allow the manufacturer to accrue credits that may be carried back to cover the shortfall in Model Years 2019 through 2021.

Overall, NHTSA anticipates that applying the adjustment beginning with Model Year 2019 may lead to the eventual application of more fuel-saving technology, resulting in fewer greenhouse gas emissions and reductions in many criteria and toxic air pollutants compared to applying the adjustment beginning in Model Year 2022.[50] Although Model Years 2019 and 2020 are already completed, and Model Year 2021 is underway, the civil penalty assessment process is not yet complete for any of them.[51] As a result, NHTSA does not yet know the anticipated manufacturer compliance shortfall for these model years. Because manufacturers can apply credits across a multi-year window, their decisions about how to apply credits in earlier model years will affect the availability of credits and the application of fuel-saving technology in later model years. However, NHTSA does not know whether and to what degree manufacturers will choose to pay fines in lieu of applying accrued credits, trade credits with other manufacturers, or rely on multi-year planning and credit carry-forward and carry-back to address shortfalls. NHTSA invites comments, information, and analyses from the public on the degree to which this may occur as a result of changes to the civil penalty rate in Model Year 2019 versus Model Year 2022.

At this time, however, NHTSA anticipates the impacts to be small. The difference between the alternatives contemplated in this action is only whether or not the civil penalty rate increase applies to three Model Years: 2019, 2020, and 2021. NHTSA continues to believe the impacts on those Model Years alone is expected to be *de minimis,* as Model Years 2019 and 2020 have largely if not entirely been produced already, and manufacturers are already selling Model Year 2021 vehicles. Further, as NHTSA has addressed in its CAFE rulemakings, many manufacturers have been unwilling to pay civil penalties historically. Those manufacturers may continue to opt to apply credits even if a lower civil penalty rate applied, rather than hold credits for future model years when the civil penalty rate would be higher. NHTSA also seeks comments on these conclusions.

IV. Agencies and Persons Consulted

NHTSA and DOT have consulted with OMB and 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 Draft EA and tentatively concludes that adjusting the CAFE civil penalty rate beginning with Model Year 2019, as compared to Model Year 2022, would have, at most, a more positive impact on the quality of the

[49] Comment from Natural Resources Defense Council and Sierra Club, NHTSA–2021–0001–0013; Comment from the New York University School of Law Institute of Policy Integrity, NHTSA–2021–0001–0011.

[50] *See* NHTSA's Final Environmental Impact Statements for the CAFE rulemaking for MYs 2017 and beyond (Docket No. NHTSA–2011–0056) and for MYs 2021–2026 (Docket No. NHTSA–2017–0069), both of which illustrate these trends as fuel economy standard stringency increases across alternatives. Both EISs are also available on the agency's fuel economy website: *https://www.nhtsa.gov/fuel-economy.*

[51] Because NHTSA does not have final model year performance data verified by EPA for these model years, any quantitative projections of the environmental impact across multiple model years would be too speculative to rely upon at this time.

human environment to the extent that manufacturers may be more likely to expend credit balances on Model Year 2019 through 2021 vehicles than if the civil penalty rate remained at $5.50 for those model years. Lacking such credits in future years, manufacturers would be more likely to make improvements to the fuel economy of their fleets to avoid paying the higher civil penalty rates that would occur under either alternative. Additionally, higher civil penalty rates in Model Years 2019 through 2021 may cause manufacturers to more rapidly implement fuel-saving technology so that they may accrue credits to be carried back to cover compliance shortfalls. But NHTSA does not expect any differences in the impacts under either of the alternatives to rise to the level of significance that would necessitate the preparation of an Environmental Impact Statement.

Based on the information in this Draft EA, and assuming no additional information or changed circumstances, NHTSA expects to make a Finding of No Significant Impact (FONSI). Such a finding will not be made before careful review of all public comments received. If NHTSA determines it is appropriate to do so, a Final EA and a FONSI will be issued as part of the final rule.

6. Executive Order 12988 (Civil Justice Reform)

This rulemaking is not expected to have a preemptive effect. This rulemaking is also not expected to have a retroactive effect, and NHTSA requests comment on this point. Judicial review of the interim final rule or a subsequent final 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 comments received into any of DOT's dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit *https://www.transportation.gov/privacy.*

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, the National Highway Traffic Safety Administration proposes to amend 49 CFR part 578 as set forth below.

PART 578—CIVIL AND CRIMINAL PENALTIES

■ 1. The authority citation for 49 CFR part 578 continues 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)(2) to read as follows:

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

* * * * *

(h) * * *

(2) Except as provided in 49 U.S.C. 32912(c), beginning with model year 2019, 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 $14, plus any adjustments for inflation that occurred or may occur (for model years before model year 2019, the civil penalty is $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 produced 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 1.95, and 501.5.

Steven S. Cliff,

Acting Administrator.

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