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**Via Federal eRulemaking Portal and Email**

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Re: Comments on Civil Penalties Supplemental Notice of Proposed Rulemaking
**(86 Fed. Reg. 46,811 (August 20, 2021)) - Docket No. NHTSA–2021–0001**

Dear Counsel Kuppersmith:

The undersigned Attorneys General submit these comments in response to the National Highway Traffic Safety Administration's (NHTSA) request for comments on its Supplemental Notice of Proposed Rulemaking regarding the adjustment for inflation to civil penalties for violations of Corporate Average Fuel Economy (CAFE) standards for light-duty vehicles for Model Years 2019–2021. 86 Fed. Reg. 46,811 (Aug. 20, 2021). The Supplemental Notice addresses NHTSA's reconsideration of the agency's January 2021 Interim Final Rule that purported to repeal the inflation adjustment for 2019–2021 Model Year vehicles that NHTSA adopted in 2016, when it raised the penalty for failure to meet the applicable CAFE standard from $5.50, the rate that had been in effect since 1997, to $14 per unit of non-compliance. 86 Fed. Reg. 3016 (Jan. 14, 2021) (IFR). Some members of our coalition filed suit to invalidate the IFR because, as stated in our January 25, 2021 comments on the IFR, NHTSA's repeal of the 2016 adjustment for Model Years 2019–2021 was legally, factually, and procedurally flawed.[1] Specifically, the IFR flouted: (i) NHTSA's statutory obligations established by the 2015 Federal Inflation Adjustment Act Improvements Act (Improvements Act); (ii) two separate decisions by the U.S. Court of Appeals for the Second Circuit affirming NHTSA's 2016 adjustment; and (iii) the procedural requirements of the Administrative Procedure Act. Accordingly, we support NHTSA's reconsideration of the IFR, and we urge NHTSA to adopt a final rule that withdraws the IFR and reverts to the $14 penalty amount for Model Years 2019–2021 without further delay.

The Supplemental Notice requests comment on two questions: (1) whether NHTSA "should proceed to a final rule that withdraws the interim final rule and reverts to the December 2016 final rule, restoring the application of the increased CAFE civil penalty rate beginning with Model Year 2019;" and (2) whether "the inflation adjustment should apply beginning with a model year later than Model Year 2019." 86 Fed. Reg. 46,816. As explained below, the answer

[1] Our January 25, 2021 comment letter is enclosed, and the comments in that letter are incorporated in this letter.

to the first question is yes, and the answer to the second question is no. NHTSA had no legal authority, express or implied, to repeal the inflation adjustment for Model Years 2019–2021 that Congress mandated in the Improvements Act, and it has no authority to delay the inflation adjustment to a model year later than 2019. Indeed, NHTSA's prior efforts to delay and repeal the mandatory penalty increase were vacated by the U.S. Court of Appeals for the Second Circuit, which *twice* confirmed that NHTSA had no discretion to delay or otherwise avoid the adjustment for inflation, and affirmed that the inflation-adjusted $14 penalty is "in force" beginning with Model Year 2019. *See New York v. Nat'l Highway Traffic Safety Admin.*, 974 F.3d 87, 101 (2d Cir. 2020) (*New York*). Thus, a final rule that does anything other than restore the $14 civil penalty amount for Model Years 2019–2021, which would conform to the requirements of the Improvements Act and two Second Circuit decisions, would be patently illegal and invite further litigation. In short, NHTSA should simply follow the law.

## Discussion

As discussed in our January 2021 comment letter, the Federal Civil Penalties Inflation Adjustment Act, as amended by the Improvements Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat. 584, 599 (2015), set a deadline of July 1, 2016 for federal agencies to adjust the civil penalty amounts within their jurisdiction to account for inflation. In response, NHTSA adopted a final rule that raised the CAFE civil penalty amount from $5.50 to $14 beginning with Model Year 2019. 81 Fed. Reg. 95,489 (Dec. 28, 2016) (2016 Civil Penalties Rule). While there may have been some question as to whether NHTSA should have applied the inflation adjustment to model years earlier than 2019, there is no question that NHTSA's later efforts to further delay the adjustment were invalid. As the U.S. Court of Appeals for the Second Circuit stated when it vacated NHTSA's attempt to indefinitely suspend the penalty increase, the Act's deadlines allow "no discretion to the agencies regarding the timing of the adjustments." *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 109, 113 n.12 (2d Cir. 2018) (*NRDC*).

Given the Improvements Act's clear requirements and the two Second Circuit decisions rejecting NHTSA's efforts to evade those requirements, the IFR, which the prior administration issued in its final days without prior notice and comment and *after* the close of Model Years 2019 and 2020, should never have been issued. We urge NHTSA to take advantage of the abeyance in the pending litigation to reverse that erroneous, misguided action without the need for further judicial intervention. And because NHTSA's purported justifications for the IFR were baseless, as stated in our January 2021 comment letter, NHTSA should abandon any notion of applying the inflation adjustment beginning with any model year after 2019. Specifically, there is no issue of retroactivity (because, *inter alia*, the adjustment was implemented in 2016, giving auto manufacturers several years to plan), auto manufacturers have no valid reliance interests, and the COVID-19 pandemic does not supersede the statutory requirements or provide any other basis for delaying the adjustment.

## I. NHTSA Must Withdraw the IFR and Reinstate the 2016 Civil Penalties Rule

As to the first question posed in the Supplemental Notice, NHTSA should withdraw the IFR and restore the inflation-adjusted penalty for Model Years 2019–2021 that it first established in 2016 to comply with the Improvement Act's explicit direction. NHTSA's subsequent attempts to evade that unambiguous directive violated a fundamental principle of administrative law that "an agency may only act within the authority granted to it by statute." *NRDC*, 894 F.3d at 108. This principle reflects the nature of an administrative agency as a "creature of statute" that "has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress." *Michigan v. EPA*, 268 F.3d 1075, 1082 (D.C. Cir. 2001); *see also NRDC v. Abraham*, 355 F.3d 179, 202 (2d Cir. 2004) (same). NHTSA never identified any statutory authority for the IFR, nor could it have done so. There is no provision in the Inflation Adjustment Act or its amendments—including the Improvements Act—that authorizes an agency to repeal a catch-up adjustment. Nor, as the Second Circuit made clear, does NHTSA's general authority to administer the CAFE program under the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975) (EPCA), provide any basis to delay the inflation adjustment. *NRDC*, 894 F.3d at 112 (EPCA provides no authority "to delay the penalty as part of" NHTSA's "responsibility for administering the fuel economy portions of that statute."). Accordingly, NHTSA's only legally permissible option is to withdraw the IFR and restore the $14 penalty amount beginning with Model Year 2019.

Tellingly, NHTSA never identified any precedent for what it did in the IFR: repeal its catch-up adjustment and restore its pre-Improvements Act penalty for violations that indisputably occurred *after* the agency made its catch-up adjustment. Such a result would deliver a windfall to manufacturers whose fleets failed to meet the CAFE standards, rewarding manufacturers who, despite being fully aware of the Improvements Act's command to federal agencies and NHTSA's increase of the CAFE penalty to $14, nevertheless failed to comply. It would also mean that the mandatory inflation adjustment would be applied beginning with Model Year 2022, *i.e.*, to vehicles sold *more than five years* after the statutory deadline for agencies to make their initial inflation adjustments. Such a delay not only is untethered to any grant of authority found in the text of the Improvements Act, but directly violates the Act's "clear and mandatory" deadlines. For these reasons, NHTSA should immediately rescind the IFR and restore the inflation-adjusted $14 penalty rate for Model Years 2019–2021, as Congress mandated.

## II. There Are No Grounds for NHTSA to Delay the Inflation Adjustment to a Model Year After 2019

As to the second question in the Supplemental Notice, there is no basis for NHTSA to hold off on applying the inflation adjustment further. Just as NHTSA lacked any express or implied statutory authority for the actions it took in the IFR, there is no legal basis for NHTSA to now consider delaying the inflation adjustment and first applying it to any model year after 2019. But, even assuming NHTSA has some authority to delay the adjustment, the grounds NHTSA pointed to in the IFR—retroactivity, reliance, and pandemic impacts—are all equally without

merit and should be repudiated by NHTSA in this rulemaking action.

### A. Application of the $14 CAFE Civil Penalty Rate to Model Year 2019 Vehicles Does Not Raise Retroactivity Concerns

The Supplemental Notice specifies that NHTSA is revisiting its prior views on purported retroactivity problems that would arise from applying the inflation adjustment beginning with Model Year 2019. 86 Fed. Reg. 46,816. NHTSA now acknowledges that "automakers were aware as of December 2016 that the inflation adjustment would apply beginning with Model Year 2019. It was not until Model Year 2019 was already nearly complete that the agency issued a final rule changing that, which the Second Circuit subsequently determined was legally invalid." *Id*. at 46,815. Further, NHTSA acknowledges that auto manufacturers participated in the litigation regarding that final rule and were "well aware" that the court could restore the inflation adjustment beginning with Model Year 2019, which the court, in fact, did. *Id*. at 46,816.

NHTSA's new analysis is correct. Because any violation of the CAFE standards for Model Years 2019–2021 occurred (or will occur) well *after* NHTSA increased the penalty in July 2016, there are no retroactivity concerns that would support delaying the inflationary adjustment to a model year after 2019. On the contrary, reinstating the obsolete $5.50 penalty for violations occurring *after* NHTSA made the adjustment would retroactively reward non-complying auto manufacturers with an undeserved windfall.

### B. Auto Manufacturers Have No Legitimate Reliance Interest in the Pre-Improvements Act $5.50 Penalty Rate

In adopting the IFR, NHTSA repeatedly referred to "industry's serious reliance interests," citing a petition from the Alliance for Automobile Innovation (the auto manufacturers' trade group) which made the conclusory allegation that manufacturers "made design, development, and production plans based on the $5.50 rate." 86 Fed. Reg. at 3021. Any such reliance, however, was not reasonable prior to issuance of the IFR and is not reasonable now. Auto manufacturers have known since at least July 2016 that NHTSA had raised the CAFE penalty to $14. 81 Fed. Reg. 43,524, 43,526 (July 5, 2016). Indeed, auto manufacturers were on notice that the CAFE penalty would increase as early as 2015, when Congress enacted the Improvements Act and directed agencies across the Federal government to implement inflation adjustments to their penalties. Moreover, NHTSA had *already* accommodated industry's need for lead time when, in December 2016, it made the inflation adjustment applicable beginning with Model Year 2019 in response to a petition jointly filed by the Alliance's two predecessor organizations. 81 Fed. Reg. at 95,491. As these industry groups requested, NHTSA gave automakers more than two years to prepare for the increased penalty. Under these circumstances, any manufacturer's claim that it reasonably relied on the pre-Improvements Act $5.50 civil penalty rate lacks credibility. And even if a manufacturer chose to proceed based on speculation about the outcome of NHTSA's rulemaking process and predictions about the subsequent litigation, that manufacturer made its gamble with full awareness of the potential consequences.

Nor do NHTSA's unsuccessful attempts to forestall and repeal the inflation adjustment provide a valid basis for any reliance claims. When the Second Circuit vacated those NHTSA actions, it also eliminated any bases for claimed reliance on those illegal rules. *See e.g.*, *Envtl. Def. v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.C. Cir. 2004); *Nat'l Fuel Gas Supply Corp. v. Fed. Energy Regulatory Comm'n*, 59 F.3d 1281, 1288 (D.C. Cir. 1995). It is well established that judicial vacatur of illegal regulations has retroactive effect. *See, e.g.*, *United States v. Sec. Indus. Bank*, 459 U.S. 70, 79 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student."). When a court vacates a regulation, "the vacatur restores the status quo before the invalid rule took effect and the agency must initiate another rulemaking proceeding if it would seek to confront the problem anew." *Envtl. Def.*, 329 F. Supp. 2d at 64 (internal citations and quotations omitted).

If NHTSA or industry had concerns about the effect that vacating the Suspension and Repeal Rules—and thus the application of the $14 penalty—would have on industry planning for Model Years 2019–2021, they could have asked the court to invoke its equitable discretion and remand to the agency without vacatur. *See NRDC v. EPA*, 808 F.3d 556, 584 (2d Cir. 2015) (when equity demands, remand without vacatur allows agencies to correct legal deficiencies while leaving challenged, unlawful regulations in place); *see also Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 97–98 (D.C. Cir. 2002) (invoking equitable discretion to remand without vacatur because there was "no apparent way to restore the status quo ante"); *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). But they did not do so either time. Nor did the Court *sua sponte* limit the scope of its vacatur in any way. Quite the contrary, the Court acted to restore the status quo ante and explicitly affirmed that the $14 penalty was "now in force" beginning with Model Year 2019. *See, NRDC*, 894 F.3d at 116; *New York*, 974 F.3d at 101.

Finally, while the IFR focused exclusively on the interests of manufacturers that had purportedly relied upon NHTSA's illegal Suspension and Repeal Rules, it entirely ignored the interests of manufacturers that had properly based their compliance decisions for Model Years 2019–2021 in reliance on the $14 penalty rate. Indeed, the inflation-adjusted $14 penalty incentivized manufacturers not only to comply with the standards, but also to design their fleets to be even more fuel-efficient than the standards require in order to earn valuable credits. Yet, as NHTSA conceded, delaying the inflation adjustment would retroactively decrease the value of those credits, *see* 86 Fed. Reg. at 3021, unfairly penalizing their holders. Thus, the only legitimate reliance interests at stake are the interests of these automakers who properly based their decisions on the legally mandated $14 penalty amount.

### C. The Economic Impact from the COVID-19 Pandemic Does Not Justify Delaying the 2016 Catch-Up Adjustment

NHTSA should also reject the IFR's inappropriate reliance on purported economic effects of the COVID-19 pandemic on the automobile industry as a reason to delay the inflation adjustment. The undersigned Attorneys General recognize the widespread economic harm that the pandemic has inflicted in our States and across the country. As explained above, however, it

is up to Congress, not NHTSA, to consider reducing the CAFE penalty based on economic considerations. *New York*, 974 F.3d at 100–01 (holding that NHTSA lacked any authority to "reconsider the economic effects of the increase it had already promulgated in 2016"). When it established the CAFE program, Congress did not make the penalty rate contingent on the level of sales or other industry-wide economic factors. Nor did Congress include any such mechanism in the original Inflation Adjustment Act or the Improvements Act.

Even if NHTSA had the theoretical authority to delay the inflation adjustment for these reasons, NHTSA did not explain how the pandemic actually impacted compliance with the CAFE standards. A decrease in vehicles sold does not necessarily mean that auto manufacturers will have more difficulty achieving CAFE compliance. Indeed, if the sale of more efficient vehicles is less affected than the sale of less efficient vehicles, compliance could be made easier, as the composition of a manufacturer's fleet will naturally shift towards more efficient vehicles. Moreover, because the total penalty a manufacturer may face is based on the total number of vehicles sold, the total amount of any penalty due is reduced during a period when fewer vehicles are sold. Also, much of the relevant conduct occurred before the pandemic commenced. For example, Model Year 2019 was virtually over and the planning for that model year had long since been completed when the pandemic hit.

Moreover, the IFR relied exclusively on self-serving information from industry sources and failed to consider—or even solicit—positive economic data to the contrary. In fact, although vehicle sales declined substantially during the second and third quarters of 2020, by the fourth quarter, many automakers saw sales rebound to pre-pandemic levels,[2] and sales in 2021 have been very strong.[3] Meanwhile, it is likely that the worst economic effects of the pandemic will have faded before the non-complying manufacturers will need to pay penalties for the model years in question. NHTSA's assessment of manufacturer compliance for Model Year 2020 is just getting underway, and penalties for that model year will not be finalized until later this year (if not next year). Penalties for Model Year 2021 will not be determined until late 2022 or even 2023.[4] In any event, manufacturers have various alternative compliance strategies available to

[2] Car and Driver, *New Car Sales See Mixed Finish in December After Tumultuous Year* (Jan. 5, 2021), https://www.caranddriver.com/news/a35130259/new-car-sales-end-2020-announced/; CNBC, *With a Lot of Optimism and Vaccine Hopes, U.S. Auto Sales Could Increase by as Much as 10% in 2021* (Jan. 14, 2021), https://www.cnbc.com/2021/01/14/with-a-lot-of-optimism-and-vaccine-hopes-us-auto-sales-%20could-increase-as-much-as-10percent-in-2021.html.

[3] Car and Driver, *Car Buyers Flocked to Dealers in First Quarter After a Tough 2020* (Apr. 1, 2021), https://www.caranddriver.com/news/a36007181/new-car-sales-first-quarter-2021-strong/; NADA Blog, *NADA Issues 2021 Second Quarter Auto Sales Analysis* (July 8, 2021), https://blog.nada.org/2021/07/08/nada-issues-2021-second-quarter-auto-sales-analysis/.

[4] There typically is a substantial lag between the end of a model year and the time a non-complying automaker pays a penalty. For instance, penalties for Model Year 2017—the most recent model year for which penalty information is available—were announced only in late 2019.

them to avoid penalties, including using credits from other fleets or past model years, drawing on anticipated credits from upcoming model years, and purchasing credits from other manufacturers.

## Conclusion

For the reasons set forth above and in our attached January 25, 2021 comment letter, the undersigned Attorneys General urge NHTSA to rescind the IFR and restore the inflation-adjusted $14 penalty for Model Years 2019–2021 that the agency adopted in 2016 in accordance with the Improvements Act. NHTSA has no legal authority to delay the inflationary adjustment, and there are no valid reasons for NHTSA to continue to consider a delay.

Respectfully submitted,

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