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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 578

[Docket No. NHTSA-2016-0136]

RIN 2127-AL82

Civil Penalties

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

ACTION: Final rule; response to petition for reconsideration; response to petition for rulemaking.

SUMMARY: On July 5, 2016, NHTSA published an interim final rule updating the maximum civil penalty amounts for violations of statutes and regulations administered by NHTSA, pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. This decision responds to a petition for partial reconsideration of that interim final rule. After carefully considering the issues raised, the Agency grants some aspects of the petition, and denies other aspects. This decision amends the relevant regulatory text accordingly. This decision also responds to a petition for rulemaking on a similar topic.

DATES: Effective date: This rule is effective **[Insert date 30 days after publication in the FEDERAL REGISTER]**.

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SUPPLEMENTARY INFORMATION:

I. Background on CAFE penalties and interim final rule

The National Highway Traffic Safety Administration (NHTSA) administers Corporate Average Fuel Economy (CAFE) standards under 49 U.S.C. 32901 et seq. Vehicle manufacturers that produce passenger cars and light trucks for sale in the United States are subject to these standards,[1] and are subject to civil penalties for failure to meet the standards.[2] Manufacturers generally meet the standards by applying technology to their vehicles to improve their fleet-wide fuel economy, but may also apply credits earned from over-compliance with standards in another year or purchased from another manufacturer. If a manufacturer does not have credits to apply, and does not apply sufficient fuel economy-improving technologies to their vehicles to meet their fleet-wide standards, then that manufacturer is liable for civil penalties.[3]

Congress has prescribed the formula for calculating a civil penalty for violation of a CAFE standard. That formula multiplies the penalty rate times the number of tenths-of-a-mile-per-gallon by which a non-compliant fleet falls short of an applicable CAFE standard, times the number of vehicles in that non-compliant fleet.[4] For many years, the penalty rate has been $5.50 per tenth-of-a-mile-per-gallon. As an illustration, assume that Manufacturer A produced 1,000,000 light trucks in model year 2010. Assume further that A has a light truck standard of 20 mpg for MY 2010, and an achieved light truck average fuel economy level of 19.7 mpg in that model year. If A has no credits to apply, then A's assessed civil penalty under this historical penalty rate would be:

> $5.50 (penalty rate) x 3 (tenths of an mpg) x 1,000,000 (vehicles in Manufacturer A's light truck fleet) = $16,500,000 due for A's light truck fleet for MY 2010.

[1] 49 U.S.C. 32911(b).
[2] 49 U.S.C. 32912(b).
[3] Civil penalties are remitted to the U.S. Treasury.
[4] 49 U.S.C. 32912(b)

To date, few manufacturers have actually paid civil penalties, and the amounts of CAFE penalties paid generally have been relatively low. Additionally, since the introduction of credit trading and transfers for MY 2011 and after, many manufacturers have taken advantage of those flexibilities rather than paying civil penalties for non-compliance.

The Federal Civil Penalties Inflation Adjustment Act Improvements Act (November 2, 2015) (the "Act") prescribed an inflation adjustment for many civil monetary penalties, including CAFE's civil penalty rate. In that Act, Congress generally required Federal agencies that administer civil monetary penalties to make an initial "catch-up" adjustment for inflation through an interim final rule by July 1, 2016, and then to make subsequent annual adjustments for inflation (see Pub. L. 114-74, Sec. 701). NHTSA developed an interim final rule (IFR) implementing the Agency's responsibilities under that Act, and that IFR published in the Federal Register on July 5, 2016. The NHTSA IFR included adjustments for all civil monetary penalties administered by the Agency, including those prescribed by the CAFE program. In accordance with the Act and OMB guidance, the updated penalty rate increased from $5.50 per tenth of a mile per gallon (mpg) to $14 per tenth of an mpg.[5] NHTSA stated in implementation guidance that it issued following the IFR that the Agency intended to apply the $14 rate to any penalties assessed on and after August 4, 2016, beginning with penalties applicable to violations for MY 2015, and also applying to any violations from prior model years that resulted from recalculation of a manufacturer's previous CAFE levels.[6]

II. Industry Petition for Reconsideration

[5] NHTSA's explanation of its process, including reliance on OMB guidance for calculating the initial adjustment required by the Act, is set forth in the interim final rule at 81 Fed. Reg. 43524-26 (Jul. 5, 2016). The interim final rule also discusses the "rounding rule" under the prior version of the Federal Civil Penalties Inflation Adjustment Act, which prevented NHTSA from raising the $5.50 rate after 1997.

[6] Memorandum, "Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015 for the Corporate Average Fuel Economy (CAFE) Program," July 18, 2016.

The Auto Alliance and Global Automakers jointly petitioned NHTSA for reconsideration of the interim final rule with regard to the inflation adjustment for CAFE non-compliance penalties (hereafter, the Alliance and Global petition will be referred to as the "Industry Petition") on August 1, 2016. The Industry Petition asked that NHTSA not apply the penalty increase to non-compliances associated with "model years that have already been completed or for which a company's compliance plan has already been set." Specifically, the Industry Petition stated that:

> Our most significant concern with the IFR is that it would apply retroactively to the 2014 and 2015 Model Years (which have been completed for all manufacturers but for which the compliance files are not all closed), to the 2016 Model Year (which is complete for many manufacturers) and to the 2017 and 2018 Model Years (for which manufacturers have already set compliance plans based on guidance from NHTSA, including the [historical penalty amounts of $5.50 per tenth of an mpg]). Applying the increased civil penalties in this manner is profoundly unfair to manufacturers, does not improve the effectiveness of this penalty, and does nothing to further the policies underlying the CAFE statute.

Industry Petition at 3.

In the alternative, the Industry Petition requested that if NHTSA decided to apply the penalty increase to MYs 2014-2018, the Agency should recalculate the adjusted penalty rate using 2007 as the "base year" for calculating the inflation adjustment. As another alternative, the Industry Petition sought a finding that immediately increasing the penalty to $14 would cause a "negative economic impact," thereby requiring a smaller initial penalty increase. See P.L. 114-74, Sec. 701(c) (providing for an exception to the otherwise-applicable penalty increase, if the Agency finds through a rulemaking proceeding that the increase would cause a "negative economic impact," a term that the statute does not define).[7]

III. Petition for Rulemaking to Raise Civil Penalty Rate

[7] Because the Agency is granting the Industry Petition's request to apply inflation-adjusted penalties only to MY 2019 and after, the Agency need not address the Industry Petition's alternative requests.

The Center for Biological Diversity (CBD) petitioned NHTSA on October 1, 2015, just over a month prior to passage of the Act, to conduct a rulemaking to raise the civil penalty rate for CAFE standard violations under NHTSA's then-existing statutory authority. The CBD petition stated correctly that NHTSA had not adjusted the $5.50 civil penalty rate for inflation since 1997, and requested that the Agency follow the procedure laid out at 49 U.S.C. 32912(c) to undertake a rulemaking to raise the amount to the maximum then allowed by Congress, $10 per tenth-of-an-mpg. A month later, Congress changed the statutory landscape by enacting the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

IV. NHTSA Response to Petitions

Having carefully considered the issues raised by the petitioners, NHTSA will grant the Industry Petition in part and deny it in part. Beginning with model year 2019, NHTSA will apply the full penalty prescribed by the Federal Civil Penalties Inflation Adjustment Improvements Act of 2015. NHTSA is required by the Act to continue adjusting the civil penalty for inflation each year, so the penalty rate applicable to MY 2019 and after fleets will be $14 per tenth-of-an-mpg, plus any adjustment(s) for inflation that occur between now and a violation's assessment. The Agency concludes that this decision also effectively addresses the issue raised by the CBD Petition. The discussion below presents the Agency's analysis and conclusion.

A. Model Years 2014-2016

NHTSA agrees with the Industry Petitioners that applying the $14 civil penalty rate to violations of CAFE standards in model years prior to the enactment of the Act would not result in additional fuel savings, and thus would seem to impose retroactive punishment without accomplishing Congress' specific intent in establishing the civil penalty provision of the Energy

Policy and Conservation Act ("EPCA"). Model years typically begin prior to their respective calendar year. By November 2, 2015 (the date of enactment of the civil penalties adjustment Act), nearly all manufacturers subject to the CAFE standards had completed both model years 2014 and 2015, and no further vehicles in those model years were being produced in significant numbers. This argument is even stronger considering that all manufacturers would have completed these model years prior to July 5, 2016, the date of the IFR. If all the vehicles for a model year have already been produced, then there is no way for their manufacturers to raise the fuel economy level of those vehicles in order to avoid higher penalty rates for non-compliance.

In the specific context of EPCA as amended, the purpose of civil penalties for non-compliance is to encourage manufacturers to comply with the CAFE standards. See 49 CFR 578.2 (section addressing penalties states that a "purpose of this part is to effectuate the remedial impact of civil penalties and to foster compliance with the law"); see generally, 49 U.S.C. 32911-32912; United States v. General Motors, 385 F.Supp. 598, 604 (D.D.C. 1974), vacated on other grounds, 527 F.2d 853 (D.C. Cir. 1975) ("The policy of the Act with regard to civil penalties is clearly to discourage noncompliance"). Assuming that higher civil penalty rates are intended, in the particular context of CAFE, to provide greater incentives for manufacturers to comply with applicable standards, then raising penalty rates for model years already completed and thus unchangeable would be not only retroactive,[8] but incapable of serving the purpose of causing greater compliance with CAFE standards. Based on the governing statutory framework and the specific CAFE regulatory scheme, NHTSA believes that Congress would not have

[8] Retroactivity is not favored in the law. The Supreme Court has stated that "congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result." Landgraf v. USI Film Products, 511 U.S. 244, 280 (1994), citing Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988). NHTSA believes that in the specific context of the CAFE program and the statutes that govern it, Congress could not have intended to impose higher civil penalty rates for time periods when they would not incentivize increased fuel economy.

intended retroactive application of an inflation adjustment to overcome this core substantive purpose and intent of EPCA. This analysis compels the conclusion that applying an increased penalty rate to MYs 2014 and 2015 would not be appropriate, nor would applying it to MY 2016, which was underway by November 2, 2015 and over halfway complete by July 5, 2016.[9]

B. Model Years 2017 and 2018

The Industry Petition asserts that manufacturers have set their product and compliance plans for MY 2017 and 2018 based on the CAFE penalty provisions in place prior to July 2016, and that it is too late at this juncture to make significant changes to those plans and avoid non-compliances (for the manufacturers already intending not to comply). The Agency determined above that it is not appropriate to apply an increased penalty rate to CAFE non-compliance in past model years, i.e. MY 2016 and before, which could not be changed in response to a higher penalty rate. The next question presented by the Industry Petition is how to address future model years' vehicles whose fuel economy levels cannot be changed at this juncture.

For immediate future model years (i.e., 2017 and 2018), the theoretical possibility exists that manufacturers could respond to a higher penalty rate by increasing their fleet fuel economy and thus achieving CAFE compliance or mitigating their non-compliance. However, because of industry design, development, and production cycles, vehicle designs (including drivetrains, which are where many fuel economy improvements are made) are often fixed years in advance, making adjustments to fleet fuel economy difficult without a lead time of multiple years.

[9] The decision not to apply the increased penalties retroactively is similar to the approach taken by various other federal agencies in implementing the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. *See, e.g.,* Department of Justice, Interim final rule with request for comments: Civil Monetary Penalties Inflation Adjustment, 81 Fed. Reg. 42491 (June 30, 2016) (applying increased penalties only to violations after November 2, 2015, the date of the Act's enactment); Federal Aviation Administration, Interim Final Rule: Revisions to Civil Penalty Inflation Adjustment Tables, 81 Fed. Reg. 43463 (July 5, 2016) (applying increased penalties only to violations after August 1, 2016).

Here, the Industry Petitioners assert that their plans for what technology to put on which MYs 2017 and 2018 vehicles are, at the point the IFR was issued, fixed and inalterable. NHTSA takes manufacturers' product cycles into account when NHTSA sets fuel economy standards. For example, because NHTSA recognizes that manufacturers' product and compliance plans are difficult to alter significantly for years ahead of a given model year,[10] the Agency includes product cadence in its assessment of CAFE standards, by limiting application of technology in its analytical model to years in which vehicles are refreshed or redesigned. NHTSA believes that this approach facilitates continued fuel economy improvements over the longer term by accounting for the fact that manufacturers will seek to make improvements when and where they are most cost-effective.

In an analogous context, EPCA provides that when DOT amends a fuel economy standard to make it more stringent, that new standard must be promulgated "at least 18 months before the beginning of the model year to which the amendment applies." 49 U.S.C. 32902(a)(2). The 18 months' notice requirement for increases in fuel economy standards represents a congressional acknowledgement of the importance of advance notice to vehicle manufacturers to allow them the lead time necessary to adjust their product plans, designs, and compliance plans to address changes in fuel economy standards. Similarly here, affording manufacturers lead time to adjust their products and compliance plans helps them to account for such an increase in the civil penalty amount. In this unique case, the 18-month lead time for increases in the stringency of fuel economy standards provides a reasonable proxy for appropriate advance notice of the application of substantially increased—here nearly tripled—civil penalties.

[10] One of the Industry Petitioners, the Alliance, submitted supplemental materials describing the activities and events that make up product cycles, which support this point. See Docket No. NHTSA-2016-0136.

Given that NHTSA issued the IFR in July 2016, 18 months from that date would be January 2018, which would encompass MY 2017 for most manufacturers and models and part of MY 2018. Based on the Industry Petition, comments, and agency expertise, NHTSA believes that, in this instance, applying the adjusted penalties only for MY 2019 and after provides a reasonable amount of lead time for manufacturers to adjust their plans and products to take into account the substantial change in penalty level.

For future model years for which the vehicles to be produced and their technologies are essentially fixed (i.e., MYs 2017-2018), it is conceivable that some manufacturers might be able to change production volumes of certain lower- or higher-fuel-economy models, which could help them to reduce or avoid CAFE non-compliance penalties. However, in this particular instance, compelling such a result through the immediate application of higher penalty rates to product design decisions that have already been made and cannot be changed would be contrary to a fundamental congressional purpose of the CAFE program. The Energy Independence and Security Act (EISA) amendments of 2007 required that fuel economy standards be attribute-based, demonstrating congressional intent that the CAFE program be responsive to consumer demand. See 49 U.S.C. 32902(b)(3). Applying higher civil penalty rates in a way that would force manufacturers to disregard consumer demand (e.g., by restricting the availability of vehicles that consumers want) would be inconsistent with that fundamental statutory command. Providing some lead time, as here, mitigates that concern.

In order to reconcile competing statutory objectives in the unique context of multi-year vehicle product cycles, NHTSA will grant the Industry Petition insofar as it seeks to apply the penalty increase only for model years 2019 and after. For CAFE standard non-compliances that occur(ed) for model years 2014-2018, NHTSA intends to assess civil penalties at the rate of

$5.50 per tenth of an mpg. Beginning with model year 2019, NHTSA will apply the full penalty prescribed by the Federal Civil Penalties Inflation Adjustment Improvements Act of 2015. NHTSA is required by the Act to continue adjusting the civil penalty for inflation each year, so the penalty rate applicable to MY-2019-and-after fleets will be $14 per tenth-of-an-mpg, plus any adjustment(s) for inflation that occur between now and then. See Pub. L. 114-74, Sec. 701(b)(2).

NHTSA believes this approach appropriately harmonizes the two congressional directives of adjusting civil penalties to account for inflation and maintaining attribute-based, consumer-demand-focused standards, applied in the context of the presumption against retroactive application of statutes. See, e.g., Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208. This decision increases civil penalties starting with the model year that manufacturers, in this particular instance, are reasonably able to design and produce vehicles in response to the increased penalties. See Industry Petition at 4-6 (seeking application of the adjusted civil penalties only to MY 2019 and after).

In summary, NHTSA partially grants the Industry Petition for Reconsideration insofar as it seeks implementation of the civil penalties adjustment only to MY 2019 and after, and denies the Industry Petition in all other respects.

This action also effectively responds to the petition for rulemaking from CBD to increase the civil penalty rate as permitted by EPCA/EISA. The civil penalty rate beginning in MY 2019 will be substantially higher than the CBD petition requested, and NHTSA believes that the increased penalty will accomplish CBD's goal of encouraging manufacturers to apply more fuel-saving technologies to their vehicles in those future model years. To the extent that the CBD

Petition requests an earlier penalty rate increase, it is denied for the reasons set forth in this decision.

V. Regulatory Notices and Analyses

A. 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, and has been determined not to be "significant" under the Department of Transportation's regulatory policies and procedures and the policies of the Office of Management and Budget.

B. Regulatory Flexibility Act

NHTSA has also considered the impacts of this rule under the Regulatory Flexibility Act. I certify that this rule will not have a significant 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 only affect manufacturers of motor vehicles. Low-volume manufacturers can petition NHTSA for an alternate CAFE standard under 49 CFR Part 525, which lessens the impacts of this rulemaking on small businesses by allowing them to avoid liability for potential 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.

C. 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, or the agency consults with State and local governments early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The reason is that this rule applies to motor vehicle manufacturers. Thus, the requirements of Section 6 of the Executive Order do not apply.

D. Unfunded Mandates Reform Act of 1995 (UMRA)

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 NHTSA does not believe that this rule will necessarily have a $100 million effect, no Unfunded Mandates assessment will be prepared.

E. Executive Order 12778 (Civil Justice Reform)

This rule does not have a retroactive or preemptive effect. Judicial review of this rule may be obtained pursuant to 5 U.S.C. 702. That section does not require that a petition for reconsideration be filed prior to seeking judicial review.

F. 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.

G. Privacy Act

Please note that 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 Fed. Reg. 19477-78) or you may visit https://www.transportation.gov/privacy.

List of Subjects in 49 CFR Part 578

Fuel economy, Motor vehicles, Penalties

In consideration of the foregoing, 49 CFR part 578 is amended as set forth below.

PART 578 – CIVIL AND CRIMINAL PENALTIES

1. The authority citation for 49 CFR part 578 is revised to read as follows:

Authority: Pub. L. 101-410, Pub. L. 104-134, Pub. L. 109-59, Pub. L. 114-74, Pub L. 114-94, 49 U.S.C. 32902 and 32912; delegation of authority at 49 CFR 1.81, 1.95.

2. Section 578.6 is amended by revising paragraph (h) to read as follows:

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

* * * * *

(h) Automobile fuel economy. (1) A person that violates 49 U.S.C. 32911(a) is liable to the United States Government for a civil penalty of not more than $40,000 for each violation. A separate violation occurs for each day the violation continues.

(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.

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Issued on: December 21, 2016

Mark R. Rosekind, Ph.D.
Administrator

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