



This document is scheduled to be published in the Federal Register on 03/01/2016 and available online at <http://federalregister.gov/a/2016-04311>, and on [FDsys.gov](http://FDsys.gov)

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

#### 49 CFR Part 578

#### Docket No. NHTSA-2016-0023

#### RIN 2127-AL38

#### Civil Penalty Factors

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

**ACTION:** Final Rule.

**SUMMARY:** This final rule provides NHTSA's interpretation of the civil penalty factors for determining the amount of a civil penalty or the amount of a compromise under the National Traffic and Motor Vehicle Safety Act (Safety Act). The Moving Ahead for Progress in the 21st Century Act (MAP-21) states that the Secretary of Transportation shall determine the amount of civil penalty or compromise under the Safety Act. MAP-21 identifies mandatory factors that the Secretary must consider and discretionary factors for the Secretary to consider as appropriate in making such determinations. MAP-21 directs NHTSA to issue a rule providing an interpretation of these penalty factors.

This final rule also amends NHTSA's regulation to the increase penalties and damages for odometer fraud, and to include the statutory penalty for knowingly and willfully submitting materially false or misleading information to the Secretary after certifying the same information as accurate.

In the NPRM, we proposed administrative procedures for NHTSA to follow when assessing civil penalties against persons who violate the Safety Act. We are not including those procedures in this final rule. Instead, NHTSA plans to address those procedures separately, in a rule to be issued soon.

**DATES:** *Effective date:* This final rule is effective **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

*Petitions for reconsideration:* Petitions for reconsideration of this final rule must be received not later than **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** Any petitions for reconsideration should refer to the docket number of this document and be submitted to: Administrator, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE, West Building, Ground Floor, Docket Room W12-140, Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:** Thomas Healy, Office of the Chief Counsel, NHTSA, 1200 New Jersey Ave., S.E., West Building, W41-211, Washington, DC 20590.  
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## **I. Executive Summary**

The Moving Ahead for Progress in the 21st Century Act (MAP-21 or the Act) was signed into law on July 6, 2012 (Pub. L. 112-141). Section 31203(a) of MAP-21 amends the civil penalty provision of the Safety Act, as amended and recodified, 49 U.S.C. Chapter 301, by requiring the Secretary of Transportation to consider various factors in determining the amount of a civil penalty or compromise. The factors that the Secretary shall consider in determining the amount of civil penalty or compromise are codified in amendments to 49 U.S.C. 30165(c). Section 31203(b) of MAP-21 requires the Secretary to issue a final rule, in accordance with 5 U.S.C. 553, providing an interpretation of the penalty factors set forth in MAP-21. Pub. L. 112-141, § 31203, 126 Stat. 758 (2012). This rule provides an interpretation of the civil penalty factors in 49 U.S.C. 30165(c) for NHTSA to consider in determining the amount of civil penalty or compromise.

NHTSA issued an NPRM that proposed an interpretation of the penalty factors in Section 31203(b) of MAP-21 on September 21, 2015.<sup>1</sup> The NPRM also included administrative procedures for NHTSA to follow when assessing civil penalties against persons who violate the Safety Act. We have decided not to include the administrative procedures for assessing civil penalties in this final rule.

On December 4, 2015, the Fixing America's Surface Transportation Act (FAST Act), Pub. L. 114-94, was signed into law. Section 24110 of the FAST Act requires NHTSA to issue a final rule providing an interpretation of the penalty factors in Section 31203(b) of MAP-21 in order for increases in the maximum amount of civil penalties that NHTSA can collect for

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<sup>1</sup> 80 FR 56944 (Sept. 21, 2015).

violations of the Safety Act to become effective. When the Secretary of Transportation certifies that NHTSA has issued a final rule providing an interpretation of the factors in Section 31203(b) of MAP-21, the maximum amount of civil penalty for each violation of the Safety Act increases from \$7,000 per violation to \$21,000 per violation and the maximum amount of civil penalties that NHTSA can collect for a related series of violations increases from \$35,000,000 to \$105,000,000. This final rule satisfies the requirements in the FAST Act necessary for the increases in the maximum amount of civil penalties that NHTSA can collect for violations of the Safety Act to become effective.

## **II. Background and Summary of Notice of Proposed Rulemaking**

### **A. Background**

NHTSA historically has considered the gravity of the violation when compromising civil penalties. Consideration of the gravity of the violation has involved a variety of factors, depending on the case. The factors that NHTSA has considered have included the nature of the violation, the nature of a safety-related defect or noncompliance with Federal Motor Vehicle Safety Standards (“FMVSS”), the safety risk, the number of motor vehicles or items of motor vehicle equipment involved, the delay in submitting a defect and noncompliance information report, the information in the possession of the violator regarding the violation, other actions by the violator, and the relationship of the violation to the integrity and administration of the agency’s programs.<sup>2</sup>

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<sup>2</sup>See, e.g., April 5, 2010 Demand Letter for TQ10-002 available at <ftp://ftp.nhtsa.dot.gov/TQ10-002/TQ10-002%20Resumes/TQ10-002%20Closing%20Resume/TQ10-002%20Sticky%20Pedal%20Demand%20Letter%204-5-10%20FINAL%20Signed.pdf> (In discussing the gravity of Toyota’s apparent violations as severe and potentially life-threatening, the agency stated, “Toyota determined that the accelerator pedals installed on

In the past, NHTSA also has considered the size of the violator when compromising civil penalties. With respect to civil penalties involving small businesses, among the factors that have been considered are the violator's ability to pay, including its ability to pay over time, and any effect on the violator's ability to continue to do business.

### **B. Civil Penalties Procedures in NPRM**

The NPRM stated that Section 31203 of MAP-21 confirmed that NHTSA, through the authority delegated from the Secretary of Transportation pursuant to 49 CFR 1.95, may impose civil penalties as well as compromise them. NHTSA stated that the Secretary's authority to impose civil penalties is confirmed by both the language and the legislative history of MAP-21. The NPRM also proposed administrative procedures for NHTSA to follow in exercising the Secretary's authority to impose civil penalties.

Given the passage of the FAST Act, and its requirements, NHTSA has decided to finalize the procedures for imposing civil penalties at a later time in order to allow NHTSA to issue the final rule providing an interpretation of the penalty factors in Section 31203 of MAP-21 in an expedited manner and to give the agency additional time to consider the comments it received

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a significant number of vehicles sold and leased in the United States contained a safety-related defect as evidenced by, among other things, its issuance of a Technical Instruction and production improvement information on September 29, 2009, in 31 countries across Europe. Toyota knew or should have known that the same or substantially similar accelerator pedals were installed on approximately 2.3 million vehicles sold or leased in the United States, and continued to sell and lease vehicles equipped with a defective accelerator pedal for months after this determination. Nonetheless, Toyota Motor Corporation affirmatively-and inexplicably-instructed Toyota Motor Engineering and Manufacturing North America, Inc. *not* to implement an Engineering Change Instruction in the U.S. market. Toyota gave this instruction despite the fact that it had issued similar or identical instructions in Canada and Europe and knew that the very same issues that prompted the European and Canadian actions existed on a significant number of vehicles in the United States. The result of these decisions by Toyota was to expose millions of American drivers, passengers and pedestrians to the dangers of driving with a defective accelerator pedal that could result, in Toyota's words, in 'sticky accelerator pedals, sudden rpm increase and/or sudden vehicle acceleration.'").

regarding the administrative procedures. Issuing the final rule providing an interpretation of the penalty factors in MAP-21 in an expedited manner will allow NHTSA to more quickly enforce the increased maximum civil penalties in the FAST Act against violators of the Safety Act. Therefore, NHTSA has decided to include only the interpretation of the civil penalty factors in this final rule.

### **C. Civil Penalty Factors in the NPRM**

The proposed interpretation of the penalty factors in MAP-21 was based on the language of the statute, informed by NHTSA's years of day-to-day enforcement experience, and the manner in which NHTSA has compromised penalties in the past. In the NPRM, we stated that MAP-21 included both general factors and nine discretionary factors for NHTSA to consider if appropriate. The NPRM provided an interpretation of the general and discretionary factors. For each of the nine discretionary penalty factors, we provided an explanation of NHTSA's proposed interpretation.

We received four comments regarding our proposed interpretation of the penalty factors in the NPRM.<sup>3</sup> Generally the commenters were supportive of NHTSA's proposed interpretation of the penalty factors. The commenters did comment on how the penalty factors should be applied and NHTSA's interpretation of some of the nine discretionary factors. All commenters submitted comments regarding how the agency should consider the "knowledge of the person charged with the violation," when determining the amount of civil penalty or compromise. The

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<sup>3</sup> We received comments regarding our proposed interpretation of the civil penalty factors in MAP-21 from Advocates for Highway and Auto Safety ("Advocates"), the Association of Global Automakers, Inc. ("Global"), the Alliance of Automobile Manufacturers ("the Alliance"), and the National Automobile Dealers Association ("NADA").

comments are addressed below.

### **III. The Final Rule**

The MAP-21 legislation set forth civil penalty factors to be considered by NHTSA in determining the amount of a civil penalty or compromise. The general provision in the amended section 30165(c) calls for consideration of the nature, circumstances, extent and gravity of the violation. The term “violation” refers to any violation addressed by 49 U.S.C. 30165(a)(1), (2), (3), or (4). The Secretary has the discretion to consider the totality of the circumstances surrounding a violation.

#### Comments

NADA stated that NHTSA should consult with the United States Department of Justice on the appropriateness of NHTSA’s proposed penalty factors because the Department of Justice understands how these civil penalty factors should be applied in civil actions. NADA also stated that NHTSA’s interpretation of the penalty factors should provide both positive and negative impacts that the factors may have on the amount of a civil penalty sought by NHTSA for violations of the Safety Act.

#### Agency Response

MAP-21 directs NHTSA, by delegation from the Secretary of Transportation, to issue a rule providing an interpretation of the civil penalty factors to consider in determining the amount of civil penalty or compromise. As we stated in the NPRM, NHTSA, through delegation from the Secretary, has the authority to assess and compromise civil penalties.

NHTSA has addressed this comment because it works closely with the Justice Department on a range of civil and criminal enforcement matters. NHTSA’s interpretation of the

civil penalty factors is based on its day-to-day enforcement experience and previous experience compromising civil penalties for violations of the Safety Act, which includes its experience and counsel from the Justice Department. This is more than sufficient to provide the interpretation of the penalty factors in this final rule.

NHTSA believes the interpretation of the penalty factors in this final rule provides both aggravating and mitigating factors and that the interpretation will provide useful information to manufacturers regarding actions that will help them avoid civil penalties.

#### **A. General Penalty Factors**

In the NPRM, NHTSA proposed to interpret the nature of the violation to mean the essential, fundamental character or constitution of the violation.<sup>4</sup> This includes, but is not limited to, the nature of the defect (in a case involving a safety-related defect) or noncompliance. It also includes what the violation involves, for example, a violation of the Early Warning Reporting (“EWR”) requirements, the failure to provide timely notification of a safety-related defect or noncompliance, the failure to remedy, the lack of a reasonable basis for certification to the FMVSS, the sale of unremedied vehicles, or the failure to respond fully and timely to a request issued under 49 U.S.C. 30166.

Second, we proposed to interpret the circumstances of the violation to mean the context, facts, and conditions having bearing on the violation.<sup>5</sup> This includes whether the manufacturer has been recalcitrant or shown disregard for its obligations under the Safety Act.

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<sup>4</sup> See e.g. *Webster’s Third New International Dictionary Unabridged*, 1507 (defining nature as “the essential character or constitution of something”); *Black’s Law Dictionary* (10<sup>th</sup> ed. 2014) (defining nature as “[a] fundamental quality that distinguishes one thing from another; the essence of something.”).

<sup>5</sup> See e.g. *Ehlert v. United States*, 422 F.2d 332, 335 (9th Cir. 1970) (Duniway, J. concurring) (stating that Webster’s New International Dictionary, 2d ed. defines “circumstances” as “conditions under which an act or event takes place or with respect to which a fact is determined.”).

Third, we proposed to interpret the extent of the violation to mean the range of inclusiveness over which the violation extends including the scope, time frame, and/or the degree of the violation.<sup>6</sup> This includes the number of violations and whether the violations are related or unrelated.

Finally, we proposed to interpret the gravity of the violation to mean the importance, significance, and/or seriousness of the violation.<sup>7</sup>

### Comments

Global asserts that a good faith disagreement over whether a safety defect exists should not be used to show that a manufacturer has been recalcitrant or shown disregard for its Safety Act obligations.

### Agency Response

A disagreement over whether a defect exists, even one in good faith, is not a mitigating factor in a civil penalty case, and Global's comments do not support otherwise. Manufacturers are aware that if they oppose NHTSA's request to conduct a recall because they disagree with NHTSA over the existence of a defect or non-compliance, they are at risk of civil penalties.<sup>8</sup> Therefore, because we do not believe that disagreement over whether a defect exists is a mitigating factor regarding a manufacturer's liability for civil penalties and because we did not

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<sup>6</sup> See e.g. *Webster's Third New International Dictionary Unabridged*, 805 (defining extent as the "range (as of inclusiveness or application) over which something extends.").

<sup>7</sup> See e.g. *Black's Law Dictionary* (10<sup>th</sup> ed. 2014) (defining "gravity" as "[s]eriousness of harm, an offense, etc., as judged from an objective, legal standpoint."); *Webster's Third New International Dictionary Unabridged*, 993 (defining gravity as the importance, significance, or seriousness).

<sup>8</sup> See *United States v. General Motors Corp.*, 565 F.2d 754, 760-61 (D.C. Cir. 1977) ("One who refuses to pay when the law requires that he shall, acts at his peril, in the sense that he must be held to the acceptance of any lawful consequences attached to the refusal. It is no answer in such circumstances that he has acted in good faith.").

receive any other comments regarding the general factors, we are adopting the interpretation proposed in the NPRM.

## **B. Discretionary Penalty Factors**

In the NPRM, we stated that the penalty factors listed in 49 U.S.C. 30165(c)(1) through (9) are discretionary factors that NHTSA may apply in determining the amount of civil penalty or compromise.

### Comments

Global asserts that the nine factors listed in 49 U.S.C. 30165(c)(1)-(9) are mandatory and each factor must be considered by NHTSA if the factor is raised by a person subject to civil penalties for violations of the Safety Act. Global claims that the phrase “determination shall include” indicates the nine penalty factors are mandatory, not discretionary.

### Agency Response

NHTSA continues to hold the position that the nine factors listed in 49 U.S.C. 30165(c)(1)-(9) are discretionary and Global’s comments, and the record in this rulemaking, do not suggest otherwise. MAP-21 states that NHTSA’s “determination shall include, as appropriate” the nine factors. NHTSA contends that by including the words “as appropriate,” Congress intended to provide NHTSA the discretion to determine which of the nine factors are relevant to a particular civil penalty case otherwise the phrase “as appropriate” would be superfluous.<sup>9</sup> Thus, the final rule continues to state that the nine factors in 49 U.S.C. 30165(c)(1)-(9) are discretionary.

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<sup>9</sup> *Clark v. Rameker*, 134 S. Ct. 2242, 2248 (2014) (stating that “a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous”).

## **1. The nature of the defect or noncompliance.**

We proposed to interpret “the nature of the defect or noncompliance,” 49 U.S.C. 30165(c)(1), to mean the essential, fundamental characteristic or constitution of the safety-related defect or noncompliance. This is consistent with the dictionary definition of “nature.”<sup>10</sup> “Defect” is defined at 49 U.S.C. 30102(a)(2) as including “any defect in performance, construction, a component, or material or a motor vehicle or motor vehicle equipment.” “Noncompliance” under this statutory factor includes a noncompliance with an FMVSS, as well as other violations subject to penalties under 49 U.S.C. 30165. Noncompliance may include, but is not limited to, noncompliance(s) with the FMVSS; the manufacture, sale, or importation of noncomplying motor vehicles and equipment or defective vehicles or equipment covered by a notice or order regarding the defect; failure to certify or have a reasonable basis to certify that a motor vehicle or item of motor vehicle equipment complies with applicable motor vehicle safety standards; failure to maintain records as required; failure to provide timely notification of defects and noncompliances with the FMVSS; failure to follow the notification procedures set forth in 49 U.S.C. 30119 and regulations prescribed thereunder; failure to remedy defects and noncompliances pursuant to 49 U.S.C. 30120 and regulations prescribed thereunder; making safety devices and elements inoperative; failure to comply with regulations relating to school buses and school bus equipment; failure to comply with Early Warning Reporting

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<sup>10</sup> See e.g. *Webster’s Third New International Dictionary Unabridged*, 1507 (defining nature as “the essential character or constitution of something”); *Black’s Law Dictionary* (9<sup>th</sup> ed. 2009) (defining nature as “[a] fundamental quality that distinguishes one thing from another; the essence of something.”).

requirements; and/or the failure to respond to an information request, Special Order, General Order, subpoena or other required reports.<sup>11</sup>

When considering the nature of a safety-related defect or noncompliance with an FMVSS in a motor vehicle or motor vehicle equipment, NHTSA may examine the conditions or circumstances under which the defect or noncompliance arises, the performance problem, and actual and probable consequences of the defect or noncompliance. When considering the nature of the noncompliance with the Safety Act or a regulation promulgated thereunder, NHTSA may examine the circumstances surrounding the violation.

For example, NHTSA has a process by which a manufacturer can petition for an exemption from the notification and remedy requirements of 49 U.S.C. 30118 and 30120 on the basis that a noncompliance is inconsequential to motor vehicle safety. 49 U.S.C. 30118(d) and 30120(h), 49 CFR Part 556. In the NPRM we stated that if a petition for inconsequential noncompliance is granted, then it could serve as mitigation under this factor.

### Comments

The Alliance asserts that the fact that a non-compliance is inconsequential to motor vehicle safety should not be a mitigating factor in determining the amount of a civil penalty. The Alliance believes that an inconsequential non-compliance should never be the subject of a civil penalty proceeding.

NADA asserts that considering the nature of a defect or non-compliance involves weighing the relative seriousness of the defect or non-compliance. NADA believes that not all defects and non-compliances have the same significance to safety.

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<sup>11</sup> The foregoing list is intended to be illustrative only, and is not exhaustive.

## Agency Response

As a general matter, it is unlikely that NHTSA would grant a petition for inconsequential noncompliance and then seek a civil penalty for a violation of the Safety Act. However, NHTSA believes such a situation would be an example of a situation with a lower degree of seriousness, where reduced civil penalties would be appropriate.

As stated in the NPRM, when considering the nature of a defect or noncompliance NHTSA will consider the conditions or circumstances under which the defect or noncompliance arises, the performance problem, and actual and probable consequences of the defect or noncompliance. We believe that these factors will give an indication of the seriousness of the defect or noncompliance. Therefore, no changes to the final rule are necessary in response to NADA's comment.

### **2. Knowledge by the respondent of its obligations under this chapter.**

In the NPRM, we proposed to interpret the “knowledge by the . . . [respondent] of its obligations under this chapter,” 49 U.S.C. 30165(c)(2), as all knowledge, legal and factual, actual, presumed and constructive, of the respondent of its obligations under 49 U.S.C. Chapter 301. We proposed that if a respondent is other than an individual, including but not limited to a corporation or a partnership, then the knowledge of an employee or employees of that non-natural person be imputed to that non-natural person. We proposed to interpret the knowledge of an agent as being imputed to a principal. We proposed that a non-natural person, such as a corporation, with multiple employees will be charged with the knowledge of each employee, regardless of whether the employees have communicated that knowledge among each other or to a decision maker for the non-natural person.

We stated in the NPRM, that under this proposed interpretation of “knowledge,” delays resulting from, or caused by, a manufacturer’s internal reporting processes would not excuse a manufacturer’s failure to report a defect or noncompliance to NHTSA. We stated that NHTSA may examine such factors as whether the respondent began producing parts to remedy a particular defect or noncompliance with an FMVSS prior to reporting the defect or noncompliance with an FMVSS to NHTSA. NHTSA may also consider communication between the respondent (e.g. a manufacturer) and other entities such as dealers and owners in determining its knowledge of a violation. NHTSA may consider the information NHTSA provided to the respondent, including notification of apparent noncompliance, information on the recall process, information on governing regulations, and information on consequences of failure to comply with regulatory requirements. NHTSA may also consider whether the respondent has been proactive in discerning other potential safety issues, and whether it has attempted to mislead the agency or conceal its full information, including its knowledge of a defect or noncompliance.

#### Comments

Advocates supports NHTSA proposal that knowledge of employees be attributed to the corporation regardless of whether employees have communicated such knowledge to the corporation.

The Alliance does not believe that it is reasonable to input the knowledge of employees to the corporation in determining whether a manufacturer fulfilled its regulatory obligations in a timely matter. The Alliance states that manufacturers must be allowed to follow reasonable processes for processing information and given time to conduct internal investigations.

Therefore, in evaluating whether a company fulfilled its regulatory obligations, NHTSA should evaluate the reasonableness of the company's internal business process for, and the circumstances of, each matter at issue.

Global states that there are circumstances when the knowledge of employees should not be attributed to the corporation such as when an employee acts illegally or against corporate policy. The extent to which a manufacturer has received or not received appropriate information from the supply chain should be a mitigating factor. Global does not believe that production of parts or communications to the field should automatically suggest knowledge of a safety defect because a manufacturer may initiate these activities while still investigating whether the issue is a safety defect. Global also believes that legitimate misunderstanding of laws and regulations should be a mitigating factor.

NADA believes that NHTSA should take into account the fact that a person's lack of knowledge may be excusable.

#### Agency Response

NHTSA agrees that in instances in which the significance of a piece of information, by itself, would not necessarily establish a defect or noncompliance, an individual employee's knowledge of this information is less relevant than the corporation's processes for gathering information and communicating it to decision makers within the company. NHTSA agrees with the Alliance that in assessing the knowledge of a corporation, NHTSA should assess the corporation's process for gathering information in support of internal investigations of potential safety issues and making decisions regarding defects and noncompliances. In making such an assessment, NHTSA will consider whether the corporation's processes are designed to gather

information and provide it to decision makers in a timely manner, whether employees are trained on these processes and how to follow them, whether the corporation conducts periodic reviews of its processes to ensure that its employees are following the processes, and whether the process was followed in the instance of the violation of the Safety Act that gave rise to the civil penalty case at hand.

NHTSA believes that there are cases in which it is appropriate to impute knowledge to the corporation when an employee has acted illegally or against corporate policy. Whether NHTSA attributes the illegal or unauthorized actions of employees to the corporation will depend on the employee's position within the company, the degree to which the corporation monitored for illegal or unauthorized activity by employees, the degree to which employees were made aware of their regulatory responsibilities, and the seriousness of the defect or noncompliance at issue.

NHTSA agrees with Global that in assessing the knowledge of a corporation NHTSA should consider the information that a corporation received from the supply chain. This includes the extent to which the corporation has policies that require suppliers to make information available and the extent that it monitors suppliers' compliance with these policies.

NHTSA believes that ordering or producing replacement parts and communications to the field can show that a manufacturer had knowledge of a defect or noncompliance. Whether this fact, by itself, is dispositive of a corporation's knowledge of a defect or noncompliance will depend on the other actions taken by a corporation to investigate a defect or noncompliance and the timing of those actions.

A corporation's misunderstanding of its regulatory responsibilities will rarely be a mitigating factor in a civil penalty case. In the NPRM, however, NHTSA did state that it would consider whether an entity was a new manufacturer in assessing the entity's knowledge. In the case of a new manufacturer, a corporation's misunderstanding regarding its regulatory responsibilities could be a mitigating factor, depending on the circumstances.

In view of the comments, and on this record, NHTSA is amending the language in the final rule to clarify that the agency has the discretion to attribute knowledge of employees to the corporation when appropriate but is not required to do so.

### **3. The severity of the risk of injury.**

We proposed to interpret the "severity of the risk of injury," 49 U.S.C. 30165(c)(3), as the gravity of exposure to potential injury, including the potential for injury or death of drivers, passengers, other motorists, pedestrians and others. The severity of the risk includes the likelihood of an injury occurring and the population group exposed to that risk. We stated that the severity of the risk of injury may depend on the component of a motor vehicle that is defective or noncompliant with an FMVSS.

#### Comments

Global believes that the absence of injuries should be considered a mitigating factor in severity of the risk of injury. NADA believes that when considering "the severity of the risk of injury" of a violation of the Safety Act, NHTSA should take into account whether the violation is likely to cause a crash that could lead to an injury or death versus whether the violation is likely to lead to an increase in the likelihood of injury or death should a crash occur (crash causation versus reduced injury/death prevention).

## Agency Response

NHTSA disagrees that the absence of injury should be a mitigating factor when considering the risk of injury. NHTSA believes that it is possible, especially in the case of a defect or noncompliance in a small number of vehicles, for the risk of injury from a defect or noncompliance to be high even if the defect or noncompliance has not yet caused any injuries, and no commenter provided credible evidence, or applicable law, to suggest otherwise.

NHTSA does not believe that it would be appropriate, when considering the risk of injury caused by a defect or noncompliance, to differentiate on the basis of whether a defect or noncompliance increases the risk of a crash versus whether the defect or noncompliance increases the likelihood that a death or injury will occur as a result of a crash. NHTSA contends that both types of defects or non-compliances have the potential to be equally severe. After considering the comments we have decided to finalize the proposed interpretation of this factor.

### **4. The occurrence or absence of injury.**

NHTSA proposed to interpret “the occurrence or absence of injury,” 49 U.S.C. 30165(c)(4), as whether injuries or deaths have occurred as a result of a defect, noncompliance, or other violation of the Safety Act or implementing regulations. NHTSA proposed also to consider allegations of death or injury. When appropriate, NHTSA may consider deaths or injuries that are alleged to have occurred as a result of a defect, noncompliance, or other violation of the Safety Act or implementing regulations regardless of whether NHTSA has been able to establish that the defect, noncompliance, or violation was the definitive cause of the death or injury.

In evaluating this factor, it is important to emphasize that the absence of deaths or injuries is not dispositive of the existence of a defect or noncompliance or a person's liability for civil penalties.

Advocates supports the agency's proposal that the absence of death or injury is not dispositive of the existence of defect or liability for civil penalties. In light of the comments we received regarding this factor, we are finalizing the proposed interpretation.

**5. The number of motor vehicles or items of motor vehicle equipment distributed with the defect or noncompliance.**

NHTSA proposed to interpret "the number of motor vehicles or items of motor vehicle equipment distributed with the defect or noncompliance," 49 U.S.C. 30165(c)(5), as referring to the total number of vehicles or items of motor vehicle equipment distributed with the defect or noncompliance with an FMVSS, or the percentage of the vehicles or items of motor vehicle equipment of the subject population with the defect or noncompliance with an FMVSS. We proposed that NHTSA may look not only at absolute numbers of motor vehicles or items of motor vehicle equipment. Rather it may also take into account the portion of a vehicle or equipment population with the defect, noncompliance, or other violation. In applying this factor, NHTSA may also consider the portion of motor vehicles that contain the defect or noncompliance with an FMVSS as a percentage of the manufacturer's total annual production of vehicles if multiple make, model and model years of motor vehicles are affected by the defect or noncompliance with an FMVSS.

Further, we proposed that NHTSA may choose to make a distinction between those defective or noncompliant products distributed in commerce that consumers received, and those defective or noncompliant products distributed in commerce that consumers have not received.

We did not receive any comments regarding our proposed interpretation of this factor so we are finalizing the proposed interpretation of this factor.

**6. Actions taken by the respondent to identify, investigate, or mitigate the condition.**

In the NPRM, NHTSA proposed to interpret “actions taken by the . . . [respondent] to identify, investigate, or mitigate the condition,” 49 U.S.C. 30165(c)(6), as actions actually taken, the time frame when those actions were taken, what those actions involved and how they ameliorated or otherwise related to the condition, what remained after those actions were taken, and the speed with which the actions were taken. NHTSA proposed that in assessing a respondent’s “actions,” a failure to act may also be considered.

We stated that, under this factor, NHTSA may consider whether the respondent has been diligent in endeavoring to meet the requirements of the Safety Act and regulations thereunder, including whether it has set up processes to facilitate timely and accurate reporting, and whether it has audited such systems. NHTSA may also take into account the investigative activities the respondent has undertaken relating to the scope of the issues identified by NHTSA. The agency may also consider whether the respondent delayed in reporting a safety-related defect or a noncompliance with an FMVSS (a person is required to file a 49 CFR Part 573 report not more than five working days after a person knew or should have known of the safety-related defect or noncompliance with an FMVSS). NHTSA may also consider whether the respondent remedied the safety-related defect or noncompliance with an FMVSS in a timely manner. For instance, NHTSA may consider whether a recall remedy is adequate, whether a new safety-related defect or noncompliance with an FMVSS arose from an inadequate recall remedy, and whether the

scope of a recall was adequate. NHTSA may also consider the timeliness and adequacy of the respondent's communications with owners and dealers.

### Comments

Global believes that a manufacturer's internal procedures should be considered when considering "actions taken to identify investigate, or mitigate the condition."

### Agency Response

As stated above, when considering the actions taken by the respondent, NHTSA may consider whether the respondent has set up systems to facilitate timely and accurate reporting, and whether it has audited such systems. NHTSA also stated that when considering the knowledge of the respondent, it will consider whether employees have been trained on those systems, and whether those systems were followed. It is equally appropriate to consider the aforementioned factors when assessing the actions taken to by the respondent to identify, investigate or mitigate the defect or noncompliance. Therefore, NHTSA has revising the proposed rule to make clear that we will consider a corporation's internal processes for reporting information to NHTSA and investigating potential safety issues under this factor.

#### **7. The appropriateness of such penalty in relation to the size of the business of the respondent, including the potential for undue adverse economic impacts.**

NHTSA takes the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) into account prior to setting any final penalty amount.<sup>12</sup> This policy will continue in light of the MAP-21 amendments to 49 U.S.C. 30165(c).

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<sup>12</sup> See NHTSA, Civil Penalty Policy Under the Small Business Regulatory Enforcement Fairness Act, 62 Fed. Reg. 37115 (July 10, 1997).

Upon a showing by a violator that it is a small entity, NHTSA will make appropriate adjustments to the proposed penalty or settlement amount (although certain exceptions may apply).<sup>13</sup> If the respondent asserts it is a “small business,” NHTSA expects the respondent to provide the supporting documentation. Under the Small Business Administration’s standards, an entity is considered “small” if it is independently owned and operated and is not dominant in its field of operation,<sup>14</sup> or if its number of employees or the dollar volume of its business does not exceed specific thresholds.<sup>15</sup> For example, 13 CFR Section 121.201 specifically identifies as “small entities” manufacturers of motor vehicles, passenger car bodies, and motor homes that employ 1,000 people or less, manufacturers of motor vehicle parts and accessories that employ 750 people or less, automobile and tire wholesalers that employ 100 people or less, new car dealers that employ 200 people or less and automotive parts and accessory stores with annual receipts less than \$15 million.

We proposed to interpret “potential for undue adverse economic impacts,” 49 U.S.C. 30165(c)(7), as the possibility that payment of a civil penalty amount would affect the ability of the respondent to continue to operate. We also stated that NHTSA may consider a respondent’s ability to pay, including in installments over time, and any effect of a penalty on that person’s ability to continue to do business. The ability of a business to pay a penalty is not dictated by its size. In some cases for small businesses, however, these two considerations may relate to one another. NHTSA also may consider relevant financial factors such as capitalization, liquidity, solvency, and profitability to determine a small business’ ability to pay a penalty. NHTSA may

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<sup>13</sup> *Id.* at 37117.

<sup>14</sup> *Id.* at 37115.

<sup>15</sup> *Id.*

also consider whether the business has been deliberately undercapitalized. The burden to present sufficient evidence relating to a charged business' size and ability to pay rests on that business. More generally, in cases where the respondent claims that it is financially unable to pay the civil penalty or that the penalty would have undue adverse economic impacts, the burden of proof is on the respondent. In the case of closely-held or privately-held companies, NHTSA may provide the respondent the opportunity to submit personal financial documentation for consideration.

### Comments

Advocates supports the agency's proposal that the respondent is responsible for establishing the severity of the impact of the financial penalty.

Global believes that NHTSA's proposed factor for considering undue adverse economic impacts only reflects the most extreme economic impacts. Global believes that for cases involving less severe violations, NHTSA should consider economic hardship to the company's competitive position caused by a civil penalty.

### Agency Response

NHTSA believes that for less severe violations consideration of other factors under 49 U.S.C. 30165(c) will reduce the amount of potential penalty and also the financial impact of the penalty. For less severe violations, NHTSA will also still consider whether the company should be permitted to pay the civil penalty over time. For these reasons, we are adopting the proposed interpretation of this factor in the NPRM without changes.

### **8. Whether the respondent has been assessed civil penalties under this section during the most recent 5 years.**

We proposed to interpret "whether the [respondent] has been assessed civil penalties under this section during the most recent 5 years," 49 U.S.C. 30165(c)(8), as including an

assessment of civil penalties, a settlement agreement containing a penalty, or a consent order or a lawsuit involving a penalty or payment of a civil penalty in the most recent 5 years from the date of the alleged violation, regardless of whether there was any admission of a violation or of liability under 49 U.S.C. 30165.

#### Comment

Advocates believes that repeated violations of the Safety Act merit the imposition of the maximum fine permitted by law.

Global requests that NHTSA consider the significance of previous violations of the Safety Act and whether previous violations are related to the violation at issue. Global believes that in some instances prior penalties may have no bearing on whether an enhanced penalty should be imposed.

#### Agency Response

NHTSA believes that repeated violations of the Safety Act, even if they are unrelated, can be indicative of a company's failure to foster a culture of safety and compliance. Therefore, NHTSA will continue to take into account all previous civil penalties paid by a company in the last five years regardless of whether they are related to the present violation giving rise to liability for civil penalties.

#### **9. Other appropriate factors.**

We proposed to interpret other appropriate factors as factors not specifically identified in Section 31203(a) of MAP-21 which are appropriately considered, including both aggravating and mitigating factors.

Such factors may include, but are not limited to:

- a. A history of violations. NHTSA may increase penalties for repeated violations of the Safety Act or implementing regulations, or for a pattern or practice of violations.
- b. An economic gain from the violation. NHTSA may consider whether the respondent benefitted economically from a violation, including a delay in complying with the Safety Act, a failure to comply with the Safety Act, or a delay or failure to comply with the regulations thereunder.
- c. Effect of the respondent's conduct on the integrity of programs administered by NHTSA. The Agency's programs depend in large part on timely and accurate reporting and certification by manufacturers. Therefore, NHTSA may consider whether a person has been forthright with the Agency. NHTSA may also consider whether a person has attempted to mislead the Agency or conceal relevant information. For instance, NHTSA may consider whether a manufacturer has provided accurate and timely statements consistent with its Early Warning Reporting obligations. NHTSA may also consider whether a registered importer has provided accurate conformity packages and/or other information consistent with 49 U.S.C. 30141-30147 and the implementing regulations.
- d. Responding to requests for information or remedial action. NHTSA may consider a person's failure to respond in a timely and complete fashion to requests from NHTSA for information or for remedial action. NHTSA may also consider whether the agency needed to make multiple requests to receive requested information.

Comments

NADA stated that under this factor NHTSA should include potential penalty waivers for first time violators and consider the speed with which a person who has violated the Safety Act acts to remedy the violation.

#### Agency Response

NHTSA does not believe that it would be appropriate to establish penalty waivers for first time violators in the context of this rulemaking. Often when NHTSA seeks a civil penalty from an entity for the first time, it is because a significant violation has occurred or because the entity has exhibited a pattern of repeated violations.

NHTSA will consider the speed with which a violator has acted to remedy a violation when considering an entity's response to a request for remedial action from NHTSA.

#### **IV. Codification of Other MAP-21 Penalty Changes in 49 CFR 578**

MAP-21 increased the penalties and damages for odometer fraud. MAP-21 31206, 126 STAT. 761. MAP-21 also established civil penalties for violations of corporate responsibility provisions in 49 U.S.C. 30166 of \$5,000 per day and a maximum penalty of \$1,000,000. MAP-21 31304(b), 126 STAT. 764. These new penalties and increased penalties and damages are all currently in effect. NHTSA is amending its penalty regulation, 49 CFR 578.6, to conform it to the MAP-21 amendments.

#### **V. Rulemaking Analyses and Notices**

##### **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 was not reviewed under Executive Order 12866 or

Executive Order 13563. This action provides an interpretation for how NHTSA will apply the civil penalty factors in 49 U.S.C. 30165. Because this rulemaking only seeks to explain the process by which the agency determines and resolves civil penalties and does not change the number of entities subject to civil penalties, the impacts of the rule are limited. Therefore, this rulemaking has been determined to be not “significant” under the Department of Transportation’s regulatory policies and procedures and the policies of the Office of Management and Budget.

### **Regulatory Flexibility Act**

We have also considered the impacts of this notice under the Regulatory Flexibility Act. I certify that this rule is not expected to have a significant economic impact on a substantial number of small entities. The following provides the factual basis for this certification under 5 U.S.C. 605(b). The amendments almost exclusively affect manufacturers of motor vehicles and motor vehicle equipment.

SBA uses size standards based on the North American Industry Classification System (“NAICS”), Subsector 336--Transportation Equipment Manufacturing, which provides a small business size standard of 1,000 employees or fewer for automobile manufacturing businesses. Other motor vehicle-related industries have lower size requirements that range between 100 and 750 employees.

For example, according to the SBA coding system, businesses that manufacture truck trailers, travel trailers/campers, and vehicular lighting equipment, qualify as small businesses if they employ 500 or fewer employees. Many small businesses are subject to the penalty provisions of 49 U.S.C. 30165 and therefore may be in some way affected by the civil penalty

factors in this final rule. However, the impacts of this rulemaking on small businesses are minimal, as NHTSA will continue to consider the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).<sup>16</sup>

### **Small Business Regulatory Enforcement Fairness Act (SBREFA)**

This final rule would not materially affect our civil penalty policy toward small businesses. Because NHTSA will continue to consider SBREFA and consider the business' size including the potential that a civil penalty would have undue adverse economic impacts on a small business before assessing or compromising a civil penalty, the impacts of this rulemaking on small businesses are minimal.

### **Executive Order 13132 (Federalism)**

Executive Order 13132 requires NHTSA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Under Executive Order 13132, the agency may not issue a regulation with Federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local officials early in the process of developing the proposed regulation.

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<sup>16</sup> See NHTSA, Civil Penalty Policy Under the Small Business Regulatory Enforcement Fairness Act, 62 Fed. Reg. 37115 (July 10, 1997).

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

This rule generally would apply to private motor vehicle and motor vehicle equipment manufacturers (including importers), entities that sell motor vehicles and equipment and motor vehicle repair businesses. Thus, Executive Order 13132 is not implicated and consultation with State and local officials is not required.

### **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 would not have a \$100 million effect, no Unfunded Mandates assessment will be prepared.

### **Executive Order 12988 (Civil Justice Reform)**

With respect to the review of the promulgation of a new regulation, section 3(b) of Executive Order 12988, “Civil Justice Reform” (61 FR 4729; Feb. 7, 1996), requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect; (2) clearly specifies the effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct, while promoting simplification and burden reduction; (4) clearly specifies the retroactive effect, if any; (5) specifies whether administrative proceedings are to be required before parties file suit in court;

(6) adequately defines key terms; and (7) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. This document is consistent with that requirement.

The rule lists the mandatory and discretionary factors for NHTSA to consider when determining the amount of civil penalty or compromise. This rule would not have retroactive effect.

### **Paperwork Reduction Act**

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

### **Regulatory Identifier Number (RIN)**

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

### **Privacy Act**

Anyone is able to search the electronic form of all comments received into any of our 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 19477-78).

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

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

### **Regulatory Text**

For the reasons set forth in the preamble, NHTSA amends 49 CFR Part 578 as follows:

#### **PART 578 – CIVIL AND CRIMINAL PENALTIES**

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

Authority: Pub. L. No. 101–410, Pub. L. No. 104–134, Pub. L. No. 112-141, 49 U.S.C. 322, 30165, 30170, 30505, 32308, 32309, 32507, 32709, 32710, 32902, 32912, and 33115 as amended; delegation of authority at 49 CFR 1.81 and 1.95.

2. Revise §§ 578.1, 578.2 and 578.3 to read as follows:

##### **§ 578.1 Scope**

This part specifies the civil penalties for violations of statutes and regulations administered by the National Highway Traffic Safety Administration (NHTSA), as adjusted for inflation. This part also sets forth NHTSA’s interpretation of the civil penalty factors listed in 49 U.S.C. 30165(c). In addition, this part sets forth the requirements regarding the reasonable time and the manner of correction for a person seeking safe harbor protection from criminal liability under 49 U.S.C. 30170(a).

##### **§ 578.2 Purpose.**

One purpose of this part is to effectuate the remedial impact of civil penalties and to foster compliance with the law by specifying the civil penalties for statutory and regulatory violations, as adjusted for inflation. Another purpose of this part is to set forth NHTSA’s interpretation of the civil penalty factors listed in 49 U.S.C. 30165(c). A third purpose of this

part is to set forth the requirements regarding the reasonable time and the manner of correction for a person seeking safe harbor protection from criminal liability under 49 U.S.C. 30170(a).

**§ 578.3 Applicability.**

This part applies to civil penalties for violations of Chapters 301, 305, 323, 325, 327, 329, and 331 of Title 49 of the United States Code or a regulation prescribed thereunder. This part applies to civil penalty factors under section 30165(c) of Title 49 of the United States Code. This part also applies to the criminal penalty safe harbor provision of section 30170 of Title 49 of the United States Code.

3. Amend § 578.4 by adding in alphabetical order definitions of “person” and “respondent” to read as follows:

**§ 578.4 Definitions.**

\* \* \* \* \*

*Person* means any individual, corporation, company, limited liability company, trust, association, firm, partnership, society, joint stock company, or any other entity.

*Respondent* means any person charged with liability for a civil penalty for a violation of sections 30112, 30115, 30117 through 30122, 30123(a), 30125(c), 30127, 30141 through 30147, or 30166 of Title 49 of the United States Code or a regulation prescribed under any of those sections.

4. Amend § 578.6 by adding paragraph (a)(4) and revising paragraph (f) to read as follows:

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

(a) \* \* \*

(4) *Section 30166(o)*. A person who knowingly and willfully submits materially false or misleading information to the Secretary, after certifying the same as accurate under the process established pursuant to section 30166(o), shall be subject to a civil penalty of not more than \$5,000 per day. The maximum penalty under this paragraph for a related series of daily violations is \$1,000,000.

\* \* \* \* \*

(f) *Odometer tampering and disclosure*. (1) A person that violates 49 U.S.C. Chapter 327 or a regulation prescribed or order issued thereunder is liable to the United States Government for a civil penalty of not more than \$10,000 for each violation. A separate violation occurs for each motor vehicle or device involved in the violation. The maximum civil penalty under this paragraph for a related series of violations is \$1,000,000.

(2) A person that violates 49 U.S.C. Chapter 327 or a regulation prescribed or order issued thereunder, with intent to defraud, is liable for three times the actual damages or \$10,000, whichever is greater.

\* \* \* \* \*

5. Add § 578.8 to read as follows:

**§578.8 Civil penalty factors under 49 U.S.C. Chapter 301.**

(a) General civil penalty factors. This subsection interprets the terms nature, circumstances, extent, and gravity of the violation consistent with the factors in 49 U.S.C. 30165(c).

(1) Nature of the violation means the essential, fundamental character or constitution of the violation. It includes but is not limited to the nature of a safety-related defect or noncompliance. It also includes what the violation involves.

(2) Circumstances of the violation means the context, facts, and conditions having bearing on the violation.

(3) Extent of the violation means the range of inclusiveness over which the violation extends including the scope, time frame and/or the degree of the violation. This includes the number of violations and whether the violations are related or unrelated.

(4) Gravity of the violation means the importance, significance, and/or seriousness of the violation.

(b) Discretionary civil penalty factors. Paragraph (b) of this section interprets the nine discretionary factors in 49 U.S.C. 30165(c)(1) through (9) that NHTSA may apply in making civil penalty amount determinations.

(1) The nature of the defect or noncompliance means the essential, fundamental characteristic or constitution of the defect or noncompliance. “Defect” is as defined in 49 U.S.C. 30102(a)(2). “Noncompliance” under this factor includes a noncompliance with a Federal Motor Vehicle Safety Standard (“FMVSS”), as well as other violations subject to penalties under 49 U.S.C. 30165. When considering the nature of a safety-related defect or noncompliance with an

FMVSS, NHTSA may examine the conditions or circumstances under which the defect or noncompliance arises, the performance problem, and actual and probable consequences of the defect or noncompliance. When considering the nature of the noncompliance with the Safety Act or a regulation promulgated thereunder, NHTSA may also examine the circumstances surrounding the violation.

(2) Knowledge by the respondent of its obligations under this chapter means all knowledge, legal and factual, actual, presumed and constructive, of the respondent of its obligations under 49 U.S.C. Chapter 301. If a respondent is other than a natural person, including but not limited to a corporation or a partnership, then the knowledge of an employee or employees of that non-natural person may be imputed to that non-natural person. The knowledge of an agent may be imputed to a principal. A person, such as a corporation, with multiple employees may be charged with the knowledge of each employee, regardless of whether the employees have communicated that knowledge among each other, or to a decision maker for the non-natural person.

(3) The severity of the risk of injury means the gravity of exposure to potential injury and includes the potential for injury or death of drivers, passengers, other motorists, pedestrians, and others. The severity of the risk includes the likelihood of an injury occurring and the population group exposed.

(4) The occurrence or absence of injury means whether injuries or deaths have occurred as a result of a defect, noncompliance, or other violation of 49 U.S.C. Chapter 301 or Chapter 5 of Title 49 of the Code of Federal Regulations. NHTSA may also take into consideration

allegations of death or injury. The absence of deaths or injuries shall not be dispositive of manufacturer's liability for civil penalties.

(5) The number of motor vehicles or items of motor vehicle equipment distributed with the defect or noncompliance means the total number of vehicles or items of motor vehicle equipment distributed with the defect or noncompliance with an FMVSS or the percentage of vehicles or items of motor vehicle equipment of the subject population with the defect or noncompliance with an FMVSS. If multiple make, model and model years of motor vehicles are affected by the defect or noncompliance with an FMVSS, NHTSA may also consider the percentage of motor vehicles that contain the defect or noncompliance with an FMVSS as a percentage of the manufacturer's total annual production of vehicles. NHTSA may choose to make distinction between those defective or noncompliant products distributed in commerce that consumers received, and those defective or noncompliant products distributed in commerce that consumers have not received.

(6) Actions taken by the respondent to identify, investigate, or mitigate the condition means actions actually taken, the time frame when those actions were taken, what those actions involved and how they ameliorated or otherwise related to the condition, what remained after those actions were taken, and the speed with which the actions were taken. A failure to act may also be considered. NHTSA may also consider whether the respondent has set up processes to facilitate timely and accurate reporting and timely investigation of potential safety issues, whether it has audited such processes, whether it has provided training to employees on the processes, and whether such processes were followed.

(7) The appropriateness of such penalty in relation to the size of the business of the respondent, including the potential for undue adverse economic impacts. NHTSA takes the Small Business Regulatory Enforcement Fairness Act of 1996 into account. Upon a showing that a violator is a small entity, NHTSA may include, but is not limited to, requiring the small entity to correct the violation within a reasonable correction period, considering whether the violation was discovered through the participation by the small entity in a compliance assistance program sponsored by the agency, considering whether the small entity has been subject to multiple enforcement actions by the agency, considering whether the violations involve willful or criminal conduct, considering whether the violations pose serious health, safety or environmental threats, and requiring a good faith effort to comply with the law. NHTSA may also consider the effect of the penalty on ability of the person to continue to operate. NHTSA may consider a person's ability to pay, including in installments over time, any effect of a penalty on the respondent's ability to continue to do business, and relevant financial factors such as liquidity, solvency, and profitability. NHTSA may also consider whether the business has been deliberately undercapitalized.

(8) Whether the respondent has been assessed civil penalties under this section during the most recent 5 years means whether the respondent has been assessed civil penalties, including a settlement agreement containing a penalty, a consent order or a lawsuit involving a penalty or payment of a civil penalty in the most recent 5 years from the date of the alleged violation, regardless of whether there was any admission of a violation or of liability, under 49 U.S.C. 30165.

(9) Other appropriate factors means other factors not identified above, including but not limited to aggravating and mitigating factors relating to the violation, such as whether there is a history of violations, whether a person benefitted economically from a violation, the effect of the respondent's conduct on the integrity of programs administered by NHTSA, and whether there was a failure to respond in a complete and timely manner to requests for information or remedial action.

Issued in Washington, D.C. on February 17, 2016 under authority delegated pursuant to 49 CFR 1.95.

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Mark R. Rosekind  
Administrator

BILLING CODE: 4910-59-P

[FR Doc. 2016-04311 Filed: 2/29/2016 8:45 am; Publication Date: 3/1/2016]