

19-2395(L)

19-2508 (Con)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

STATE OF NEW YORK, STATE OF CALIFORNIA, STATE OF CONNECTICUT, STATE OF
DELAWARE, DISTRICT OF COLUMBIA, STATE OF ILLINOIS, STATE OF MARYLAND,
COMMONWEALTH OF MASSACHUSETTS, STATE OF NEW JERSEY, STATE OF OREGON,
STATE OF RHODE ISLAND, STATE OF VERMONT, STATE OF WASHINGTON, STATE OF
MAINE, NATURAL RESOURCES DEFENSE COUNCIL, INC., SIERRA CLUB,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION; JAMES C. OWENS,
in his capacity as Deputy Administrator of the National Highway Traffic Safety
Administration, ELAINE CHAO, in her capacity as Secretary of the United States
Department of Transportation,

Respondents,

ALLIANCE FOR AUTOMOTIVE INNOVATION,

Intervenor.

On Petition for Review of a Rule of the
National Highway Traffic Safety Administration

**BRIEF OF INTERVENOR
ALLIANCE FOR AUTOMOTIVE INNOVATION**

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CORPORATE DISCLOSURE STATEMENT

In January 2020, The Association of Global Automakers, Inc., and the Alliance of Automobile Manufacturers, Inc. announced the formation of a new association that combines the two organizations. The combined association's name is the **Alliance for Automotive Innovation**.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Alliance for Automotive Innovation states that it is a nonprofit trade association that is headquartered in Washington, D.C., with offices in Southfield, Michigan and Sacramento, California. The new association is focused on creating a safe and transformative path for sustainable industry growth, and represents manufacturers producing nearly 99 percent of cars and light trucks sold in the United States. It is charged with promoting the interests of its members in regulatory and policy matters impacting the light-duty vehicle market across the country.

The Alliance for Automotive Innovation is not a publicly held corporation, has no parent companies, and no companies have a ten percent or greater ownership interest in the Alliance for Automotive Innovation.

The Court previously granted the intervention requests of both the Association of Global Automakers and the Alliance of Automobile Manufacturers. To avoid duplication and for the Court's convenience, the new combined association is filing a single, joint brief.

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INTRODUCTION

In these consolidated appeals, petitioners urge the Court to reverse two administrative agencies’ expert judgments concerning the appropriateness of adjusting a civil penalty rate, even though those judgments were made after notice-and-comment rulemaking and prevented significant harm to the nation’s economy. Petitioners do not dispute that substantial evidence supports the agencies’ well-reasoned decisions. Nonetheless, they ask the Court to ignore the agencies’ findings on grounds that the agencies were required to increase the civil penalty amount no matter what economic harms would likely result. Petitioners’ arguments fail because they cannot be reconciled with the relevant statutory provisions or long-standing principles of administrative law.

Petitioners challenge the National Highway Traffic Safety Administration’s (“NHTSA”) decision to reconsider its previous findings with respect to a statute — the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (“the Improvements Act”) — that requires agencies to adjust certain defined classes of penalties for inflation unless doing so would have a negative economic impact. Pub. L. No. 114-74, § 701(b), 129 Stat. 584, 599, codified at 28 U.S.C. § 2461, note (Special Appendix (“SA”) 46). Initially, NHTSA assumed – without discussion and without substantive input from stakeholders – that the Improvements Act should apply to the Corporate Average Fuel Economy

(“CAFE”) penalty rate and rate cap, which were established by the Energy Policy and Conservation Act of 1975 (“EPCA”), as amended by the Energy Independence and Security Act of 2007 (“EISA”). *See* 49 U.S.C. § 32912(b) & (c) (SA 48).

NHTSA then increased the CAFE penalty rate by 150%.

On reconsideration, NHTSA reviewed the issues more carefully. The agency first considered whether Congress intended the Improvements Act to apply to the CAFE penalty rate and rate cap. It also undertook the economic analysis that Congress required and considered record evidence showing that increasing the CAFE civil penalty rate would impose an additional annual burden of \$1 billion on the industry — a greater amount than the *combined* increase of every other adjustment to civil penalties called for under the Improvements Act. After completing its analysis, the agency reasonably concluded that Congress did not intend the Improvements Act to apply to the CAFE civil penalty rate or rate cap and that, even if the Improvements Act did apply, increasing the CAFE penalty rate and rate cap would have a devastating impact on the economy. That decision was reviewed and approved by the Office of Management and Budget (“OMB”).

In reaching its conclusions, NHTSA followed proper administrative procedures. NHTSA issued a notice of proposed rulemaking (“NPRM”) giving notice of its tentative reconsideration and seeking comments on it. *See* SA 29 (Apr. 2, 2018). It then issued a final rule (“Final Rule”) that provided a detailed analysis,

responded to comments, and provided a reasoned basis for the agency's conclusions and why those conclusions were different from the initial rulemaking. SA 1 (July 26, 2019).

Petitioners challenge NHTSA's conclusions, arguing that the Improvements Act requires the mechanical application of the inflation adjustment to the CAFE civil penalty rate and rate cap. In framing their arguments, petitioners attempt to minimize the clear conflicts between their rigid approach and the policies of EPCA by suggesting that fuel conservation concerns should be paramount. In fact, EPCA reflects a careful balancing of *both* energy conservation goals *and* Congressional policy mandating that increases in fuel economy standards and the CAFE civil penalty rate should *not* occur if they have "a substantial deleterious impact on the economy of the United States, a State, or a region of a State." 49 U.S.C.

§ 32912(c)(1)(A)(ii) (SA 48).

NHTSA's conclusions with regard to the applicability and application of the Improvements Act to the CAFE civil penalty rate and rate cap, which were reviewed and approved by OMB, are both reasonable and compelling. And nothing in the Improvements Act, this Court's decision in *Natural Resources Defense Council v. National Highway Traffic Safety Administration*, 894 F.3d 95 (2d Cir. 2018) ("*NRDC*"), or NHTSA's earlier statements and positions precluded

NHTSA from reconsidering its earlier findings and acting to prevent substantial economic harm. Petitioners' challenges to the Final Rule should be rejected.

JURISDICTIONAL STATEMENT

Intervenor agrees with petitioners that this Court has jurisdiction to review the Final Rule under 49 U.S.C. § 32909(a). Intervenor takes no position on the petitioners' assertions concerning standing.

ISSUES PRESENTED

1. Whether NHTSA and OMB reasonably concluded that the Improvements Act does not apply to the CAFE civil penalty rate and rate cap.
2. Whether, were the Improvements Act to apply, NHTSA reasonably determined that an inflation adjustment that would more than double the existing CAFE civil penalty rate and rate cap and impose \$1 billion in additional costs would have a "negative economic impact."
3. Whether the terms of the Improvements Act deprive NHTSA of its well-established authority to reconsider an earlier, erroneous decision by the agency.

STATEMENT OF THE CASE.

A. Regulatory background

The CAFE standards. Congress enacted CAFE as part of EPCA, which Congress designed as a comprehensive response to the energy crisis of 1973.

Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871, 901 (1975).

In particular, EPCA established the CAFE program to “bring about improved motor vehicle fuel efficiency.” *Gen. Motors Corp. v. NHTSA*, 898 F.2d 165, 167 (D.C. Cir. 1990). But EPCA did not authorize NHTSA to pursue energy conservation at any cost. Instead, Congress structured the CAFE program to require NHTSA to consider technological feasibility and economic impacts when setting fuel economy standards and the CAFE civil penalty rate. Concerned about protecting workers’ jobs, Congress repeatedly indicated its intent that neither the standards nor the penalties should be set at a level that would cause harm to the U.S. economy.

EPCA requires NHTSA to establish CAFE standards for cars and light trucks in each model year. 49 U.S.C. § 32902(a). Auto manufacturers that produce vehicles for sale in the United States and do not meet the standards are subject to a “civil penalty.” That penalty is calculated by multiplying (1) the applicable “penalty rate” by (2) the number of tenths of a mile per gallon that their vehicle fleet falls short of the applicable CAFE standard by (3) the number of vehicles in the fleet. *See* 49 U.S.C. § 32912(b) (SA 48).¹ EPCA set the applicable

¹ More specifically, the CAFE civil penalty rate is just one variable in a complex calculation that involves numerous variables: CAFE Penalty = CAFE Penalty Rate x [(CAFE Standard - CAFE Performance) x 10 x Sales Volume - ΣCredits from

penalty rate at \$5 per tenth of a mile per gallon. *See id.* § 32912(b). Before the events that gave rise to this case, NHTSA increased the penalty rate to \$5.50 per tenth of a mile per gallon. *See Civil Penalties*, JA 660, 662 (July 5, 2016).

Unlike other statutory penalties, the “civil penalty” provided by EPCA is not a fixed penalty designed simply to punish manufacturers that fail to meet the federal standards. Instead, as NHTSA has recognized, EPCA provides manufacturers the option of paying the civil penalty as one of several “compliance flexibilities” under the law. *See* NHTSA, *Home*, CAFE Public Information Center (updated Oct. 6, 2017), perma.cc/BEL5-3QYW. Other ways to address a shortfall include applying credits earned in prior years or carried back from future years, trading credits with other manufacturers, or transferring credits from one manufacturer’s compliance fleet to another of its compliance fleets. *See* SA 4 (Final Rule).²

Same Fleet carried forward or back - $\Sigma(\text{Traded or Transferred Credits} \times (\text{VMTu} \times \text{Stde} \times \text{CAFEe}) / (\text{VMTe} \times \text{Stdu} \times \text{CAFEu}))$].

² Under the CAFE program, manufacturers earn CAFE credits “[w]hen the average fuel economy of passenger automobiles manufactured by a manufacturer in a particular model year exceeds an applicable average fuel economy standard.” 49 U.S.C. § 32903(a). These credits may be applied to mitigate or eliminate otherwise applicable CAFE penalties. In addition, a manufacturer can earn “carryback credits” if, despite a fuel economy shortfall in a given year, it submits a plan to the agency “demonstrating that the manufacturer will earn sufficient credits . . . within the next 3 model years to allow the manufacturer to meet that standard for the model year involved.” *Id.* § 32903(b)(2)(A). A manufacturer also

Congress permitted compliance flexibility because it understood that manufacturers can become subject to CAFE shortfalls even if they have made good faith efforts to meet the standards. Compliance with a CAFE standard is calculated based on how many of which vehicles in a manufacturer's fleet are sold in any given model year. Because compliance is based on actual sales, a manufacturer's ability to meet the CAFE standards can be heavily influenced by changes in market conditions. In practice, CAFE has largely remained a backstop for companies with more limited product offerings or companies that, despite good faith efforts to comply with the standards, fail to meet the standards due to changes in market conditions. *See* NHTSA, *Civil Penalties*, CAFE Public Information Center (updated Oct. 15, 2019), https://one.nhtsa.gov/cafe_pic/CAFE_PIC_Fines_LIVE.html. CAFE has thus operated not as a broad-based environmental protection measure but as a means to prompt automakers to continue investing in technology and designs that increase fuel economy — in essence, to set a floor for how much automakers should invest — without imposing unfair costs (which would be passed onto consumers).

The Improvements Act. In 2015, Congress enacted the Improvements Act, which adopted a new methodology for making general inflationary adjustments to

may acquire credits from other manufacturers and transfer credits within its own fleet. *Id.* § 32903(f) & (g).

certain types of civil penalties assessed by federal agencies. When a civil penalty is subject to the Improvements Act, the statute directs agencies to make an initial “catch-up” adjustment in an interim final rule issued by July 1, 2016, and thereafter to make annual adjustments for inflation. *See* Pub. L. No. 114-74, § 701(b), 129 Stat. 584, 599 (2015), codified at 28 U.S.C. § 2461 note (SA 46). The statute also directs agencies to base the initial catch-up adjustment on the Consumer Price Index and caps those initial adjustments at 150 percent of the previous penalty. 28 U.S.C. § 2461 note, § 5(b)(2)(C) (SA 47).

Congress made clear that no adjustment should result in significant economic harm. The law allows the head of an agency to make a smaller “catch-up” adjustment if the agency concludes that “increasing the civil monetary penalty by the otherwise required amount will have a negative economic impact” or, alternatively, that the increased penalty would impose social costs that exceed its benefits. 28 U.S.C. § 2461 note, § 4(c)(1)(A) (SA 46). Congress also provided for two levels of administrative review. The Improvements Act grants the Director of OMB authority to interpret the statute, directing OMB “to issue guidance to agencies on implementing the inflation adjustments required under this Act.” *Id.* § 7(a) (SA 47). In addition, when an agency head determines that an adjustment would have a “negative economic impact” or “social costs” that “outweigh the

benefits,” the Improvements Act requires review and concurrence by OMB. *Id.* § 4(c)(1)-(2) (SA 46).

NHTSA’s Interim Final Rule. On the assumption that the Improvements Act should apply to CAFE penalties, NHTSA issued an interim final rule on July 5, 2016, adjusting the penalty rate for violations of the CAFE standards from \$5.50 per tenth of a mile per gallon to \$14 per tenth of a mile per gallon — the maximum 150 percent increase permitted by the Improvements Act. JA 662. NHTSA observed that “[o]ver the last five model years, NHTSA has collected an average of \$20 million per model year in civil penalties” and, without undertaking the type of analysis it had previously conducted when assessing CAFE rules, suggested that increasing the penalty rate by 150 percent “would not result in an annual effect on the economy of \$100 million or more” — a threshold that would trigger review of the rule by the Office of Information and Regulatory Affairs. JA 663.

B. The petition for partial reconsideration

The Alliance of Automobile Manufacturers (“Alliance”) and Association of Global Automakers (“Global”) — which have formed and are represented here by intervenor Alliance for Automotive Innovation — petitioned NHTSA for partial reconsideration. *See* JA 666 (Letter from Chris Nevers, VP of Energy & Env’t, Alliance, and Julia Rege, Dir., Env’t & Energy Affairs, Global, to Mark Rosekind, Adm’r, NHTSA (Aug. 1, 2016)). The petition expressed “serious concerns about

the effects of the [interim final rule’s] significant adjustment to the CAFE penalty.” JA 666.

In particular, the petition argued that the interim final rule had substantially underestimated the economic impact of nearly tripling the CAFE penalty rate. The petition noted that NHTSA had previously calculated the costs of CAFE rules using the “Volpe model,” which accounts for the fact that some manufacturers will choose to pay civil penalties in lieu of meeting applicable fuel economy standards. JA 672. Under the Volpe model, the proposed hike in the penalty rate would result in economic costs of approximately \$ 1 billion annually. JA 672.

The petition also expressed concern that NHTSA would apply the new proposed penalty rate retroactively to model years that had already been completed or for which manufacturers had already set compliance plans. JA 668.

C. The 2016 Final Rule

On December 28, 2016, NHTSA issued a final rule granting in part and denying in part the petition for reconsideration. NHTSA did not adjust the penalty rate, but acknowledged the force of the petition’s concerns about retroactive penalties and announced that the new penalty rate would apply beginning in model year 2019. JA 684, 686 (“2016 Final Rule”). Soon thereafter, NHTSA determined on its own initiative that it should seek public comment on whether and how the agency should consider the economic effects of the penalty increase. On July 12,

2017, and without first providing for notice and comment, NHTSA issued a final rule indefinitely delaying the effective date of the 2016 Final Rule pending reconsideration. JA 689 (“Delay Rule”). NHTSA explained that the 2016 Final Rule “did not give adequate consideration to all of the relevant issues” — including the economic consequences detailed in the petition for reconsideration. JA 689. In a separate notice, NHTSA also sought public comment on whether the proposed \$14 per tenth of a mile per gallon penalty rate was appropriate in light of a dispute over the correct baseline year and the economic effects of increasing the penalty rate. JA 691, 693-94.

Several organizational and state government petitioners challenged the Delay Rule. On review, this Court held that NHTSA exceeded its statutory authority and violated the Administrative Procedure Act (“APA”) by imposing the delay without proceeding through notice and comment rulemaking. *NRDC*, 894 F.3d at 115. The Court vacated the Delay Rule, stating that the 2016 Final Rule “is now in force.” *Id.* at 116.

D. The 2019 Final Rule

In April 2018, while the parties briefed the *NRDC* case, NHTSA issued a proposed rule announcing that it was reconsidering the 2016 Final Rule and whether the Improvements Act applies to the CAFE civil penalty rate. SA 29 (“NPRM”). NHTSA referred to the NPRM in its respondent’s brief in *NRDC*, *see*

NHTSA Br. at 5 n.2, *NRDC*, 894 F.3d 95 (No. 17-2780) (“NHTSA *NRDC* Br.”); the States addressed the NPRM in their reply brief, *see* States’ Reply Br. at 12-15, *NRDC*, 894 F.3d 95 (No. 17-2780) (States’ *NRDC* Reply Br.); and the NPRM was discussed during oral argument.

During the ensuing notice and comment period, several parties submitted comments, including Alliance and Global. In July 2019, after considering the comments, NHTSA announced that it had reconsidered the 2016 Final Rule and would not apply the Improvements Act to CAFE’s civil penalty rate, leaving the current rate in place. SA 1 (Final Rule). OMB concurred with NHTSA’s analysis and decision in two detailed letters to Department of Transportation Secretary Elaine Chao, both from OMB Acting Director Russell T. Vought, and both dated July 12, 2019. *See* JA 926 (“OMB Applicability Letter”); JA 934 (“OMB Negative Economic Impact Letter”).

NHTSA’s decision to reconsider rested on two grounds. First, NHTSA concluded that the Improvements Act, by its terms, does not apply to the CAFE civil penalty rate because the Improvements Act applies only to penalties that are “for a specific monetary amount as provided by Federal law” or have “a maximum amount provided for by Federal law.” 28 U.S.C. § 2461 note, § 3(2)(A) (SA 46). The CAFE penalty rate, NHTSA explained, does not fit this definition because it is an input used to *calculate* a penalty, rather than a penalty amount itself, and

because it has no maximum amount — an automaker’s ultimate penalty depends on factors in addition to the penalty rate. SA 10-11 (Final Rule). Second, NHTSA concluded that allowing the CAFE penalty rate to increase to the level prescribed by the 2016 Final Rule would have a “negative economic impact.” 28 U.S.C. § 2461 note, § 4(c)(1)(A) (SA 46). SA 1 (Final Rule).

Various States (“States”) and the Natural Resources Defense Council, Inc. and Sierra Club (“NGOs”) petitioned for review of the Final Rule.

SUMMARY OF ARGUMENT

1. NHTSA properly concluded that the Improvements Act does not apply to the CAFE civil penalty rate or rate cap because neither is a penalty, fine or other sanction “for a specific monetary amount” or a “maximum amount.” 28 U.S.C. §2461 note, § 3(2) (SA 46). The CAFE civil penalty rate is just one input in a complex formula used to calculate the CAFE penalty. OMB, whose interpretation of the Improvements Act is entitled to *Chevron* deference, agreed with NHTSA’s detailed analysis of these issues.

Unlike other penalties that *are* subject to the Improvements Act, the CAFE penalty formula involves much more than applying a simple multiplier. Instead, as NHTSA’s Final Rule explains, under the statutory scheme, NHTSA determines only the initial penalty rate and has almost no discretion to reduce the amount of the overall penalty specified by the formula. The manufacturer then decides

whether to use credits it has obtained (or can acquire) to determine the amount of the penalty it will pay, including whether to pay any penalty at all. Moreover, unlike other penalties administered by NHTSA and other agencies, CAFE does not establish a ceiling for penalties. The CAFE civil penalty rate and rate cap thus do not set “specific monetary penalties” or a “maximum amount” assessed and enforced by the government.

Other considerations support the conclusion that Congress did not intend the Improvements Act to apply to the CAFE civil penalty rate or rate cap. For instance, applying the Improvements Act would be inconsistent with EPCA, which requires NHTSA not to increase the CAFE civil penalty rate if it would cause undue economic damage. Nothing in the Improvements Act indicates Congress intended the Improvements Act to repeal the carefully wrought EPCA CAFE penalty rate scheme *sub silentio*. Congress wanted NHTSA to set the CAFE penalty rate and cap based on a careful consideration of multiple, complex and interrelated factors; it did not intend for the rate and cap to be changed reflexively.

Applying the Improvements Act to CAFE programs would also be inconsistent with Congress’s understanding of the revenue impact of the Improvements Act, as described in a CBO report issued when Congress considered the Improvements Act. Indeed, applying the Improvements Act to CAFE civil

penalties would have a revenue impact that would dwarf CBO’s estimate of the collective impact of the Improvements Act on *all* federal civil penalties.

This Court’s decision in *NRDC* did not foreclose NHTSA from reconsidering its earlier construction and application of the Improvements Act. The parties and the Court in *NRDC* were well aware that NHTSA was undertaking the reconsideration, which was addressed at length during the *NRDC* oral argument. Petitioners in *NRDC* told the Court that the merits of the reconsideration proceeding were *not* before the Court and, as was apparent during oral argument, the Court agreed. The Court’s decision in *NRDC* is consistent with that understanding.

2. If the Improvements Act does apply to the CAFE civil penalty rate and rate cap, NHTSA correctly concluded that a zero dollar increase was appropriate and that an increase to \$14, which would cost the industry an additional *\$1 billion every year*, would have a “negative economic impact.” In reaching those conclusions, NHTSA correctly considered and applied the factors set forth in EPCA, a scheme rooted in fundamental Congressional policy decisions with regard to fuel economy, technology, and permissible economic impacts of policy choices. Moreover, as NHTSA showed in the Final Rule, its finding of negative economic impact would be warranted even if the EPCA factors were not applied.

Petitioners’ procedural objections to NHTSA’s analysis are unavailing, as well. They argue that NHTSA ignored its previous analysis from a draft Technical Analysis Report — an argument that ignores that the factual underpinnings of that report are no longer valid. Petitioners’ argument that NHTSA should have considered economic factors favoring an increase in the CAFE civil penalty rate misconstrues the Improvements Act, as definitively interpreted by OMB. Their arguments that NHTSA should have adjusted the \$10 rate cap ignores the statute’s plain language. And their suggestion that NHTSA failed to take a “hard look” at the environmental impacts of a zero-dollar adjustment ignores that NHTSA actually considered the issues.

3. NHTSA’s reconsideration of the Improvements Act’s applicability was also proper. Nothing in the Improvements Act precludes reconsideration, and agencies have inherent authority to reconsider their past decisions, as long as they observe proper procedures in doing so, acknowledge their changed position, explain the reasons for the change, and take any pertinent reliance interests into account — all of which NHTSA did. The fact that the Improvements Act imposed deadlines for the initial catch-up adjustment does not undercut this conclusion.

ARGUMENT

I. THE IMPROVEMENTS ACT DOES NOT APPLY TO THE CAFE CIVIL PENALTY RATE OR RATE CAP

A. The Improvements Act Does Not Apply to the CAFE Civil Penalty Rate or Rate Cap Because CAFE Does Not Set Penalties for a “Specific Monetary Amount” and Does Not Have a “Maximum Amount.”

The Final Rule presents compelling reasons for NHTSA’s conclusion that the Improvements Act does not apply to the CAFE civil penalty rate and rate cap. Petitioners’ arguments cannot be reconciled with the statute’s plain text. Nor should this Court accept petitioners’ invitation to override NHTSA’s and OMB’s expert judgment on when the statute is properly applied.

1. By its terms, the Improvements Act does not apply.

The starting point for determining a statute’s scope is the language of the statute itself. *See Dean v. United States*, 556 U.S. 568, 572 (2008) (“We start, as always, with the language of the statute.”) (internal quotation marks omitted). By its terms, the Improvements Act applies only to “civil monetary penalt[ies],” which are specifically defined as:

any penalty, fine, or other sanction that —

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts

28 U.S.C. § 2461 note, § 3(2) (SA 46). Through these express requirements, Congress sought to identify those statutory civil penalties where adjusting the penalty to account for changes in the general price of good and services (inflation) would be consistent with the Improvements Act’s underlying policy.

CAFE’s civil penalty rate and rate cap do not meet the statutory requirements of a “civil monetary penalty.” As NHTSA and OMB have both determined, the CAFE civil penalty rate is not a “penalty, fine, or other sanction that” “is for a specific monetary amount” or “has a maximum amount . . . assessed or enforced by an agency.” 28 U.S.C. § 2461 note, § 3(2)(A) & (B) (SA 46). Instead, as the Final Rule explained, the CAFE civil penalty rate “is one factor in a complex formula that is used to calculate the penalty.” SA 10. The “portion of the penalty calculated by NHTSA is only the potential penalty,” and the “ultimate penalty owed is determined by the manufacturer based on the statutory provision authorizing the deduction of ‘the credits available to the manufacturer.’” *Id.* (quoting 49 U.S.C. § 32912(b)(3) (SA 48)). The complexity of the process for determining the appropriate level of CAFE penalties torpedoes any suggestion that Congress wanted the penalties to be mechanically adjusted for inflation.

OMB agrees with this conclusion. OMB's position is significant because Congress gave OMB responsibility for providing guidance about how to construe and apply the Improvements Act. *See* 28 U.S.C. § 2461 note, § 7(a) (SA 47). When Congress has delegated authority to OMB to issue binding guidance about other statutes, courts have not hesitated to accord that guidance *Chevron* deference. *See Prime Time Int'l Co. v. Vilsack*, 599 F.3d 678, 685 (D.C. Cir. 2010) (“[B]ecause Congress delegated to OMB authority to develop binding guidelines implementing the [Information Quality Act], we defer to OMB's reasonable construction of the statute.”); *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1120 (D.C. Cir. 2007) (similar for the Privacy Act); *Env'tl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 432 F.3d 945, 947 (9th Cir. 2005) (similar for FOIA). The same deference is owed here.

It is thus significant that OMB has found that “there is no set penalty.” JA 929 (OMB Applicability Letter). That is because “[a]ny *penalty* is a function not only of the *penalty rate*, but also a manufacturer's average fuel economy, the number of cars it manufactures, and [the amount of] credits the manufacturer earns, may earn in the future, purchases from third parties, and chooses to apply.” *Id.*; *see also* 49 U.S.C. § 32912(b) (SA 48). Each manufacturer's compliance is measured through a sales weighted average of its vehicle fleet. A manufacturer may sell vehicles that do not meet their fuel economy targets, as long as other

vehicles in their fleet exceed the targets and their fleet as a whole meets the standard. Even if a manufacturer's fleet has a shortfall against the standard, the manufacturer still may not face "a penalty if the manufacturer has credits from prior years, has a plan to earn credits in future years or acquire them on the private market, and decides to apply them." JA 929 (OMB Applicability Letter). "This feature," OMB has reasonably concluded, "distinguishes the CAFE penalty rate from civil monetary penalties that are incurred for each violation." *Id.* The experts at NHTSA reached the same well-reasoned conclusion. As the Final Rule explains, the "'specific monetary amount' [of any penalty] is unknown until the manufacturer decides to use any available credits it has, or can acquire, to make up for the shortfall identified by NHTSA." SA 10 (footnote omitted). "[I]f a manufacturer has enough credits or has a plan to earn sufficient credits in the future, the penalty ultimately calculated may be zero." *Id.*

In addition, unlike other penalty provisions enforced by NHTSA, CAFE does not impose a maximum penalty. "[A]lthough the CAFE civil penalty *rate* is capped at \$10 by statute, the civil penalty for manufacturers that violate an average fuel economy standards, as defined in 49 U.S.C. 32912(b) (SA 48), has no maximum amount. The higher the shortfall or the higher the number of vehicles in the fleet, the higher the potential penalty (before accounting for credits)." SA 9 (Final Rule) (emphasis added; footnote omitted).

Moreover, as NHTSA determined, the \$10 cap is not “assessed or enforced” by the agency. SA 23 (Final Rule); 28 U.S.C. § 2461 note, § 3(2)(B) & (C) (SA 46). It is also not a “penalty, fine, or other sanction.” *Id.* Contrary to the States’ argument, *see* States’ Br. 53, NHTSA reasonably concluded that the Improvements Act does not require adjustment of the \$10 *limit* on the civil penalty rate found in 49 U.S.C. § 32912(c)(1)(B) (SA 48). Notably, the \$10 cap was not adjusted when NHTSA increased the penalty rate from \$5 to \$5.50 in 1997. SA 23 (Final Rule). Nor was it adjusted when Congress amended the civil penalty provision by enacting EISA in 2007, which reflects Congressional satisfaction with the \$10 maximum as recently as 2007. *Id.*; *see* Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 112, 121 Stat. 1492, 1508.

The differences between the CAFE civil penalty rate and other penalties enforced by NHTSA amply support this conclusion. As NHTSA notes, other penalties — to which it did apply the Improvements Act — typically specify an amount per violation up to “not more than” a specified maximum amount. SA 13 (Final Rule). Those types of straightforward formulaic penalty schemes are markedly different from CAFE’s complex scheme, which “does not use a simple multiplier comparable to the examples provided by commenters.” *Id.*

2. Congress did not intend the Improvements Act to apply to the CAFE civil penalty rate or penalty cap.

In addition to the plain text, there are other reasons OMB and NHTSA correctly determined that Congress did not intend the Improvements Act to apply to CAFE civil penalty rates.

Most notably, the process envisioned by the Improvements Act conflicts with the elaborate process for increasing CAFE penalties set forth in EPCA. As NHTSA explained in the Final Rule, “[a]pparently concerned about the ease with which the CAFE civil penalties program could damage the economy and the automobile industry in particular, Congress imposed a strict, tailored procedure for adjusting the CAFE civil penalty rate, requiring robust substantive findings and specific procedures This process stands in stark contrast to the summary approach delineated in the [Improvements] Act” SA 11 (footnotes omitted) (discussing 49 U.S.C. § 32912(c) (SA 48)).

The Improvements Act also conflicts with other features of the CAFE program. In particular, because the penalty amount is directly tied to the standards, which are set at a maximum feasible level, it makes no sense to have the penalty adjusted based on general increases in the price of good and services. As NHTSA, referring to the OMB Applicability Letter analysis, noted,

the unique features of EPCA also make the 2015 Act inconsistent with the CAFE civil penalty rate because, under EPCA, Congress required the Secretary of

Transportation to regularly establish the maximum feasible fuel efficiency standards based on, among other things, developing technology, as opposed to applying a rote, formulaic increase to the penalty rate. Rather than maintain[ing] the real value of the CAFE civil penalty formula through inflation adjustment procedures, Congress chose other means: the CAFE civil penalty formula is based in part on the amount of the manufacturer's shortfall, and Congress requires NHTSA to prescribe the maximum feasible average fuel economy standards annually. If a manufacturer failed to adapt to the increasing standards, its shortfall — and in turn, its penalty calculation (before accounting for credits) — increases automatically. Requiring an inflation adjustment on top of that would be gratuitous.

SA 11-12 (Final Rule) (internal quotation marks and footnotes omitted). Relatedly, NHTSA explained how the increasing stringency of the fuel economy standards translates to increasing CAFE civil penalties in real terms. SA 12 (Final Rule).³

Petitioners seek to minimize the tension between a simplistic, mechanical application of the Improvements Act and the policies of EPCA by portraying EPCA as solely focused on maximizing energy conservation and environmental objectives. In their view, any increase in the CAFE civil penalty rate would advance those goals. But petitioners fundamentally misconstrue EPCA. EPCA *does* seek to advance energy conservation and environmental policies, but *only to*

³ The NGO petitioners note that NHTSA has recently proposed to “flatline” the fuel economy standards. NGOs’ Br. 28. But that proposal does not provide any insights into Congress’s intent in passing the Improvements Act.

the extent that the advancement of those policies is consistent with technological feasibility and does **not** cause “substantial deleterious impact on the economy of the United States, a State, or a region of a State.” 49 U.S.C. § 32912(c)(1)(A)(ii) (SA 48). The flaw running through all of petitioners’ arguments is that they ignore these essential directions from Congress.

The theme of promoting conservation without imposing economic harm runs throughout the CAFE program. Standards are to be set with an eye towards economic impacts; penalties are to be assessed with a view towards economic considerations; and the penalty calculation is to be set at a level that will not be economically disruptive. Were the penalty calculation to remain at a level that NHTSA has since found to be economically harmful, Congress’s goal of ensuring a balance between conservation and economic impacts would be disrupted. Companies that could not meet a standard due to their product mix might be forced to withdraw from the U.S. market. And companies that face penalties due to unexpected changes in market conditions might be forced to curtail production, reducing jobs. Setting the penalty calculation without regard to potential economic hardship, as petitioners suggest, would disrupt the balance that is essential to the CAFE program, effectively nullifying or repealing EPCA’s express requirement to balance conservation with economic considerations.

Petitioners’ failure to reconcile their position with EPCA’s express requirements is contrary to well-settled law that implied repeals are to be avoided whenever it is possible to harmonize statutory provisions. *See, e.g., Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (“where there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment”) (internal quotation marks, alterations, and citations omitted); *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (statutes are to be construed so as “to give effect to each” if possible “while preserving their sense and purpose”); *Force v. Facebook, Inc.*, 934 F.3d 53, 72 (2d Cir. 2019) (“repeals by implication are not favored and will not be presumed unless” Congressional intent to repeal is “clear and manifest”) (alterations, internal quotation, and citation omitted). Accordingly, an existing statute (such as EPCA) should not be deemed to have been superseded, repealed, or controlled by a later-enacted statute (such as the Improvements Act) unless the “two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute.” *Id.* (quoting *Branch v. Smith*, 538 U.S. 254, 273 (2003)).

No such conflict exists here. The Improvements Act — which is in a different section of the U.S. Code than EPCA — is a general statute, and nothing

in its text or legislative history evinces an intent to override the existing EPCA framework.

As NHTSA recognized, there is also another powerful reason for concluding that Congress did not intend for the Improvements Act to apply to the CAFE civil penalty rate: the dramatic disparity between the Congressional Budget Office (“CBO”) estimate of the Improvements Act’s revenue effects on *all* applicable penalties, on one hand, and the impact of applying the Improvements Act to the CAFE civil penalty rate *alone*, on the other. *See* SA 13 (Final Rule); SA 36 (NPRM). As NHTSA noted, CBO estimated that the revenue that would accrue to the Federal government from “*all* inflation adjustments pursuant to [the Improvements Act] (across *every* Federal agency) would” total \$1.3 billion across ten years. SA 36 (NPRM). But “[c]ommenters indicate that adjusting the [CAFE] civil penalty rate to \$14 could cost up to \$1 billion *annually* in penalty payments. Across ten years, the penalty payments under this provision of the statute alone could dwarf CBO’s contemporaneous estimate of [the Improvements Act’s] effect on revenues from *all* civil monetary penalties across *all* statutes.” *Id.* (footnote omitted).

After carefully considering criticisms of the use of the CBO estimate to discern Congressional intent, NHTSA correctly concluded that this anomaly

further shows that Congress did not intend the CAFE civil penalty rate to be subject to the Improvements Act. SA 13-14 (Final Rule).

3. Petitioners’ arguments that Congress intended the Improvements Act to apply to the CAFE civil penalty rate or rate cap are unavailing.

Petitioners advance several arguments in an attempt to support their position that Congress intended the Improvements Act to apply to the CAFE civil penalty rate or rate cap. These arguments cannot overcome the plain text, let alone overcome the deference owed to OMB’s interpretation.

Citing other statutory penalty schemes, petitioners first argue that there is nothing unique about CAFE penalties. *See* States’ Br. 37-39; NGOs’ Br. 25-27. None of their examples, however, bears any resemblance to CAFE. All involve simple multipliers — typically on a per-violation basis up to a maximum amount. Under the CAFE program, by contrast, applying a multiplier is just the *start* of a process. As noted above, the “specific monetary amount” is unknown until the manufacturer decides to use any available credits it has, or can acquire, to make up for the shortfall identified by NHTSA, and the result of the manufacturer’s choices may be no payment of a fine at all. Petitioners have failed to identify any other penalty scheme that resembles the CAFE civil penalty.

Petitioners next contend that the Improvements Act must apply to the CAFE civil penalty rate and rate cap because Congress intended the Improvements Act to

apply “broadly.” *See* States’ Br. 34. NHTSA addressed this argument in the Final Rule, SA 15. Even though Congress intended the Improvements Act to apply broadly, it also adopted restrictive definitions of key statutory terms that limit the Act’s scope. Consistent with Congress’s intent, OMB, in guidance issued in 2016 and in its Applicability Letter, has specifically concluded that the Improvements Act does not apply to all civil penalties. *See* JA 929-31 (OMB Applicability Letter); JA 515 (Mem. for the Heads of Exec. Dep’ts and Agencies from Shaun Donovan, Director, OMB, Feb. 24, 2016) (“2016 OMB Guidance”).

Petitioners emphasize that the CAFE civil penalty rate has been referred to as a “penalty” or “civil penalty,” but that also does not support their position. *See* States’ Br. 47-49; NGOs’ Br. 20. As noted, the Improvements Act specifies particular penalties to which it applies, using narrowly defined terms. Because Congress did not intend the Improvements Act to apply to all penalties imposed by agencies under Federal law, there is no reason to determine that references to the CAFE civil penalty rate as a “penalty” establish that Congress intended that the Improvements Act apply to the CAFE civil penalty rate or rate cap. Nor is there any evidence that Congress was aware of this usage and assumed that the Improvements Act would apply to the CAFE civil penalty rate or rate cap.

With no other meaningful support for their position, petitioners are left arguing that certain government reports show that Congress intended the

Improvements Act to apply to CAFE civil penalty rates. Petitioners' reliance on those reports is misplaced. They have not cited any reference to those reports in the legislative history of the Improvements Act. Nor is there any reason to infer that, in enacting the Improvements Act, Congress focused on the scattered references to the CAFE civil penalty rate or rate cap in the reports.⁴

For example, the OMB *Civil Monetary Penalty Assessments and Collections 1990 Report to Congress and Civil Monetary Penalty Inflation Adjustment Report* (July 1991) includes two exhibits listing civil penalties identified by federal agencies. *See* JA 57-120; *see also* States' Br. 48 (discussing this report); NGOs' Br. 7, 20 (same). Exhibit 1 is 31 pages long, with many pages including dozens of entries. The CAFE civil penalty statute is a single entry in that sea of entries. Similarly, Exhibit 2, which lists civil monetary penalty inflation adjustments, has 31 pages, some with dozens of entries. There is no reason to believe that Congress specifically focused on the isolated references to the CAFE civil penalty rate or rate cap in the 1991 report when enacting the Improvements Act.

⁴ We have not found any indication that any commenter on the NPRM argued that the reports were considered by Congress in connection with the Improvements Act. Arguments not presented to an agency are ordinarily deemed waived. *See Foster v. INS*, 376 F.3d 75, 78 (2d Cir. 2004) (per curiam); *Beharry v. Ashcroft*, 329 F.3d 51, 56 (2d Cir. 2003); *see also Koretoff v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) (per curiam) (deeming argument waived because the court requires "the argument [petitioner] advances here to be raised before the agency, not merely the same legal issue") (internal quotation marks omitted).

Similarly, the 2003 and 2007 Government Accountability Office (“GAO”) reports cited by the States and NGOs do not support their position. *See* States Br. 12, 13, 49; NGOs’ Br. 7-8, 21-22. The 2003 GAO report is a 50-page report with two references to the CAFE civil penalty rate. *See* JA 189, 208. The second reference to the CAFE civil penalty rate merely consists of a reference to “5.5”; it does not even mention CAFE or fuel economy.

The 2007 GAO report discusses the adequacy of CAFE civil penalty rates at length and does recommend that NHTSA continue to study the possibility of indexing CAFE civil penalty rates to keep pace with inflation. JA 221, 238, 244, 263. But the 2007 report also notes that “DOT officials generally concurred with the report’s findings, [but] did not believe indexing civil penalties to inflation would achieve further compliance with CAFE standards.” JA 221. Significantly, the report’s recommendations do not urge Congress to consider mandating inflation adjustments to CAFE civil penalty rates pursuant to a revised inflation adjustment statute. Rather, GAO stated,

So that the DOT is prepared to move quickly to revise the CAFE program in the event Congress decides to set higher CAFE standards or authorizes NHTSA to reform the existing program, we recommend that as part of the process for determining future CAFE standards, the Secretary of Transportation direct the Administrator of NHTSA to consider in the agency’s analysis whether the CAFE program should be enhanced to include credit trading, eliminate incentives to classify vehicles as light

trucks, index CAFE penalties to keep pace with inflation, or incorporate other reforms.

JA 263.

Petitioners also cite a 2010 GAO Report, *Vehicle Fuel Economy[:] NHTSA and EPA's Partnership for Setting Fuel Economy and Greenhouse Gas Emissions Standards Improved Analysis and Should be Maintained* (GAO-10-336), <https://www.gao.gov/assets/310/301194.pdf>. See States' Br. 14, 49; NGOs' Br. 19.

The sole discussion of the adequacy of the CAFE civil penalty rates in the 2010 GAO Report observes that CAFE fine rates

have not been increased since 1997, and GAO has reported that, as a result, CAFE penalties may not provide a strong enough incentive for manufacturers to comply with CAFE. NHTSA officials noted that under EPCA, NHTSA has the authority to raise the fines up to \$10 per tenth of an mpg. However, raising fines requires an analysis finding that substantial energy conservation would result and that raising fines would not have substantially deleterious impact on the U.S. economy. GAO has recommended that agencies collecting penalties regularly conduct these types of analyses.

2010 GAO Report, at 27-28 (footnote omitted)). There is no reason to assume that Congress considered such observations, in a report about the NHTSA and EPA's partnership for setting fuel economy and greenhouse gas standards, as a basis for applying the Improvements Act to the CAFE civil penalty rate and rate cap.

Lastly, petitioners cite a 2008 Congressional Research Service ("CRS") Report, RL34368, *Adjustment of Civil Monetary Penalties for Inflation* (Feb. 11,

2008). *See* States’ Br. 13-14, 49; NGOs’ Br. 8, 19, 22. That report discusses a considerable number of penalties of various kinds, discussing CAFE civil penalty rates on a single page — specifically, page CRS-9. That truncated discussion — one paragraph in a 13-page CRS report that was issued seven years before the Improvements Act — does not support an inference that Congress intended the Improvements Act to apply to the CAFE civil penalty rate or rate cap.

B. This Court’s Decision in *NRDC* Did Not Preclude NHTSA from Determining that the Improvements Act Is Not Applicable to the CAFE Civil Penalty Rates.

The States argue that, in *NRDC*, this Court already decided that the Improvements Act applies to the CAFE civil penalty rate and rate cap. States’ Br. 26-30. These arguments are also wrong.

During the *NRDC* proceedings, the parties and this Court were aware that NHTSA had raised the applicability issue in the NPRM. Both the parties and the Court repeatedly and emphatically stated that the applicability question was *not* before the Court and that the appropriate time for considering that question would be in a future proceeding.

In its *NRDC* brief, for example, NHTSA cited the NPRM and stated that “there are substantial questions about whether the [Improvements] Act applied to the CAFE civil penalty rate at all.” NHTSA *NRDC* Br. 5 n.2. While arguing that the Improvements Act does apply to the CAFE civil penalty rate, *see* States’

NRDC Reply Br. 12-15, the States also noted that the merits of the agency’s reconsideration were *not* at issue in the *NRDC* proceeding. *See id.* at 11 (“While the States disagree with NHTSA’s just-released proposal to reduce the penalty to \$5.50, their objection in *this* proceeding focuses on the delay that NHTSA instituted nearly a year ago.”); *id.* at 24 (“The reconsideration is a separate rulemaking addressing a different issue: whether to change the penalty, not whether to suspend it.”).

The NPRM was also discussed at the *NRDC* oral argument. There, the parties and the Court agreed that the merits of that proceeding — including the question whether the Improvements Act is applicable to the CAFE civil penalty rate — were *not* before the Court. During his argument, for example, counsel for NHTSA referred to the applicability question in the NPRM reconsideration proceeding. *See* Oral Arg. at 9:55 to 10:53. Counsel for NHTSA later noted that petitioners had not disputed NHTSA’s authority to undertake the reconsideration. *Id.* at 22:10 to 22:25. During the States’ rebuttal, Judge Pooler observed that NHTSA is allowed to reconsider the \$14 per tenth of a mile penalty rate, and counsel for the States responded: “They are allowed to reconsider it. It’s a separate question of whether they are allowed to delay it pending that consideration.” *Id.* at 25:42 to 25:48. Judge Pooler then observed that “what is before us is the delay.

You’re not challenging the reconsideration.” *Id.* at 25:50 to 26:54.⁵ Counsel for NRDC also clearly stated that the applicability question was not before the Court: “My opposing counsel has pointed out there is an ongoing reconsideration. That’s correct. We are not challenging that yet.” *Id.* at 34:40 to 34:45.

It is thus clear that the parties and the Court understood that the merits of the reconsideration proceeding — including whether the Improvements Act applies to the CAFE civil penalty rate and rate cap — were *not* before the Court in *NRDC*. And with this context, it is clear that the portions of the Court’s decision cited by the States do not support their position. Throughout the *NRDC* decision, the Court focused on whether NHTSA had authority to *suspend* its \$14 per tenth of a mile final rule pending reconsideration. The Court noted that NHTSA was not entitled to deference on that issue — both because the Improvements Act applies to many agencies and because, with regard to the issue before the Court, the Improvements Act is not ambiguous. 894 F.3d at 112 n.10. The Court was referring to ambiguities relating to the statutory due dates for action and authority to suspend final rules pending reconsideration. That is obvious not just from the issues that were understood to be before the Court but also from the Court’s observation that

⁵ Later in the argument, counsel for the States did express his disagreement with the proposition that the Improvements Act might be inapplicable, but he did not ask the Court to rule on that issue. *NRDC* Oral Argument at 31:20 to 31:48.

the Improvements Act is “unambiguous regarding the mandatory nature of the penalty *deadlines*.” *Id.* at 113 (emphasis added); *see also id.* at 113 n.12 (the Improvements Act “is an unusually precise and directive statute. The Act mandates that all agencies increase penalties by a date certain with no suggestion for delay.”).

The issue before the Court in *NRDC* was whether NHTSA could suspend the final rule, and the Court held that, with respect to that question, the Improvements Act was unambiguous. The Court did not hold that the Improvements Act is unambiguous in all respects, and certainly did not hold that the Improvements Act was unambiguous with regard to the applicability issue — an issue that everyone agreed was *not* before the Court. As a result, the Final Rule at issue here does not come within the prohibition in *National Cable and Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 982-83 (2005), against an agency’s reconsideration of a statute’s meaning after a court finds that the statute is unambiguous with regard to the question at issue in the reconsideration.

In their brief, the States also trumpet the Court’s statement that “[t]he penalty increase is mandated by the Improvements Act, and applies to all agencies across the federal government. Nothing in EPCA contradicts or undermines that mandate. The goal of the Improvements Act was to increase compliance with *all* federal regulatory programs, not just the CAFE standards.” *NRDC*, 894 F.3d at

112 (cited in part in States’ Br. at 27). In context, the Court’s statement merely responded to NHTSA’s contention that suspending the \$14 final rule was authorized by NHTSA’s administrative responsibilities under EPCA. The statement does not speak to whether the Improvements Act applies to the complex CAFE penalty program.

To read more into the statement would result in an obvious error in statutory construction: the Improvements Act, by its terms and as authoritatively interpreted by OMB for both the Obama and Trump Administrations, applies only to “civil monetary penalt[ies]” as defined in Section 3, paragraph 2 of the statute. *See* 28 U.S.C. § 2461 note (SA 46). Guidance issued by OMB in February 2016 provides specific instructions for distinguishing the penalties to which the Improvements Act applies from the penalties to which the Improvements Act does **not** apply. *See* JA 515 (2016 OMB Guidance). Similarly, the OMB Applicability Letter concurs with NHTSA’s conclusion that the Improvements Act does not apply to the CAFE civil penalty rate.

The States’ argument that NHTSA should have raised the applicability issue in *NRDC* ignores that those petitioners and the Court recognized that NHTSA was still considering the applicability of the Improvements Act to the CAFE civil penalty rate and rate cap. Putting off the issue was appropriate: NHTSA had not yet issued a final rule concluding that the Improvements Act was inapplicable, and

so there was no final agency action for the Court to consider, and the issue would not have been ripe for review. The Court focused on the narrow issue properly before it: *assuming that* the Improvements Act applied to the CAFE civil penalty, was NHTSA's suspension, without notice and an opportunity for comment, of its previous rule increasing the CAFE civil penalty rate sustainable? The States' attempt to characterize the issues in this proceeding as already decided by *NRDC* not only rewrites history but ignores the States' representations to the Court.

II. **EVEN IF THE IMPROVEMENTS ACT WERE TO APPLY, NHTSA REASONABLY INVOKED ITS STATUTORY AUTHORITY TO REDUCE THE INITIAL CATCH-UP ADJUSTMENT**

NHTSA concluded in the alternative that, even if the Improvements Act were to apply to the CAFE civil penalty rate, a reduced catch-up adjustment — specifically, an increase of zero dollars — was warranted, because raising the CAFE rate to \$14, as otherwise mandated by the Improvements Act, would cost the industry *\$ 1 billion per year*, which would cause undue economic damage to the nation's economy. Petitioners do not meaningfully challenge these well-supported findings. Instead, emphasizing the Improvements Act's goal of "increasing compliance with underlying substantive rules (such as the CAFE standards)," States' Br. 64, petitioners complain about the environmental consequences that will purportedly occur if the CAFE civil penalty rate is not increased. States' Br. 70-72; NGOS' Br. 49-53. They urge this Court to balance

the various factors in a way that is more to their liking, notwithstanding the economic consequences. But Congress did not intend NHTSA to apply either the Improvements Act or EPCA in a way that would cause economic harm. Because petitioners ignore the economic harms that will be caused by increasing the CAFE civil penalty rate, their position cannot be reconciled with the statutory scheme and Congress's priorities.

A. Petitioners Wrongly Contend that NHTSA Should Have Ignored CAFE's Framework When Applying the Improvements Act's Generic Inflation Adjustment Mechanism.

NHTSA reasonably concluded that EPCA "must be read harmoniously with the [Improvements] Act." SA 3 (Final Rule). Petitioners contend that Congress intended to strip NHTSA of any discretion to consider the existing EPCA statutory scheme when applying the Improvements Act. Viewing the catch-up adjustment as a ministerial tabulation with no discretion for NHTSA to protect against economic harm, petitioners argue that NHTSA applied "inapposite criteria" found in EPCA when deciding to impose a reduced catch-up adjustment. States' Br. 60-63; *see also* NGOs' Br. 35-39. In petitioners' view, taking account of anything but the deterrent effect of increasing civil penalties would "flout Congress's intent." States' Br. 62.

Petitioners' position cannot be reconciled with Congress's instructions. As noted above, statutes should be harmonized where possible, and repeals by

implication are disfavored in the law. Accordingly, an existing statute (such as EPCA) will not be deemed to have been superseded, repealed, or controlled by a later-enacted statute (such as the Improvements Act) unless the “two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute.” *Force*, 934 F.3d at 72 (quoting *Branch*, 538 U.S. at 273).

The Improvements Act does not manifest any Congressional intent to repeal or nullify EPCA or to prevent NHTSA from taking account of EPCA when considering whether a “negative economic impact” exists. To the contrary, the Improvements Act and EPCA are readily reconciled because *neither* statute mandates an increase in civil penalties that results in economic harm.

The Improvements Act specifically authorizes agencies to adjust a civil penalty by “less than the otherwise required amount” if “increasing the civil monetary penalty” would “have a negative economic impact.” 28 U.S.C. 2461 note, § 4(c)(1)(A) (SA 46). In fact, Congress was so concerned about the risk of damaging the economy that the Improvements Act directs OMB to take an independent look at the economic impact of increasing a particular civil penalty. *Id.* § 4(c)(2) (SA 46). As noted above, OMB’s interpretation of the Improvements Act is entitled to *Chevron* deference because Congress specifically delegated to

OMB the authority to construe, and provide guidance to agencies on, the Improvements Act.

NHTSA’s decision to consider the EPCA factors is consistent with Congress’s intent in both EPCA and the Improvements Act. Congress structured the CAFE program to require NHTSA to consider economic impact when raising CAFE civil penalty rates. Under the CAFE program, NHTSA sets a “maximum feasible average fuel economy level” applicable to automakers’ fleets for each model year that reflect the maximum *feasible* level that manufacturers can achieve in that model year, not the maximum *obtainable* level. The maximum feasible level must consider NHTSA’s projection of (1) technological feasibility, (2) economic practicability, (3) fuel economy, and (4) energy conservation. 49 U.S.C. § 32902(a) & (f). EPCA thus does not require increasingly stringent fuel economy standards regardless of cost. Instead, EPCA allows NHTSA to gradually raise fuel economy standards with at least eighteen months’ lead time to automakers, which regulates fuel conservation but avoids disrupting the economy — thereby protecting jobs and consumer choice. *See* 49 U.S.C. § 32902(a) & (f).

Congress later amended EPCA to include the factors that NHTSA must consider when deciding to raise the CAFE civil penalty rate. *See* Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745, 1072. The amendment demonstrates Congress’s intent that NHTSA set penalties without causing economic harm.

Under the amendment, NHTSA may increase the CAFE civil penalty rate only if the increase “will not have a substantial deleterious impact on the economy of the United States, a State, or a region of a State.” 49 U.S.C. § 32912(c)(1)(A)(ii) (SA 48).

To find no “substantial deleterious impact,” NHTSA must determine that the increased penalty likely will not “(i) cause a significant increase in unemployment in a State or a region of a State; (ii) adversely affect competition; or (iii) cause a significant increase in automobile imports.” 49 U.S.C. § 32912(c)(1)(C) (SA 48). These factors reflect Congressional policy precluding NHTSA from pursuing CAFE’s conservation goals without considering the economic consequences of CAFE civil penalties.

In suggesting that EPCA is irrelevant to whether a penalty adjustment would have a negative economic impact, petitioners fail to acknowledge that the CAFE standards require NHTSA to consider the technology that will be available and how economic conditions will evolve over time. NHTSA must carefully apply its expertise to set the CAFE standards, taking account of market forces that impact energy consumption. *See Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin.*, 793 F.2d 1322, 1341 (D.C. Cir. 1986) (“NHTSA acted within the reasonable range of interpretations of the statute in correcting the 1985 standards to

account for” changes in gasoline prices and consumer demand for fuel-efficient vehicles).

In light of EPCA’s specific and complex scheme for determining the CAFE civil penalty amount, and because *nothing* in the Improvements Act suggests Congress intended for NHTSA to ignore EPCA, NHTSA had broad discretion to take account of the EPCA factors in determining economic harm. NHTSA reasonably harmonized the Improvements Act’s broadly applicable inflation adjustment mechanisms with EPCA. That reasonable decision is entitled to deference.

B. Petitioners Do Not Meaningfully Challenge NHTSA’s Finding of Negative Economic Impact.

NHTSA found that “[t]he likely effects raising the CAFE civil penalty rate to \$14 would have on unemployment, competition, and automobile imports” would “have a negative economic impact.” SA 16 (Final Rule). NHTSA also determined that “[i]mposing an additional billion dollars in costs to the automobile industry — every year — would have the type of ‘negative economic impact’ envisioned by Congress when it provided this exception, and this negative economic impact is magnified” for domestic manufacturers who must meet additional statutory domestic minimum standards for passenger vehicles (which do not apply to foreign-manufactured vehicles) and whose ability to achieve CAFE compliance through the use of credits is restricted under the CAFE program as compared to

manufacturers of imported vehicles. SA 21-22 (Final Rule). Lacking an adequate response to this well-reasoned analysis, petitioners urge the Court to force the agency to increase the penalty amounts — no matter the harm to the economy — but they provide no justification for their position.

1. NHTSA’s analysis comports with EPCA.

Evaluating each of the EPCA factors, NHTSA “conclude[d] that increasing the CAFE civil penalty rate would have a negative economic impact.” SA 3 (Final Rule). In so finding, NHTSA noted that “it is appropriate to consider the impact raising the CAFE civil penalty rate would have on individual manufacturers who fall short of fuel economy standards, and those affected, such as dealers,” SA 18 n.173 (Final Rule) (quoting NPRM, SA 38), which is “consistent with how other statutory provisions permitting or requiring agencies to consider economic impacts have been interpreted.” SA 38 (NPRM). The record amply supports NHTSA’s findings under each EPCA factor.

First, NHTSA could not rationally conclude that raising the CAFE civil penalty rate would *not* cause a significant increase in unemployment in a State or region of a State. Although some commenters offered contrary data (SA 18 (Final Rule)), these commenters failed to break down the data geographically, incorrectly assumed that the increased \$14 penalty rate had been in effect since 2016, or conducted a survey on job growth that did not actually ask about increased

stringency of CAFE standards. SA 17-18 (Final Rule (citing comments)). In contrast, NHTSA cited a peer-reviewed study from Indiana University showing that increased vehicle prices resulting from harsher CAFE standards would result in job losses, particularly in states like Illinois, Indiana, Michigan, Ohio, Wisconsin, Arkansas, Louisiana, Oklahoma, and Texas. SA 18 (Final Rule).

Second, NHTSA reasonably evaluated the impact of an increased CAFE civil penalty rate on competition from the perspectives of both consumers and manufacturers and found that the increased penalty rate could limit consumer choice and distort normal market competition, especially among “domestic manufacturers.” SA 20 (Final Rule).

Third, NHTSA found that increasing the CAFE civil penalty rate would increase automobile imports since “the import passenger car fleet has consistently had a superior fuel economy performance to the domestic passenger car fleet for over ten years,” which means “increasing the CAFE civil penalty rate would likely have a harsher impact on domestic manufacturers, who would need to invest more to reduce fuel economy shortfalls” and who cannot trade credits to satisfy a shortfall in compliance. SA 20 (Final Rule).

2. Even if the EPCA factors were not considered, NHTSA’s analysis was reasonable.

NHTSA concluded that “[e]ven if the EPCA factors do not apply,” “raising the CAFE civil penalty rate to \$14 would have a ‘negative economic impact.’” SA

20 (Final Rule). “Imposing an additional *billion dollars* in costs to the automobile industry — every year — would have the type of ‘negative economic impact’ envisioned by Congress when it provided this exception,” which was “magnified” with regard to domestic passenger vehicles. SA 21-22 (Final Rule) (emphasis added). Traditionally, \$100 million has served as a threshold for finding a new regulation qualifies as a “major rule” or “significant regulatory action.” 5 U.S.C. § 804(2)(A); Exec. Order No. 12866, 58 Fed. Reg. 51735, 51739 (Sept. 30, 1993). NHTSA thus reasonably found that a rule imposing ten times that cost would qualify as the type of economically significant rule that would concern Congress. SA 22 (Final Rule).

In fact, the CAFE civil penalty adjustment suggested by the OMB formula (to \$14) would cost society \$3.5 billion per year industry-wide by model year 2025 and would not produce commensurate benefits. JA 703, 708 (Alliance/Global Oct. 10, 2017 Comments). In the Final Rule, NHTSA addressed and reasonably rejected comments from the Union of Concerned Scientists (“UCS”), which critiqued this annual cost estimate, because UCS did not properly factor in the costs of CAFE compliance in its analysis. SA 21. The States persist in UCS’s flawed approach, arguing that NHTSA should not have considered the costs of CAFE compliance when determining “negative economic impact” because the Improvements Act’s exception could be “automatically triggered by the adjustment

of almost every penalty.” States’ Br. 64-65. But OMB provided several “benchmarks” to guide analysis of whether the increased CAFE civil penalty rate qualifies as “negative economic impact,” JA 936 (OMB Negative Economic Impact Letter), and increasing the CAFE civil penalty rate to \$14 meets all those thresholds.

The States’ concern that agencies would abuse this exception is “purely hypothetical,” because in the years since passage of the Improvements Act, other agencies have not invoked it. SA 17 (Final Rule). It also makes no sense. Congress specifically provided for an additional layer of OMB review to prevent abuse, and OMB concurred with NHTSA’s conclusions.

C. None of Petitioners’ Procedural Objections Overcome NHTSA’s Analysis and Exercise of Discretion.

Lacking persuasive reasons why the Court should disregard NHTSA’s expert findings, petitioners lodge a series of procedural objections that only serve to magnify the substantive inadequacies of their arguments.

Petitioners first assert that NHTSA failed to consider earlier agency findings, including allegedly contradictory industry cost estimates in a Draft Technical Analysis Report (“Draft TAR”) that NHTSA had previously released for model year 2022-2025 vehicles. NGOs’ Br. 40-42; States’ Br. 65-67. Petitioners are wrong.

As NHTSA noted in the Final Rule, since it released that draft analysis, the EPA Administrator “reconsidered the emission standards for model year 2022-2025 light-duty vehicles and determined that they ‘are based on outdated information, and that more recent information suggests that the current standards may be too stringent,’” requiring EPA to revisit these standards in partnership with NHTSA. SA 21 (citing 83 Fed. Reg. 16077 (Apr. 13, 2018)). These standards formed the basis of NHTSA’s previous analysis, which means NHTSA’s previous “conclusion is no longer operative.” *Id.* NHTSA’s disregard of the Draft TAR makes sense, as agencies should and commonly do change initial determinations upon a change in factual circumstances. *Bechtel v. F.C.C.*, 957 F.2d 873, 881 (D.C. Cir. 1992) (“In the rulemaking context, for example, it is settled law that an agency may be forced to reexamine its approach if a significant factual predicate of a prior decision has been removed.”) (internal citation and quotation omitted).

Petitioners next contend that NHTSA should have considered other factors favoring an *increase* in the CAFE civil penalty rate or the relative costs *and* benefits of raising the rate. States’ Br. 67; NGOs’ Br. 42-43. But as OMB stated in its concurrence to NHTSA’s zero-dollar adjustment, the “ambiguous statute identifies only the direction (negative) and general nature (economic) of the impact the head of the agency should consider.” JA 935 (OMB Negative Economic Impact Letter). Consideration of any other factors is therefore not required.

Petitioners’ argument might make sense had NHTSA invoked the Improvements Act’s *alternative* basis for reducing the catch-up adjustment, which weighs the social costs of an adjustment against its benefits. 28 U.S.C. §2461 note, § 4(c)(1)(B) (SA 46). But NHTSA acted pursuant to Section 4(c)(1)(A), which permits the agency to adjust the catch-up adjustment if the agency determines there will be a “negative economic impact,” full stop, no cost-benefit analysis required. Accordingly, even if regulation “ordinarily” requires consideration of costs and benefits, States’ Br. 67 (internal quotation marks omitted), NGOs’ Br. 42 (internal quotation marks omitted), here, the statute’s alternative provisions explicitly displace that presumption.

Petitioners also argue that NHTSA’s rulemaking was procedurally defective because the agency failed to take a “hard look” at the environmental impacts of the reduced catch-up adjustment. States’ Br. 70-72; NGOs’ Br. 49-53. Petitioners have ignored the text of the Final Rule, where NHTSA not only acknowledged that reducing the CAFE penalty would result in additional fuel consumption over a 15-year period, but explicitly found that the increased fuel consumption would “result in environmental impacts that are a fraction of those shown in the” environmental analyses prepared in connection with NHTSA’s setting of the model year 2017-2025 CAFE standards. SA 26.

III. NHTSA COULD AND REASONABLY DID RECONSIDER ITS INITIAL DECISION TO APPLY THE IMPROVEMENTS ACT AND RAISE THE CAFE CIVIL PENALTY RATE.

When NHTSA initially raised the CAFE civil penalty rate, it “did not give adequate consideration to all of the relevant issues, including the potential economic consequences of increasing CAFE penalties by potentially *\$1 billion* per year.” JA 689 (Delay Rule (July 12, 2017)) (emphasis added). Nonetheless, petitioners contend that NHTSA lacked discretion to reconsider its initial decision in order to complete the analysis that Congress required. Petitioners are wrong. Agencies have inherent power to correct mistakes and address evolving economic conditions. Nothing in the Improvements Act precludes NHTSA from reconsidering its earlier decision to apply the Improvements Act and raise the CAFE civil penalty rate.

“It is widely accepted that an agency may, on its own initiative, reconsider its interim or even its final decisions, regardless of whether the applicable statute and agency regulations expressly provide for such review.” *Dun & Bradstreet Corp. Found. v. U.S. Postal Serv.*, 946 F.2d 189, 193 (2d Cir. 1991). Unless specifically precluded from doing so by statute, agencies have inherent authority to reconsider their own decisions. *See Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92, 93 (2015) (agencies may amend rules provided that they “use the same procedures when they amend . . . a rule as they used to issue the rule in the first

instance”). In short, “administrative agencies possess the inherent authority to revise previously-promulgated rules, so long as they follow the proper administrative requirements and provide a reasoned basis for the agency decision.” *Clean Water Action v. EPA*, 936 F.3d 308, 313 (5th Cir. 2019); *see also ConocoPhillips Co. v. EPA*, 612 F.3d 822, 832 (5th Cir. 2010) (“Embedded in an agency’s power to make a decision is its power to reconsider that decision.”); *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1360 (Fed. Cir. 2008) (noting that agencies “possess inherent authority to reconsider their decisions, subject to certain limitations, regardless of whether they possess explicit statutory authority to do so.”).

In the Final Rule, NHTSA acknowledged and explained its change of position on the issues. *See* SA 7-9. In doing so, NHTSA provided a detailed explanation showing the “good reasons for the new policy.” *Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). Those reasons included a detailed analysis of the Improvements Act, which established that the statute was not applicable to the CAFE civil penalty rate or rate cap. NHTSA also established “good reasons for the new policy” by demonstrating that if the Improvements Act did apply to the CAFE civil penalty rate or rate cap, the record evidence, which the agency had not previously addressed in full, demonstrated that significant harm to the economy would result.

That is more than sufficient to justify reconsideration. An agency presenting a new position must acknowledge the change, but is *not* required to show that the new position is better than the old one. *See FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009) (when an agency changes a prior policy or position, “it need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates”). As Justice Ginsburg has explained, “there is no heightened standard of arbitrary-and-capricious review” when an agency departs from a prior position; an agency “need not demonstrate . . . that the reasons for the new policy are *better* than the reasons for the old one.” *Encino Motorcars*, 136 S. Ct. at 2128 (Ginsburg, J., concurring) (internal quotation marks and citations omitted).

Here, NHTSA is not relying on factual findings that contradict findings underlying a previous position. Nor has its earlier position “engendered serious reliance interests.” *Fox*, 556 U.S. at 515. Moreover, NHTSA provided an elaborate justification for its Final Rule sufficient to overcome any reliance interests that might exist. SA 8 (citing *Fox*, 556 U.S. at 515).

The deadline in the Improvements Act for the determination of the “catch-up” adjustment does not undercut this conclusion. For one thing, if the

Improvements Act is inapplicable to the CAFE civil penalty rate and rate cap, the deadlines in the Improvements Act are equally inapplicable. In addition, the imposition of deadlines in a statute does not foreclose an agency from taking action after those deadlines. An agency may act after deadlines have expired unless the statute both imposes a mandatory deadline and specifies that a consequence of a failure to act within the allotted time is the loss of jurisdiction to act. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158 (2003); *id.* at 159 (“[I]f a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction.”) (internal quotation marks omitted); *St. Regis Mohawk Tribe, New York v. Brock*, 769 F.2d 37, 41 (2d Cir. 1985) (Friendly, J.) (“[C]ourts have enunciated a general rule that [a] statutory time period is not mandatory unless it *both* expressly requires an agency or public official to act within a particular time period *and* specifies a consequence for failure to comply with the provision.”); *see also Valona v. U.S. Parole Comm’n*, 235 F.3d 1046, 1048 (7th Cir. 2000) (noting “when the statute is silent on the effect of delay, shortcomings by public officials rarely preclude (eventual) implementation of laws designed for protection of the public at large.”). Especially where, as here, “important public rights are at stake,” the “courts should not assume that Congress intended the agency to lose its power to act.” *Brock v. Pierce County*, 476 U.S. 253, 260 (1986).

In short, although “[i]n a perfect world, agencies ... would never miss their deadlines,” *Americans for Clean Energy v. EPA*, 864 F.3d 691, 719 (D.C. Cir. 2017), the Improvements Act should not be construed to impose a “use it or lose it” requirement on agencies. Thus, even if the statutory deadlines of the Improvements Act applied here, they would not preclude NHTSA’s determination in the Final Rule that the Improvements Act is not applicable to the CAFE civil penalty rate and rate cap.

The principle articulated by the Supreme Court in *Barnhart* and *Brock* applies equally to *both* NHTSA’s conclusion that the Improvements Act does not apply to the CAFE civil penalty rate or rate cap *and* NHTSA’s alternative conclusion in the Final Rule that even if the Improvements Act does apply, no increase in the CAFE civil penalty rate is permissible under the Improvements Act.

Neither of this Court’s decisions in *NRDC* or *Abraham* support a different result. In *NRDC*, a prior panel of this Court found that NHTSA lacked inherent authority to indefinitely delay implementation of the \$14 increase to the CAFE civil penalty rate because NHTSA had duly promulgated the rule and the Improvements Act directed that it should take effect by August 1, 2016. *NRDC*, 894 F.3d at 112; 28 U.S.C. §2461 note, § 4(b)(1)(B) (SA 46). Now, by contrast, NHTSA has, by notice-and-comment rulemaking and with OMB’s concurrence, determined that a reduced catch-up adjustment is warranted that should

immediately take effect. Nothing in the Improvements Act proscribes this course of action.

Natural Resources Defense Council v. Abraham is similarly inapposite. There, another provision within EPCA stated that the Secretary (of Energy) “*may not* prescribe any amended standard” relaxing or rescinding the standards once they had been published. *Natural Resources Defense Council v. Abraham*, 355 F.3d 179, 195, 202 (2d Cir. 2004) (citing 42 U.S.C. § 6295(o)(1)). As *Abraham* shows, had Congress wanted to eliminate an agency’s ability to reconsider application of the catch-up adjustment, Congress could have done so. In short, although inherent reconsideration authority is not available “where a statute forbids the exercise of such power,” *Tokyo Kikai Seisakusho*, 529 F.3d at 1361, the Improvements Act contains no mechanism expressly forbidding agencies to rectify misapplication of the catch-up adjustment. The Court should decline petitioners’ invitation to read words into the Improvements Act that do not exist.

That the Improvements Act provides for a one-way ratchet — mandating that all subsequent inflation adjustments are based off the catch-up adjustment — reinforces the utmost importance of getting the initial catch-up adjustment right. Just as the Constitution takes account of public necessity and is not construed as a “suicide pact,” *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting), so too the Court should not construe the Improvements Act as

precluding correction of a gross error in an agency's estimation of "negative economic impact" which, to the agency's credit, it recognized and corrected.

CONCLUSION

NHTSA, with OMB concurrence, properly concluded that the Improvements Act does not apply to the CAFE civil penalty rate or rate cap and that, even if it did apply, an inflation adjustment raising the civil penalty rate to \$14 would have a negative economic impact. Petitioners' objections to these conclusions are unavailing. NHTSA was not precluded, either by the Improvements Act or this Court's prior decisions, from reconsidering its prior positions with regard to the Improvements Act, and NHTSA followed proper administrative procedures in issuing the Final Rule. Accordingly, the petitions for review should be denied.

DATED: March 5, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this brief complies with the type-volume limitations of Second Circuit Rule 32.1(a)(4)(A) because it contains 12,615 words, excluding parts of the document exempted by Federal Rule of Appellate Procedure 32(f).

Dated: March 5, 2020

/s/ Erika Z. Jones
Erika Z. Jones

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that I have this 5th day of March, 2020, served a copy of the foregoing document on all parties through the Court's CM/ECF system.

/s/ Erika Z. Jones

Erika Z. Jones

STATUTORY ADDENDUM

**STATUTORY ADDENDUM TO
BRIEF OF INTERVENOR
ALLIANCE FOR AUTOMOTIVE INNOVATION**

| Description | Page |
|-----------------------|-------------|
| 28 U.S.C. § 2461 note | ADD001 |
| 49 U.S.C. § 32902 | ADD003 |
| 49 U.S.C. § 32903 | ADD008 |
| 49 U.S.C. § 32912 | ADD010 |

EFFECTIVE DATE OF 2000 AMENDMENT

Amendment by Pub. L. 106–185 applicable to any forfeiture proceeding commenced on or after the date that is 120 days after Apr. 25, 2000, see section 21 of Pub. L. 106–185, set out as a note under section 1324 of Title 8, Aliens and Nationality.

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

Pub. L. 101–410, Oct. 5, 1990, 104 Stat. 890, as amended by Pub. L. 104–134, title III, §31001(s)(1), Apr. 26, 1996, 110 Stat. 1321–373; Pub. L. 105–362, title XIII, §1301(a), Nov. 10, 1998, 112 Stat. 3293; Pub. L. 114–74, title VII, §701(b), Nov. 2, 2015, 129 Stat. 599, provided that:

“SHORT TITLE

“SECTION 1. This Act may be cited as the ‘Federal Civil Penalties Inflation Adjustment Act of 1990’.

“FINDINGS AND PURPOSE

“SEC. 2. (a) FINDINGS.—The Congress finds that—

“(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

“(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

“(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

“(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

“(b) PURPOSE.—The purpose of this Act is to establish a mechanism that shall—

“(1) allow for regular adjustment for inflation of civil monetary penalties;

“(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

“(3) improve the collection by the Federal Government of civil monetary penalties.

“DEFINITIONS

“SEC. 3. For purposes of this Act, the term—

“(1) ‘agency’ means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

“(2) ‘civil monetary penalty’ means any penalty, fine, or other sanction that—

“(A)(i) is for a specific monetary amount as provided by Federal law; or

“(ii) has a maximum amount provided for by Federal law; and

“(B) is assessed or enforced by an agency pursuant to Federal law; and

“(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

“(3) ‘Consumer Price Index’ means the Consumer Price Index for all-urban consumers published by the Department of Labor.

“CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

“SEC. 4. (a) IN GENERAL.—Not later than July 1, 2016, and not later than January 15 of every year thereafter, and subject to subsections (c) and (d), the head of each agency shall—

“(1) in accordance with subsection (b), adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 et seq.] or the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], by the inflation adjustment described under section 5 of this Act; and

“(2) publish each such adjustment in the Federal Register.

“(b) PROCEDURES FOR ADJUSTMENTS.—

“(1) CATCH UP ADJUSTMENT.—For the first adjustment made under subsection (a) after the date of enactment of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 [Nov. 2, 2015]—

“(A) the head of an agency shall adjust civil monetary penalties through an interim final rulemaking; and

“(B) the adjustment shall take effect not later than August 1, 2016.

“(2) SUBSEQUENT ADJUSTMENTS.—For the second adjustment made under subsection (a) after the date of enactment of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, and each adjustment thereafter, the head of an agency shall adjust civil monetary penalties and shall make the adjustment notwithstanding section 553 of title 5, United States Code.

“(c) EXCEPTION.—For the first adjustment made under subsection (a) after the date of enactment of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, the head of an agency may adjust the amount of a civil monetary penalty by less than the otherwise required amount if—

“(1) the head of the agency, after publishing a notice of proposed rulemaking and providing an opportunity for comment, determines in a final rule that—

“(A) increasing the civil monetary penalty by the otherwise required amount will have a negative economic impact; or

“(B) the social costs of increasing the civil monetary penalty by the otherwise required amount outweigh the benefits; and

“(2) the Director of the Office of Management and Budget concurs with the determination of the head of the agency under paragraph (1).

“(d) OTHER ADJUSTMENTS MADE.—If a civil monetary penalty subject to a cost-of-living adjustment under this Act is, during the 12 months preceding a required cost-of-living adjustment, increased by an amount greater than the amount of the adjustment required under subsection (a), the head of the agency is not required to make the cost-of-living adjustment for that civil monetary penalty in that year.

“COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

“SEC. 5. (a) ADJUSTMENT.—The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest multiple of \$1.

“(b) DEFINITION.—

“(1) IN GENERAL.—Except as provided in paragraph (2), for purposes of subsection (a), the term ‘cost-of-living adjustment’ means the percentage (if any) for each civil monetary penalty by which—

“(A) the Consumer Price Index for the month of October preceding the date of the adjustment, exceeds

“(B) the Consumer Price Index for the month of October 1 year before the month of October referred to in subparagraph (A).

“(2) INITIAL ADJUSTMENT.—

“(A) IN GENERAL.—Subject to subparagraph (C), for the first inflation adjustment under section 4 made by an agency after the date of enactment of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 [Nov. 2, 2015], the term ‘cost-of-living adjustment’ means the percentage (if any) for each civil monetary penalty by which the Consumer Price Index for the month of October, 2015 exceeds the Consumer Price Index for the month of October of the calendar year during

which the amount of such civil monetary penalty was established or adjusted under a provision of law other than this Act.

“(B) APPLICATION OF ADJUSTMENT.—The cost-of-living adjustment described in subparagraph (A) shall be applied to the amount of the civil monetary penalty as it was most recently established or adjusted under a provision of law other than this Act.

“(C) MAXIMUM ADJUSTMENT.—The amount of the increase in a civil monetary penalty under subparagraph (A) shall not exceed 150 percent of the amount of that civil monetary penalty on the date of enactment of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

“SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to civil monetary penalties, including those whose associated violation predated such increase, which are assessed after the date the increase takes effect.

“SEC. 7. IMPLEMENTATION AND OVERSIGHT ENHANCEMENTS

“(a) OMB GUIDANCE.—Not later than February 29, 2016, not later than December 15, 2016, and December 15 of every year thereafter, the Director of the Office of Management and Budget shall issue guidance to agencies on implementing the inflation adjustments required under this Act.

“(b) AGENCY FINANCIAL REPORTS.—The head of each agency shall include in the Agency Financial Report submitted under OMB Circular A–136, or any successor thereto, information about the civil monetary penalties within the jurisdiction of the agency, including the adjustment of the civil monetary penalties by the head of the agency under this Act.

“(c) GAO REVIEW.—The Comptroller General of the United States shall annually submit to Congress a report assessing the compliance of agencies with the inflation adjustments required under this Act, which may be included as part of another report submitted to Congress.”

[Pub. L. 104–134, title III, § 31001(s)(2), Apr. 26, 1996, 110 Stat. 1321–373, which provided that the first adjustment of a civil monetary penalty made pursuant to the amendment by § 31001(s)(1) of Pub. L. 104–134 (amending Pub. L. 101–410, set out above) could not exceed 10 percent of the penalty, was repealed by Pub. L. 114–74, title VII, § 701(c), Nov. 2, 2015, 129 Stat. 601.]

[For authority of the Director of the Office of Management and Budget to consolidate reports required under the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101–410, set out above, to be submitted between Jan. 1, 1995, and Sept. 30, 1997, or to adjust their frequency and due dates, see section 404 of Pub. L. 103–356, set out as a note under section 501 of Title 31, Money and Finance.]

§ 2462. Time for commencing proceedings

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

(June 25, 1948, ch. 646, 62 Stat. 974.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 791 (R.S. § 1047).
Changes were made in phraseology.

§ 2463. Property taken under revenue law not repleviable

All property taken or detained under any revenue law of the United States shall not be re-

pleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof.

(June 25, 1948, ch. 646, 62 Stat. 974.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 747 (R.S. § 934).
Changes were made in phraseology.

§ 2464. Security; special bond

(a) Except in cases of seizures for forfeiture under any law of the United States, whenever a warrant of arrest or other process in rem is issued in any admiralty case, the United States marshal shall stay the execution of such process, or discharge the property arrested if the process has been levied, on receiving from the respondent or claimant of the property a bond or stipulation in double the amount claimed by the libellant, with sufficient surety, to be approved by the judge of the district court where the case is pending, or, in his absence, by the collector of the port, conditioned to answer the decree of the court in such case. Such bond or stipulation shall be returned to the court, and judgment or decree thereon, against both the principal and sureties, may be secured at the time of rendering the decree in the original case. The owner of any vessel may deliver to the marshal a bond or stipulation, with sufficient surety, to be approved by the judge of the district court, conditioned to answer the decree of such court in all or any cases that are brought thereafter in such court against the vessel. Thereupon the execution of all such process against such vessel shall be stayed so long as the amount secured by such bond or stipulation is at least double the aggregate amount claimed by libellants in such suits which are begun and pending against such vessel. Similar judgments or decrees and remedies may be had on such bond or stipulation as if a special bond or stipulation had been filed in each of such suits.

(b) The court may make necessary orders to carry this section into effect, particularly in giving proper notice of any such suit. Such bond or stipulation shall be indorsed by the clerk with a minute of the suits wherein process is so stayed. Further security may be required by the court at any time.

(c) If a special bond or stipulation in the particular case is given under this section, the liability as to said case on the general bond or stipulation shall cease. The parties may stipulate the amount of the bond or stipulation for the release of a vessel or other property to be not more than the amount claimed in the libel, with interest, plus an allowance for libellant's costs. In the event of the inability or refusal of the parties to so stipulate, the court shall fix the amount, but if not so fixed then a bond shall be required in the amount prescribed in this section.

(June 25, 1948, ch. 646, 62 Stat. 974.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 754 (R.S. § 941; Mar. 3, 1899, ch. 441, 30 Stat. 1354; Aug. 3, 1935, ch. 431, § 3, 49 Stat. 513).

“(A) is in drivable condition;

“(B) has been continuously insured consistent with the applicable State law and registered to the same owner for a period of not less than 1 year immediately prior to such trade-in;

“(C) was manufactured less than 25 years before the date of the trade-in; and

“(D) in the case of an automobile, has a combined fuel economy value of 18 miles per gallon or less;

“(8) the term ‘new fuel efficient automobile’ means an automobile described in paragraph (1), (2), (3), or (4)—

“(A) the equitable or legal title of which has not been transferred to any person other than the ultimate purchaser;

“(B) that carries a manufacturer’s suggested retail price of \$45,000 or less;

“(C) that—

“(i) in the case of passenger automobiles, category 1 trucks, or category 2 trucks, is certified to applicable standards under section 86.1811-04 of title 40, Code of Federal Regulations; or

“(ii) in the case of category 3 trucks, is certified to the applicable vehicle or engine standards under section 86.1816-08, 86-007-11 [probably means 86.007-11], or 86.008-10 of title 40, Code of Federal Regulations; and

“(D) that has the combined fuel economy value of at least—

“(i) 22 miles per gallon for a passenger automobile;

“(ii) 18 miles per gallon for a category 1 truck; or

“(iii) 15 miles per gallon for a category 2 truck;

“(9) the term ‘Program’ means the Consumer Assistance to Recycle and Save Program established by this section;

“(10) the term ‘qualifying lease’ means a lease of an automobile for a period of not less than 5 years;

“(11) the term ‘scrapage value’ means the amount received by the dealer for a vehicle upon transferring title of such vehicle to the person responsible for ensuring the dismantling and destroying of the vehicle;

“(12) the term ‘Secretary’ means the Secretary of Transportation acting through the National Highway Traffic Safety Administration;

“(13) the term ‘ultimate purchaser’ means, with respect to any new automobile, the first person who in good faith purchases such automobile for purposes other than resale;

“(14) the term ‘vehicle identification number’ means the 17 character number used by the automobile industry to identify individual automobiles; and

“(15) the term ‘voucher’ means an electronic transfer of funds to a dealer based on an eligible transaction under this program.

“(j) APPROPRIATION.—There is hereby appropriated to the Secretary of Transportation \$1,000,000,000, of which up to \$50,000,000 is available for administration, to remain available until expended to carry out this section.”

§ 32902. Average fuel economy standards

(a) PRESCRIPTION OF STANDARDS BY REGULATION.—At least 18 months before the beginning of each model year, the Secretary of Transportation shall prescribe by regulation average fuel economy standards for automobiles manufactured by a manufacturer in that model year. Each standard shall be the maximum feasible average fuel economy level that the Secretary decides the manufacturers can achieve in that model year.

(b) STANDARDS FOR AUTOMOBILES AND CERTAIN OTHER VEHICLES.—

(1) IN GENERAL.—The Secretary of Transportation, after consultation with the Secretary

of Energy and the Administrator of the Environmental Protection Agency, shall prescribe separate average fuel economy standards for—

(A) passenger automobiles manufactured by manufacturers in each model year beginning with model year 2011 in accordance with this subsection;

(B) non-passenger automobiles manufactured by manufacturers in each model year beginning with model year 2011 in accordance with this subsection; and

(C) work trucks and commercial medium-duty or heavy-duty on-highway vehicles in accordance with subsection (k).

(2) FUEL ECONOMY STANDARDS FOR AUTOMOBILES.—

(A) AUTOMOBILE FUEL ECONOMY AVERAGE FOR MODEL YEARS 2011 THROUGH 2020.—The Secretary shall prescribe a separate average fuel economy standard for passenger automobiles and a separate average fuel economy standard for non-passenger automobiles for each model year beginning with model year 2011 to achieve a combined fuel economy average for model year 2020 of at least 35 miles per gallon for the total fleet of passenger and non-passenger automobiles manufactured for sale in the United States for that model year.

(B) AUTOMOBILE FUEL ECONOMY AVERAGE FOR MODEL YEARS 2021 THROUGH 2030.—For model years 2021 through 2030, the average fuel economy required to be attained by each fleet of passenger and non-passenger automobiles manufactured for sale in the United States shall be the maximum feasible average fuel economy standard for each fleet for that model year.

(C) PROGRESS TOWARD STANDARD REQUIRED.—In prescribing average fuel economy standards under subparagraph (A), the Secretary shall prescribe annual fuel economy standard increases that increase the applicable average fuel economy standard ratably beginning with model year 2011 and ending with model year 2020.

(3) AUTHORITY OF THE SECRETARY.—The Secretary shall—

(A) prescribe by regulation separate average fuel economy standards for passenger and non-passenger automobiles based on 1 or more vehicle attributes related to fuel economy and express each standard in the form of a mathematical function; and

(B) issue regulations under this title prescribing average fuel economy standards for at least 1, but not more than 5, model years.

(4) MINIMUM STANDARD.—In addition to any standard prescribed pursuant to paragraph (3), each manufacturer shall also meet the minimum standard for domestically manufactured passenger automobiles, which shall be the greater of—

(A) 27.5 miles per gallon; or

(B) 92 percent of the average fuel economy projected by the Secretary for the combined domestic and non-domestic passenger automobile fleets manufactured for sale in the United States by all manufacturers in the model year, which projection shall be pub-

lished in the Federal Register when the standard for that model year is promulgated in accordance with this section.

(c) AMENDING PASSENGER AUTOMOBILE STANDARDS.—The Secretary of Transportation may prescribe regulations amending the standard under subsection (b) of this section for a model year to a level that the Secretary decides is the maximum feasible average fuel economy level for that model year. Section 553 of title 5 applies to a proceeding to amend the standard. However, any interested person may make an oral presentation and a transcript shall be taken of that presentation.

(d) EXEMPTIONS.—(1) Except as provided in paragraph (3) of this subsection, on application of a manufacturer that manufactured (whether in the United States or not) fewer than 10,000 passenger automobiles in the model year 2 years before the model year for which the application is made, the Secretary of Transportation may exempt by regulation the manufacturer from a standard under subsection (b) or (c) of this section. An exemption for a model year applies only if the manufacturer manufactures (whether in the United States or not) fewer than 10,000 passenger automobiles in the model year. The Secretary may exempt a manufacturer only if the Secretary—

(A) finds that the applicable standard under those subsections is more stringent than the maximum feasible average fuel economy level that the manufacturer can achieve; and

(B) prescribes by regulation an alternative average fuel economy standard for the passenger automobiles manufactured by the exempted manufacturer that the Secretary decides is the maximum feasible average fuel economy level for the manufacturers to which the alternative standard applies.

(2) An alternative average fuel economy standard the Secretary of Transportation prescribes under paragraph (1)(B) of this subsection may apply to an individually exempted manufacturer, to all automobiles to which this subsection applies, or to classes of passenger automobiles, as defined under regulations of the Secretary, manufactured by exempted manufacturers.

(3) Notwithstanding paragraph (1) of this subsection, an importer registered under section 30141(c) of this title may not be exempted as a manufacturer under paragraph (1) for a motor vehicle that the importer—

(A) imports; or

(B) brings into compliance with applicable motor vehicle safety standards prescribed under chapter 301 of this title for an individual under section 30142 of this title.

(4) The Secretary of Transportation may prescribe the contents of an application for an exemption.

(e) EMERGENCY VEHICLES.—(1) In this subsection, “emergency vehicle” means an automobile manufactured primarily for use—

(A) as an ambulance or combination ambulance-hearse;

(B) by the United States Government or a State or local government for law enforcement; or

(C) for other emergency uses prescribed by regulation by the Secretary of Transportation.

(2) A manufacturer may elect to have the fuel economy of an emergency vehicle excluded in applying a fuel economy standard under subsection (a), (b), (c), or (d) of this section. The election is made by providing written notice to the Secretary of Transportation and to the Administrator of the Environmental Protection Agency.

(f) CONSIDERATIONS ON DECISIONS ON MAXIMUM FEASIBLE AVERAGE FUEL ECONOMY.—When deciding maximum feasible average fuel economy under this section, the Secretary of Transportation shall consider technological feasibility, economic practicability, the effect of other motor vehicle standards of the Government on fuel economy, and the need of the United States to conserve energy.

(g) REQUIREMENTS FOR OTHER AMENDMENTS.—(1) The Secretary of Transportation may prescribe regulations amending an average fuel economy standard prescribed under subsection (a) or (d) of this section if the amended standard meets the requirements of subsection (a) or (d), as appropriate.

(2) When the Secretary of Transportation prescribes an amendment under this section that makes an average fuel economy standard more stringent, the Secretary shall prescribe the amendment (and submit the amendment to Congress when required under subsection (c)(2) of this section) at least 18 months before the beginning of the model year to which the amendment applies.

(h) LIMITATIONS.—In carrying out subsections (c), (f), and (g) of this section, the Secretary of Transportation—

(1) may not consider the fuel economy of dedicated automobiles;

(2) shall consider dual fueled automobiles to be operated only on gasoline or diesel fuel; and

(3) may not consider, when prescribing a fuel economy standard, the trading, transferring, or availability of credits under section 32903.

(i) CONSULTATION.—The Secretary of Transportation shall consult with the Secretary of Energy in carrying out this section and section 32903 of this title.

(j) SECRETARY OF ENERGY COMMENTS.—(1) Before issuing a notice proposing to prescribe or amend an average fuel economy standard under subsection (a), (c), or (g) of this section, the Secretary of Transportation shall give the Secretary of Energy at least 10 days from the receipt of the notice during which the Secretary of Energy may, if the Secretary of Energy concludes that the proposed standard would adversely affect the conservation goals of the Secretary of Energy, provide written comments to the Secretary of Transportation about the impact of the standard on those goals. To the extent the Secretary of Transportation does not revise a proposed standard to take into account comments of the Secretary of Energy on any adverse impact of the standard, the Secretary of Transportation shall include those comments in the notice.

(2) Before taking final action on a standard or an exemption from a standard under this sec-

tion, the Secretary of Transportation shall notify the Secretary of Energy and provide the Secretary of Energy a reasonable time to comment.

(k) **COMMERCIAL MEDIUM- AND HEAVY-DUTY ON-HIGHWAY VEHICLES AND WORK TRUCKS.**—

(1) **STUDY.**—Not later than 1 year after the National Academy of Sciences publishes the results of its study under section 108 of the Ten-in-Ten Fuel Economy Act, the Secretary of Transportation, in consultation with the Secretary of Energy and the Administrator of the Environmental Protection Agency, shall examine the fuel efficiency of commercial medium- and heavy-duty on-highway vehicles and work trucks and determine—

(A) the appropriate test procedures and methodologies for measuring the fuel efficiency of such vehicles and work trucks;

(B) the appropriate metric for measuring and expressing commercial medium- and heavy-duty on-highway vehicle and work truck fuel efficiency performance, taking into consideration, among other things, the work performed by such on-highway vehicles and work trucks and types of operations in which they are used;

(C) the range of factors, including, without limitation, design, functionality, use, duty cycle, infrastructure, and total overall energy consumption and operating costs that affect commercial medium- and heavy-duty on-highway vehicle and work truck fuel efficiency; and

(D) such other factors and conditions that could have an impact on a program to improve commercial medium- and heavy-duty on-highway vehicle and work truck fuel efficiency.

(2) **RULEMAKING.**—Not later than 24 months after completion of the study required under paragraph (1), the Secretary, in consultation with the Secretary of Energy and the Administrator of the Environmental Protection Agency, by regulation, shall determine in a rule-making proceeding how to implement a commercial medium- and heavy-duty on-highway vehicle and work truck fuel efficiency improvement program designed to achieve the maximum feasible improvement, and shall adopt and implement appropriate test methods, measurement metrics, fuel economy standards, and compliance and enforcement protocols that are appropriate, cost-effective, and technologically feasible for commercial medium- and heavy-duty on-highway vehicles and work trucks. The Secretary may prescribe separate standards for different classes of vehicles under this subsection.

(3) **LEAD-TIME; REGULATORY STABILITY.**—The commercial medium- and heavy-duty on-highway vehicle and work truck fuel economy standard adopted pursuant to this subsection shall provide not less than—

(A) 4 full model years of regulatory lead-time; and

(B) 3 full model years of regulatory stability.

(Pub. L. 103-272, §1(e), July 5, 1994, 108 Stat. 1059; Pub. L. 110-140, title I, §§102, 104(b)(1), Dec. 19, 2007, 121 Stat. 1498, 1503.)

HISTORICAL AND REVISION NOTES

| <i>Revised Section</i> | <i>Source (U.S. Code)</i> | <i>Source (Statutes at Large)</i> |
|------------------------|---|---|
| 32902(a) | 15:2002(b). | Oct. 20, 1972, Pub. L. 92-513, 86 Stat. 947, §502(a)(1), (3)-(c), (e) (1st sentence), (f), (h); added Dec. 22, 1975, Pub. L. 94-163, §301, 89 Stat. 902, 903, 905; Oct. 10, 1980, Pub. L. 96-425, §§3(a)(1), 7, 8(c), 94 Stat. 1821, 1828. |
| 32902(b) | 15:2002(a)(1), (3). | |
| 32902(c)(1) .. | 15:2002(a)(4) (words before 5th comma), (h). | |
| 32902(c)(2) .. | 15:2002(a)(4) (words after 5th comma), (5). | |
| 32902(d) | 15:1397 (note). | Oct. 31, 1988, Pub. L. 100-562, §2(f), 102 Stat. 2825. |
| 32902(e) | 15:2002(c). 15:2002(g). | Oct. 20, 1972, Pub. L. 92-513, 86 Stat. 947, §502(g); added Oct. 10, 1980, Pub. L. 96-425, §7, 94 Stat. 1828. |
| 32902(f) | 15:2002(e) (1st sentence). | |
| 32902(g) | 15:2002(f). | |
| 32902(h) | 15:2002(e) (last sentence). | Oct. 20, 1972, Pub. L. 92-513, 86 Stat. 947, §502(e) (last sentence), 513(g)(2)(B); added Oct. 14, 1988, Pub. L. 100-494, §6(a), (c), 102 Stat. 2450, 2452; Oct. 24, 1992, Pub. L. 102-486, §403(2), (5)(G)(ii)(II), (III), 106 Stat. 2876, 2878. |
| 32902(i) | 15:2013(g)(2)(B). 15:2002(i) (1st sentence). | Oct. 20, 1972, Pub. L. 92-513, 86 Stat. 947, §502(i), (j); added Aug. 4, 1977, Pub. L. 95-91, §305, 91 Stat. 580; Oct. 10, 1980, Pub. L. 96-425, §7, 94 Stat. 1828. |
| 32902(j) | 15:2002(i) (2d, last sentences), (j). | |

In subsection (a), the words “Any standard applicable to a model year under this subsection shall be prescribed” are omitted as surplus. The words “which begins more than 30 months after December 22, 1975” are omitted as executed.

In subsection (b), the text of 15:2002(a)(1) (related to model years before 1985) and (3) is omitted as expired. The words “at least” are omitted as unnecessary because of the source provisions restated in subsection (c) of this section.

In subsection (c)(1), the words “Subject to paragraph (2) of this subsection” are added for clarity. The words “may prescribe regulations amending” are substituted for “may, by rule, amend” for clarity and consistency in the revised title and because “rule” is synonymous with “regulation”. The words “for a model year” are substituted for “for model year 1985, or for any subsequent model year” to eliminate the expired limitation. The reference in 15:2002(h) to 15:2002(d) is omitted because 15:2002(d) is omitted from the revised title as executed. The words “as well as written” are omitted as surplus.

In subsection (c)(2), the words “If an amendment increases the standard . . . or decreases the standard” are substituted for “except that any amendment that has the effect of increasing . . . a standard . . . , or of decreasing . . . a standard” to eliminate unnecessary words. The words “For purposes of considering any modification which is submitted to the Congress under paragraph (4)” are omitted as surplus. The words “are deemed to be” are substituted for “shall be lengthened to” for clarity and consistency.

In subsection (d)(1), before clause (A), the words “Except as provided in paragraph (3) of this subsection” are added because of the restatement. The words “in the model year 2 years before” are substituted for “in the second model year preceding” for clarity. The words “The Secretary may exempt a manufacturer only if the Secretary” are substituted for “Such exemption may only be granted if the Secretary” and “The Secretary may not issue exemptions with respect to a model year unless he” to eliminate unnecessary words. The words

“each such standard shall be set at a level which” are omitted as surplus.

In subsection (d)(3), before clause (A), the words “Notwithstanding paragraph (1) of this subsection” are substituted for “Notwithstanding any provision of law authorizing exemptions from energy conservation requirements for manufacturers of fewer than 10,000 motor vehicles” to eliminate unnecessary words. In clause (B), the word “compliance” is substituted for “conformity” for consistency with chapter 301 of the revised title. The words “prescribed under chapter 301 of this title” are substituted for “Federal” for consistency in the revised title.

Subsection (d)(4) is substituted for 15:2002(c)(1) (2d sentence) to eliminate unnecessary words. The text of 15:2002(c)(2) is omitted as expired.

In subsection (e)(1)(B), the words “police or other” are omitted as unnecessary because the authority to prescribe standards includes the authority to amend those standards.

In subsection (g)(1), the words “from time to time” are omitted as unnecessary. The cross-reference to 15:2002(a)(3) is omitted as executed because 15:2002(a)(3) applied to model years 1981–1984.

In subsection (g)(2), the words “that makes” are substituted for “has the effect of making” to eliminate unnecessary words.

In subsection (i), the words “his responsibilities under” are omitted as surplus.

In subsection (j), the reference to 15:2002(d) and the words “or any modification of” are omitted because 15:2002(d) is omitted from the revised title as executed.

In subsection (j)(1), the words “to prescribe or amend” are substituted for “to establish, reduce, or amend” to eliminate unnecessary words. The words “adverse impact” are substituted for “level” for clarity and consistency. The words “those comments” are substituted for “unaccommodated comments” for clarity.

REFERENCES IN TEXT

Section 108 of the Ten-in-Ten Fuel Economy Act, referred to in subsec. (k)(1), is section 108 of Pub. L. 110–140, title I, Dec. 19, 2007, 121 Stat. 1505, which is not classified to the Code.

AMENDMENTS

2007—Subsec. (a). Pub. L. 110–140, §102(a)(1), in heading, substituted “Prescription of Standards by Regulation” for “Non-Passenger Automobiles”, and, in text, struck out “(except passenger automobiles)” after “for automobiles” and “The Secretary may prescribe separate standards for different classes of automobiles.” at end.

Subsec. (b). Pub. L. 110–140, §102(a)(2), added subsec. (b) and struck out former subsec. (b). Prior to amendment, text of subsec. (b) read as follows: “Except as provided in this section, the average fuel economy standard for passenger automobiles manufactured by a manufacturer in a model year after model year 1984 shall be 27.5 miles a gallon.”

Subsec. (c). Pub. L. 110–140, §102(a)(3), substituted “The Secretary” for “(1) Subject to paragraph (2) of this subsection, the Secretary” and struck out par. (2) which read as follows: “If an amendment increases the standard above 27.5 miles a gallon or decreases the standard below 26.0 miles a gallon, the Secretary of Transportation shall submit the amendment to Congress. The procedures of section 551 of the Energy Policy and Conservation Act (42 U.S.C. 6421) apply to an amendment, except that the 15 calendar days referred to in section 551(c) and (d) of the Act (42 U.S.C. 6421(c), (d)) are deemed to be 60 calendar days, and the 5 calendar days referred to in section 551(f)(4)(A) of the Act (42 U.S.C. 6421(f)(4)(A)) are deemed to be 20 calendar days. If either House of Congress disapproves the amendment under those procedures, the amendment does not take effect.”

Subsec. (h)(3). Pub. L. 110–140, §104(b)(1), added par. (3).

Subsec. (k). Pub. L. 110–140, §102(b), added subsec. (k).

EFFECTIVE DATE OF 2007 AMENDMENT

Amendment by Pub. L. 110–140 effective on the date that is 1 day after Dec. 19, 2007, see section 1601 of Pub. L. 110–140, set out as an Effective Date note under section 1824 of Title 2, The Congress.

CONTINUED APPLICABILITY OF EXISTING STANDARDS

Pub. L. 110–140, title I, §106, Dec. 19, 2007, 121 Stat. 1504, provided that: “Nothing in this subtitle [subtitle A (§§101–113) of title I of Pub. L. 110–140, see Short Title of 2007 Amendment note set out under section 30101 of this title], or the amendments made by this subtitle, shall be construed to affect the application of section 32902 of title 49, United States Code, to passenger automobiles or non-passenger automobiles manufactured before model year 2011.”

NATIONAL ACADEMY OF SCIENCES STUDIES

Pub. L. 110–140, title I, §107, Dec. 19, 2007, 121 Stat. 1504, provided that:

“(a) IN GENERAL.—As soon as practicable after the date of enactment of this Act [Dec. 19, 2007], the Secretary of Transportation shall execute an agreement with the National Academy of Sciences to develop a report evaluating vehicle fuel economy standards, including—

“(1) an assessment of automotive technologies and costs to reflect developments since the Academy’s 2002 report evaluating the corporate average fuel economy standards was conducted;

“(2) an analysis of existing and potential technologies that may be used practically to improve automobile and medium-duty and heavy-duty truck fuel economy;

“(3) an analysis of how such technologies may be practically integrated into the automotive and medium-duty and heavy-duty truck manufacturing process; and

“(4) an assessment of how such technologies may be used to meet the new fuel economy standards under chapter 329 of title 49, United States Code, as amended by this subtitle [subtitle A (§§101–113) of title I of Pub. L. 110–140, see Short Title of 2007 Amendment note set out under section 30101 of this title].

“(b) REPORT.—The Academy shall submit the report to the Secretary, the Committee on Commerce, Science, and Transportation of the Senate, and the Committee on Energy and Commerce of the House of Representatives, with its findings and recommendations not later than 5 years after the date on which the Secretary executes the agreement with the Academy.

“(c) QUINQUENNIAL UPDATES.—After submitting the initial report, the Academy shall update the report at 5 year intervals thereafter through 2025.”

THE ENERGY INDEPENDENCE AND SECURITY ACT OF 2007

Memorandum of President of the United States, Jan. 26, 2009, 74 F.R. 4907, provided:

Memorandum for the Secretary of Transportation [and] the Administrator of the National Highway Traffic Safety Administration

In 2007, the Congress passed the Energy Independence and Security Act (EISA). This law mandates that, as part of the Nation’s efforts to achieve energy independence, the Secretary of Transportation prescribe annual fuel economy increases for automobiles, beginning with model year 2011, resulting in a combined fuel economy fleet average of at least 35 miles per gallon by model year 2020. On May 2, 2008, the National Highway Traffic Safety Administration (NHTSA) published a Notice of Proposed Rulemaking entitled *Average Fuel Economy Standards, Passenger Cars and Light Trucks; Model Years 2011–2015*, 73 Fed. Reg. 24352. In the notice and comment period, the NHTSA received numerous comments, some of them contending that certain aspects of the proposed rule, including appendices providing for preemption of State laws, were inconsistent with provisions of EISA

and the Supreme Court's decision in *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007).

Federal law requires that the final rule regarding fuel economy standards be adopted at least 18 months before the beginning of the model year (49 U.S.C. 32902(g)(2)). In order for the model year 2011 standards to meet this requirement, the NHTSA must publish the final rule in the Federal Register by March 30, 2009. To date, the NHTSA has not published a final rule.

Therefore, I request that:

(a) in order to comply with the EISA requirement that fuel economy increases begin with model year 2011, you take all measures consistent with law, and in coordination with the Environmental Protection Agency, to publish in the Federal Register by March 30, 2009, a final rule prescribing increased fuel economy for model year 2011;

(b) before promulgating a final rule concerning model years after model year 2011, you consider the appropriate legal factors under the EISA, the comments filed in response to the Notice of Proposed Rulemaking, the relevant technological and scientific considerations, and to the extent feasible, the forthcoming report by the National Academy of Sciences mandated under section 107 of EISA; and

(c) in adopting the final rules in paragraphs (a) and (b) above, you consider whether any provisions regarding preemption are consistent with the EISA, the Supreme Court's decision in *Massachusetts v. EPA* and other relevant provisions of law and the policies underlying them.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

The Secretary of Transportation is hereby authorized and directed to publish this memorandum in the Federal Register.

BARACK OBAMA.

IMPROVING ENERGY SECURITY, AMERICAN COMPETITIVENESS AND JOB CREATION, AND ENVIRONMENTAL PROTECTION THROUGH A TRANSFORMATION OF OUR NATION'S FLEET OF CARS AND TRUCKS

Memorandum of President of the United States, May 21, 2010, 75 F.R. 29399, provided:

Memorandum for the Secretary of Transportation[,] the Secretary of Energy[,] the Administrator of the Environmental Protection Agency[, and] the Administrator of the National Highway Traffic Safety Administration

America has the opportunity to lead the world in the development of a new generation of clean cars and trucks through innovative technologies and manufacturing that will spur economic growth and create high-quality domestic jobs, enhance our energy security, and improve our environment. We already have made significant strides toward reducing greenhouse gas pollution and enhancing fuel efficiency from motor vehicles with the joint rulemaking issued by the National Highway Traffic Safety Administration (NHTSA) and the Environmental Protection Agency (EPA) on April 1, 2010, which regulates these attributes of passenger cars and light-duty trucks for model years 2012–2016. In this memorandum, I request that additional coordinated steps be taken to produce a new generation of clean vehicles.

SECTION 1. *Medium- and Heavy-Duty Trucks.*

While the Federal Government and many States have now created a harmonized framework for addressing the fuel economy of and greenhouse gas emissions from cars and light-duty trucks, medium- and heavy-duty trucks and buses continue to be a major source of fossil fuel consumption and greenhouse gas pollution. I therefore request that the Administrators of the EPA and the NHTSA immediately begin work on a joint rulemaking under the Clean Air Act (CAA) and the Energy

Independence and Security Act of 2007 (EISA) to establish fuel efficiency and greenhouse gas emissions standards for commercial medium- and heavy-duty vehicles beginning with model year 2014, with the aim of issuing a final rule by July 30, 2011. As part of this rule development process, I request that the Administrators of the EPA and the NHTSA:

(a) Propose and take comment on strategies, including those designed to increase the use of existing technologies, to achieve substantial annual progress in reducing transportation sector emissions and fossil fuel consumption consistent with my Administration's overall energy and climate security goals. These strategies should consider whether particular segments of the diverse heavy-duty vehicle sector present special opportunities to reduce greenhouse gas emissions and increase fuel economy. For example, preliminary estimates indicate that large tractor trailers, representing half of all greenhouse gas emissions from this sector, can reduce greenhouse gas emissions by as much as 20 percent and increase their fuel efficiency by as much as 25 percent with the use of existing technologies;

(b) Include fuel efficiency and greenhouse gas emissions standards that take into account the market structure of the trucking industry and the unique demands of heavy-duty vehicle applications; seek harmonization with applicable State standards; consider the findings and recommendations published in the National Academy of Science report on medium- and heavy-duty truck regulation; strengthen the industry and enhance job creation in the United States; and

(c) Seek input from all stakeholders, while recognizing the continued leadership role of California and other States.

SEC. 2. *Passenger Cars and Light-Duty Trucks.*

Building on the earlier joint rulemaking, and in order to provide greater certainty and incentives for long-term innovation by automobile and light-duty vehicle manufacturers, I request that the Administrators of the EPA and the NHTSA develop, through notice and comment rulemaking, a coordinated national program under the CAA and the EISA to improve fuel efficiency and to reduce greenhouse gas emissions of passenger cars and light-duty trucks of model years 2017–2025. The national program should seek to produce joint Federal standards that are harmonized with applicable State standards, with the goal of ensuring that automobile manufacturers will be able to build a single, light-duty national fleet. The program should also seek to achieve substantial annual progress in reducing transportation sector greenhouse gas emissions and fossil fuel consumption, consistent with my Administration's overall energy and climate security goals, through the increased domestic production and use of existing, advanced, and emerging technologies, and should strengthen the industry and enhance job creation in the United States. As part of implementing the national program, I request that the Administrators of the EPA and the NHTSA:

(a) Work with the State of California to develop by September 1, 2010, a technical assessment to inform the rulemaking process, reflecting input from an array of stakeholders on relevant factors, including viable technologies, costs, benefits, lead time to develop and deploy new and emerging technologies, incentives and other flexibilities to encourage development and deployment of new and emerging technologies, impacts on jobs and the automotive manufacturing base in the United States, and infrastructure for advanced vehicle technologies; and

(b) Take all measures consistent with law to issue by September 30, 2010, a Notice of Intent to Issue a Proposed Rule that announces plans for setting stringent fuel economy and greenhouse gas emissions standards for light-duty vehicles of model year 2017 and beyond, including plans for initiating joint rulemaking and gathering any additional information needed to support regulatory action. The Notice should describe the key elements of the program that the EPA and the NHTSA intend jointly to propose, under their respective statu-

tory authorities, including potential standards that could be practicably implemented nationally for the 2017–2025 model years and a schedule for setting those standards as expeditiously as possible, consistent with providing sufficient lead time to vehicle manufacturers.

SEC. 3. *Cleaner Vehicles and Fuels and Necessary Infrastructure.*

The success of our efforts to achieve enhanced energy security and to protect the environment also depends upon the development of infrastructure and promotion of fuels, including biofuels, which will enable the development and widespread deployment of advanced technologies. Therefore, I further request that:

(a) The Administrator of the EPA review for adequacy the current nongreenhouse gas emissions regulations for new motor vehicles, new motor vehicle engines, and motor vehicle fuels, including tailpipe emissions standards for nitrogen oxides and air toxics, and sulfur standards for gasoline. If the Administrator of the EPA finds that new emissions regulations are required, then I request that the Administrator of the EPA promulgate such regulations as part of a comprehensive approach toward regulating motor vehicles; and [sic]

(b) The Secretary of Energy promote the deployment of advanced technology vehicles by providing technical assistance to cities preparing for deployment of electric vehicles, including plug-in hybrids and all-electric vehicles; and

(c) The Department of Energy work with stakeholders on the development of voluntary standards to facilitate the robust deployment of advanced vehicle technologies and coordinate its efforts with the Department of Transportation, the NHTSA, and the EPA.

SEC. 4. *General Provisions.*

(a) This memorandum shall be implemented consistent with applicable law, including international trade obligations, and subject to the availability of appropriations.

(b) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(c) Nothing in this memorandum shall be construed to impair or otherwise affect:

(1) authority granted by law to a department, agency, or the head thereof; or

(2) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

SEC. 5. *Publication.*

The Secretary of Transportation is hereby authorized and directed to publish this memorandum in the Federal Register.

BARACK OBAMA.

§ 32903. Credits for exceeding average fuel economy standards

(a) **EARNING AND PERIOD FOR APPLYING CREDITS.**—When the average fuel economy of passenger automobiles manufactured by a manufacturer in a particular model year exceeds an applicable average fuel economy standard under subsections (a) through (d) of section 32902 (determined by the Secretary of Transportation without regard to credits under this section), the manufacturer earns credits. The credits may be applied to—

(1) any of the 3 consecutive model years immediately before the model year for which the credits are earned; and

(2) to the extent not used under paragraph (1)¹ any of the 5 consecutive model years im-

mediately after the model year for which the credits are earned.

(b) **PERIOD OF AVAILABILITY AND PLAN FOR FUTURE CREDITS.**—(1) Except as provided in paragraph (2) of this subsection, credits under this section are available to a manufacturer at the end of the model year in which earned.

(2)(A) Before the end of a model year, if a manufacturer has reason to believe that its average fuel economy for passenger automobiles will be less than the applicable standard for that model year, the manufacturer may submit a plan to the Secretary of Transportation demonstrating that the manufacturer will earn sufficient credits under this section within the next 3 model years to allow the manufacturer to meet that standard for the model year involved. Unless the Secretary finds that the manufacturer is unlikely to earn sufficient credits under the plan, the Secretary shall approve the plan. Those credits are available for the model year involved if—

(i) the Secretary approves the plan; and

(ii) the manufacturer earns those credits as provided by the plan.

(B) If the average fuel economy of a manufacturer is less than the applicable standard under subsections (a) through (d) of section 32902 after applying credits under subsection (a)(1) of this section, the Secretary of Transportation shall notify the manufacturer and give the manufacturer a reasonable time (of at least 60 days) to submit a plan.

(c) **DETERMINING NUMBER OF CREDITS.**—The number of credits a manufacturer earns under this section equals the product of—

(1) the number of tenths of a mile a gallon by which the average fuel economy of the passenger automobiles manufactured by the manufacturer in the model year in which the credits are earned exceeds the applicable average fuel economy standard under subsections (a) through (d) of section 32902; times

(2) the number of passenger automobiles manufactured by the manufacturer during that model year.

(d) **APPLYING CREDITS FOR PASSENGER AUTOMOBILES.**—The Secretary of Transportation shall apply credits to a model year on the basis of the number of tenths of a mile a gallon by which the manufacturer involved was below the applicable average fuel economy standard for that model year and the number of passenger automobiles manufactured that model year by the manufacturer. Credits applied to a model year are no longer available for another model year. Before applying credits, the Secretary shall give the manufacturer written notice and reasonable opportunity to comment.

(e) **APPLYING CREDITS FOR NON-PASSENGER AUTOMOBILES.**—Credits for a manufacturer of automobiles that are not passenger automobiles are earned and applied to a model year in which the average fuel economy of that class of automobiles is below the applicable average fuel economy standard under section 32902(a) of this title, to the same extent and in the same way as provided in this section for passenger automobiles.

(f) **CREDIT TRADING AMONG MANUFACTURERS.**—

¹ So in original. Probably should be followed by a comma.

(1) IN GENERAL.—The Secretary of Transportation may establish, by regulation, a fuel economy credit trading program to allow manufacturers whose automobiles exceed the average fuel economy standards prescribed under section 32902 to earn credits to be sold to manufacturers whose automobiles fail to achieve the prescribed standards such that the total oil savings associated with manufacturers that exceed the prescribed standards are preserved when trading credits to manufacturers that fail to achieve the prescribed standards.

(2) LIMITATION.—The trading of credits by a manufacturer to the category of passenger automobiles manufactured domestically is limited to the extent that the fuel economy level of such automobiles shall comply with the requirements of section 32902(b)(4), without regard to any trading of credits from other manufacturers.

(g) CREDIT TRANSFERRING WITHIN A MANUFACTURER'S FLEET.—

(1) IN GENERAL.—The Secretary of Transportation shall establish by regulation a fuel economy credit transferring program to allow any manufacturer whose automobiles exceed any of the average fuel economy standards prescribed under section 32902 to transfer the credits earned under this section and to apply such credits within that manufacturer's fleet to a compliance category of automobiles that fails to achieve the prescribed standards.

(2) YEARS FOR WHICH USED.—Credits transferred under this subsection are available to be used in the same model years that the manufacturer could have applied such credits under subsections (a), (b), (d), and (e), as well as for the model year in which the manufacturer earned such credits.

(3) MAXIMUM INCREASE.—The maximum increase in any compliance category attributable to transferred credits is—

(A) for model years 2011 through 2013, 1.0 mile per gallon;

(B) for model years 2014 through 2017, 1.5 miles per gallon; and

(C) for model year 2018 and subsequent model years, 2.0 miles per gallon.

(4) LIMITATION.—The transfer of credits by a manufacturer to the category of passenger automobiles manufactured domestically is limited to the extent that the fuel economy level of such automobiles shall comply with the requirements under section 32904(b)(4), without regard to any transfer of credits from other categories of automobiles described in paragraph (6)(B).

(5) YEARS AVAILABLE.—A credit may be transferred under this subsection only if it is earned after model year 2010.

(6) DEFINITIONS.—In this subsection:

(A) FLEET.—The term “fleet” means all automobiles manufactured by a manufacturer in a particular model year.

(B) COMPLIANCE CATEGORY OF AUTOMOBILES.—The term “compliance category of automobiles” means any of the following 3 categories of automobiles for which compliance is separately calculated under this chapter:

(i) Passenger automobiles manufactured domestically.

(ii) Passenger automobiles not manufactured domestically.

(iii) Non-passenger automobiles.

(h) REFUND OF COLLECTED PENALTY.—When a civil penalty has been collected under this chapter from a manufacturer that has earned credits under this section, the Secretary of the Treasury shall refund to the manufacturer the amount of the penalty to the extent the penalty is attributable to credits available under this section.

(Pub. L. 103–272, §1(e), July 5, 1994, 108 Stat. 1061; Pub. L. 110–140, title I, §104(a), Dec. 19, 2007, 121 Stat. 1501.)

HISTORICAL AND REVISION NOTES

| Revised Section | Source (U.S. Code) | Source (Statutes at Large) |
|-----------------|------------------------|--|
| 32903(a) | 15:2002(l)(1)(B), (4). | Oct. 20, 1972, Pub. L. 92–513, 86 Stat. 947, §502(l); added Oct. 10, 1980, Pub. L. 96–425, §6(b), 94 Stat. 1826. |
| 32903(b)(1) .. | 15:2002(l)(1)(A). | |
| 32903(b)(2) .. | 15:2002(l)(1)(C). | |
| 32903(c) | 15:2002(l)(1)(D). | |
| 32903(d) | 15:2002(l)(1)(E). | |
| 32903(e) | 15:2002(l)(2). | |
| 32903(f) | 15:2002(l)(3). | |

In this section, various forms of the words “apply credits” are substituted for various forms of “credits are available to be taken into account” to be more concise and to make more clear the distinction between when credits are available and to what years they may be applied.

In subsection (a), before clause (1), the text of 15:2002(l)(4) is omitted as surplus because of 49:322(a). The words “any adjustment under subsection (d) of this section” are omitted because 15:2002(d) is omitted from the revised title as executed. The words “calculated under subparagraph (C)” (which apparently should be “calculated under subparagraph (D)”) are omitted as surplus. In clauses (1) and (2), the words “with respect to the average fuel economy of that manufacturer” are omitted as surplus. The words “year for which the credits are earned” are substituted for “year in which such manufacturer exceeds such applicable average fuel economy standard” to eliminate unnecessary words.

Subsection (b)(1) is substituted for 15:2002(l)(1)(A) to eliminate unnecessary words.

In subsection (b)(2)(A) is substituted for 15:2002(l)(1)(C)(i)–(iii) to eliminate unnecessary words.

In subsection (e), the words “as provided in this section for passenger automobiles” are substituted for “as provided for under paragraph (1)” for clarity. The text of 15:2002(l)(2) (last sentence) is omitted as expired.

AMENDMENTS

2007—Subsec. (a). Pub. L. 110–140, §104(a)(1), substituted “subsections (a) through (d) of section 32902” for “section 32902(b)–(d) of this title” in introductory provisions.

Subsec. (a)(2). Pub. L. 110–140, §104(a)(2), substituted “paragraph (1)” for “clause (1) of this subsection,” and “5 consecutive” for “3 consecutive”.

Subsecs. (b)(2)(B), (c)(1). Pub. L. 110–140, §104(a)(1), substituted “subsections (a) through (d) of section 32902” for “section 32902(b)–(d) of this title”.

Subsecs. (f) to (h). Pub. L. 110–140, §104(a)(3), (4), added subsecs. (f) and (g) and redesignated former subsec. (f) as (h).

EFFECTIVE DATE OF 2007 AMENDMENT

Amendment by Pub. L. 110–140 effective on the date that is 1 day after Dec. 19, 2007, see section 1601 of Pub. L. 110–140, set out as an Effective Date note under section 1824 of Title 2, The Congress.

AMENDMENTS

1994—Subsec. (a). Pub. L. 103-429 substituted “, 32917(b), and 32918” for “, and 32917(b)”.

§ 32912. Civil penalties

(a) **GENERAL PENALTY.**—A person that violates section 32911(a) of this title 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 day the violation continues.

(b) **PENALTY FOR MANUFACTURER VIOLATIONS OF FUEL ECONOMY STANDARDS.**—Except as provided in subsection (c) of this section, a manufacturer that violates a standard prescribed for a model year under section 32902 of this title is liable to the Government for a civil penalty of \$5 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—

(1) calculated under section 32904(a)(1)(A) or (B) of this title for automobiles to which the standard applies manufactured by the manufacturer during the model year;

(2) multiplied by the number of those automobiles; and

(3) reduced by the credits available to the manufacturer under section 32903 of this title for the model year.

(c) **HIGHER PENALTY AMOUNTS.**—(1)(A) The Secretary of Transportation shall prescribe by regulation a higher amount for each .1 of a mile a gallon to be used in calculating a civil penalty under subsection (b) of this section, if the Secretary decides that the increase in the penalty—

(i) will result in, or substantially further, substantial energy conservation for automobiles in model years in which the increased penalty may be imposed; and

(ii) will not have a substantial deleterious impact on the economy of the United States, a State, or a region of a State.

(B) The amount prescribed under subparagraph (A) of this paragraph may not be more than \$10 for each .1 of a mile a gallon.

(C) The Secretary may make a decision under subparagraph (A)(ii) of this paragraph only when the Secretary decides that it is likely that the increase in the penalty will not—

(i) cause a significant increase in unemployment in a State or a region of a State;

(ii) adversely affect competition; or

(iii) cause a significant increase in automobile imports.

(D) A higher amount prescribed under subparagraph (A) of this paragraph is effective for the model year beginning at least 18 months after the regulation stating the higher amount becomes final.

(2) The Secretary shall publish in the Federal Register a proposed regulation under this subsection and a statement of the basis for the regulation and provide each manufacturer of automobiles a copy of the proposed regulation and the statement. The Secretary shall provide a period of at least 45 days for written public comments on the proposed regulation. The Secretary shall submit a copy of the proposed regu-

lation to the Federal Trade Commission and request the Commission to comment on the proposed regulation within that period. After that period, the Secretary shall give interested persons and the Commission an opportunity at a public hearing to present oral information, views, and arguments and to direct questions about disputed issues of material fact to—

(A) other interested persons making oral presentations;

(B) employees and contractors of the Government that made written comments or an oral presentation or participated in the development or consideration of the proposed regulation; and

(C) experts and consultants that provided information to a person that the person includes, or refers to, in an oral presentation.

(3) The Secretary may restrict the questions of an interested person and the Commission when the Secretary decides that the questions are duplicative or not likely to result in a timely and effective resolution of the issues. A transcript shall be kept of a public hearing under this subsection. A copy of the transcript and written comments shall be available to the public at the cost of reproduction.

(4) The Secretary shall publish a regulation prescribed under this subsection in the Federal Register with the decisions required under paragraph (1) of this subsection.

(5) An officer or employee of a department, agency, or instrumentality of the Government violates section 1905 of title 18 by disclosing, except in an in camera proceeding by the Secretary or a court, information—

(A) provided to the Secretary or the court during consideration or review of a regulation prescribed under this subsection; and

(B) decided by the Secretary to be confidential under section 11(d) of the Energy Supply and Environmental Coordination Act of 1974 (15 U.S.C. 796(d)).

(d) **WRITTEN NOTICE REQUIREMENT.**—The Secretary shall impose a penalty under this section by written notice.

(e) **USE OF CIVIL PENALTIES.**—For fiscal year 2008 and each fiscal year thereafter, from the total amount deposited in the general fund of the Treasury during the preceding fiscal year from fines, penalties, and other funds obtained through enforcement actions conducted pursuant to this section (including funds obtained under consent decrees), the Secretary of the Treasury, subject to the availability of appropriations, shall—

(1) transfer 50 percent of such total amount to the account providing appropriations to the Secretary of Transportation for the administration of this chapter, which shall be used by the Secretary to support rulemaking under this chapter; and

(2) transfer 50 percent of such total amount to the account providing appropriations to the Secretary of Transportation for the administration of this chapter, which shall be used by the Secretary to carry out a program to make grants to manufacturers for retooling, re-equipping, or expanding existing manufacturing facilities in the United States to produce advanced technology vehicles and components.

(Pub. L. 103-272, §1(e), July 5, 1994, 108 Stat. 1072; Pub. L. 110-140, title I, §112, Dec. 19, 2007, 121 Stat. 1508.)

HISTORICAL AND REVISION NOTES

| <i>Revised Section</i> | <i>Source (U.S. Code)</i> | <i>Source (Statutes at Large)</i> |
|------------------------|-------------------------------|--|
| 32912(a) | 15:2008(b)(2). | Oct. 20, 1972, Pub. L. 92-513, 86 Stat. 947, §508(b)(1)-(3) (1st sentence); added Dec. 22, 1975, Pub. L. 94-163, §301, 89 Stat. 913; Oct. 10, 1980, Pub. L. 96-425, §§6(c)(1), (3), 8(f), 94 Stat. 1827, 1828, 1829. |
| 32912(b) | 15:2008(b)(1). | Oct. 20, 1972, Pub. L. 92-513, 86 Stat. 947, §508(d), (e)(1), (2), (4); added Nov. 9, 1978, Pub. L. 95-619, §402, 92 Stat. 3255, 3256. |
| 32912(c)(1) .. | 15:2008(d). | |
| 32912(c)(2), (3). | 15:2008(e)(1). | |
| 32912(c)(4) .. | 15:2008(e)(2). | |
| 32912(c)(5) .. | 15:2008(e)(4). | |
| 32912(d) | 15:2008(b)(3) (1st sentence). | |

In this section, the words “whom the Secretary determines under subsection (a) of this section” are omitted as surplus.

In subsection (b), before clause (1)(A), the words “Except as provided in subsection (c) of this section” are added for clarity. The words “that violates a standard prescribed for a model year under section 32902 of this title” are substituted for “to have violated a provision of section 2007(a)(1) of this title with respect to any model year” and “to have violated section 2007(a)(2) of this title” to avoid referring, as in the source, to one provision that in turn refers to another provision. In clause (1), the words “calculated under” are substituted for “established under” for clarity. The reference to section 32904(a)(1)(A), which is a reference to the provision under which average fuel economy for nonpassenger automobiles is calculated, is added for clarity. The reference to section 32904(a)(1)(B), which is a reference to the provision under which average fuel economy for passenger automobiles is calculated, is substituted for the reference in the source to 15:2002(a) and (c), which is a reference to the provision under which the average fuel economy standard for those automobiles is established, for clarity. The words “in which the violation occurs” are omitted as surplus.

In subsection (c)(1)(A), before clause (i), the words “shall prescribe by regulation” are substituted for “shall, by rule . . . substitute” for consistency in the revised title and because “rule” and “regulation” are synonymous. The words “in accordance with the provisions of this subsection and subsection (e)” are omitted as surplus. The words “be less than \$5.00” are omitted as surplus because under the subsection the Secretary may only raise the amount imposed to \$10, or a \$5 increase. The words “in the absence of such rule” are omitted as surplus. The words “increase in the penalty” are substituted for “additional amount of the civil penalty” for clarity. In clause (ii), the words “subject to subparagraph (B)” are omitted as surplus.

In subsection (c)(1)(C), the words “the later of” and the text of 15:2008(d)(3)(A) are omitted as obsolete.

In subsection (c)(2), before clause (A), the words “After the Secretary of Transportation develops a proposed rule pursuant to subsection (d) of this section” are omitted as surplus. In clause (B), the words “written comments or an oral presentation” are substituted for “written or oral presentations” for consistency in the section. The text of 15:2008(e)(1)(B) (last sentence) and (C) is omitted as surplus because of 5:556(d).

In subsection (c)(5), before clause (A), the words “department, agency, or instrumentality” are substituted for “department or agency” for consistency in the revised title and with other titles of the United States Code.

AMENDMENTS

2007—Subsec. (e). Pub. L. 110-140 added subsec. (e).

EFFECTIVE DATE OF 2007 AMENDMENT

Amendment by Pub. L. 110-140 effective on the date that is 1 day after Dec. 19, 2007, see section 1601 of Pub. L. 110-140, set out as an Effective Date note under section 1824 of Title 2, The Congress.

§ 32913. Compromising and remitting civil penalties

(a) GENERAL AUTHORITY AND LIMITATIONS.—The Secretary of Transportation may compromise or remit the amount of a civil penalty imposed under section 32912(a) or (b) of this title. However, the amount of a penalty imposed under section 32912(b) may be compromised or remitted only to the extent—

(1) necessary to prevent the insolvency or bankruptcy of the manufacturer of automobiles;

(2) the manufacturer shows that the violation was caused by an act of God, a strike, or a fire; or

(3) the Federal Trade Commission certifies under subsection (b)(1) of this section that a reduction in the penalty is necessary to prevent a substantial lessening of competition.

(b) CERTIFICATION BY COMMISSION.—(1) A manufacturer liable for a civil penalty under section 32912(b) of this title may apply to the Commission for a certification that a reduction in the penalty is necessary to prevent a substantial lessening of competition in the segment of the motor vehicle industry subject to the standard that was violated. The Commission shall make the certification when it finds that reduction is necessary to prevent the lessening. The Commission shall state in the certification the maximum amount by which the penalty may be reduced.

(2) An application under this subsection must be made not later than 30 days after the Secretary decides that the manufacturer has violated section 32911(b) of this title. To the maximum extent practicable, the Commission shall make a decision on an application by the 90th day after the application is filed. A proceeding under this subsection may not delay the manufacturer's liability for the penalty for more than 90 days after the application is filed.

(3) When a civil penalty is collected in a civil action under this chapter before a decision of the Commission under this subsection is final, the payment shall be paid to the court in which the action was brought. The court shall deposit the payment in the general fund of the Treasury on the 90th day after the decision of the Commission becomes final. When the court is holding payment of a penalty reduced under subsection (a)(3) of this section, the Secretary shall direct the court to remit the appropriate amount of the penalty to the manufacturer.

(Pub. L. 103-272, §1(e), July 5, 1994, 108 Stat. 1073; Pub. L. 103-429, §6(41), Oct. 31, 1994, 108 Stat. 4382; Pub. L. 104-287, §6(d)(1)(A), Oct. 11, 1996, 110 Stat. 3399.)