EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

July 12, 2019

The Honorable Elaine L. Chao
United States Department of Transportation
1200 New Jersey Ave. SE
Washington, D.C. 20590

Dear Secretary Chao:

We understand that the National Highway Traffic Safety Administration ("NHTSA") is reconsidering whether the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the "2015 Act")[1] applies to the civil penalty rate at 49 U.S.C. § 32912(b) and 49 C.F.R. § 578.6(h)(2) for NHTSA's Corporate Average Fuel Economy ("CAFE") program ("CAFE civil penalty rate") and the statutory cap for that rate. NHTSA has preliminarily determined that the 2015 Act's required inflation adjustments do not apply to the CAFE civil penalty rate or the cap and has asked the Office of Management and Budget ("OMB") for its views regarding that assessment.[2] We concur with NHTSA.

I. Inflation Adjustments of Civil Monetary Penalties

Congress and the Executive have taken a number of gradual steps to adjust civil monetary penalty amounts for inflation. First, during Congress' initial consideration of this issue, the President's Council on Integrity and Efficiency delivered a report on July 1, 1988, cataloging such penalties for consideration by the Senate Committee on Governmental Affairs. On October 5, 1990, Congress passed the Federal Civil Penalties Inflation Adjustment Act of 1990 (the 1990 Act),[3] directing the President to report regularly about the adjustments to civil monetary penalties that would be necessary to account for inflation. On April 26, 1996, Congress amended the 1990 Act to require agencies to adjust covered civil monetary penalties for inflation every four years in accordance with a formula Congress provided. (In this memorandum, we refer to this amended version of the 1990 Act as the 1996 Act.) Finally, on November 2, 2015, Congress further amended the 1990 Act with the 2015 Act. The 2015 Act altered the inflation adjustment formula and requires each agency to, among other things, make an initial "catch-up" inflation adjustment to the civil monetary penalties to account for inflation from the time the penalty was enacted or last adjusted and requires agencies to make annual inflation adjustments thereafter.[4]

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[1] Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, § 701, 128 Stat. 568. ("2015 Act").

[2] NHTSA has also made other preliminary assessments but, as we believe our concurrence allows NHTSA to implement its proposal, it is not clear whether offering our views on NHTSA's other assessments is currently necessary.

[3] Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890.

[4] 2015 Act, § 701(b).

The 2015 Act also requires OMB to "issue guidance to agencies on implementing the inflation adjustments required under this Act." On February 26, 2016, OMB issued guidance explaining that "[a]gencies are responsible for identifying the civil monetary penalties that fall under the statutes and regulations they enforce" and for determining the "applicability of the inflation adjustment requirement to an individual penalty...."[5] OMB's guidance further explained that "[a]gencies with questions on the applicability of the inflation adjustment requirement to an individual penalty, should first consult with the Office of General Counsel of the agency for the applicable statute, and then seek clarifying guidance from OMB if necessary."[6] After consulting with DOT's Office of General Counsel, NHTSA has sought clarification about its preliminary analysis regarding the CAFE penalty rate.

II. The CAFE Penalty Structure

The Energy Policy and Conservation Act (EPCA)[7] directs the Secretary of Transportation to establish average fuel economy standards for vehicles sold in the United States. Those standards must be set annually at the "maximum feasible average fuel economy level that ... manufacturers can achieve in that model year."[8] For each model year from 2011 through 2020, EPCA requires the Secretary to prescribe successively increasing annual fuel economy standards that result in standards for model year 2020 of at least 35 miles per gallon for a manufacturer's total fleet of passenger and non-passenger automobiles.[9] Under EPCA, an auto manufacturer whose fleet average fuel economy exceeds the Secretary's standard for a given model year is liable for:

> a civil penalty of [$5.50][10] 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—
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> (1) calculated under [49 U.S.C. § 32904(a)(1)(A) or (B)] for automobiles to which the standard applies manufactured by the manufacturer during the model year;
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> (2) multiplied by the number of those automobiles; and

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[5] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-16-06, IMPLEMENTATION OF THE FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT ACT IMPROVEMENTS ACT OF 2015 at 2 (Feb. 24, 2016). OMB later issued additional guidance on implementing the 2015 Act. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-17-11, IMPLEMENTATION OF THE 2017 ANNUAL ADJUSTMENT PURSUANT TO THE FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT ACT IMPROVEMENTS ACT OF 2015 (Dec. 16, 2016); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-18-03, IMPLEMENTATION OF PENALTY INFLATION ADJUSTMENTS FOR 2018, PURSUANT TO THE FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT ACT IMPROVEMENTS ACT OF 2015 (Dec. 15, 2017).

[6] M-16-06.

[7] Energy Policy and Conservation Act, Pub. L. No. 94-163, § 301, 89 Stat. 871, 913 (1975).

[8] 49 U.S.C. § 32902(a) (2018).

[9] *Id.* § 32902(b)(2)(A), (C).

[10] The statutory rate was adjusted to $5.50 in 1997, as codified at 49 C.F.R. § 578.6(h)(2). 62 Fed. Reg. 5167 (Feb. 4, 1997).

(3) reduced by the credits available to the manufacturer under [49 U.S.C. § 32903] for the model year.[11]

EPCA also authorizes the Secretary to increase the penalty rate multiplier, upon a finding that doing so would "result in, or substantially further, substantial energy conservation" and would not "have a substantial deleterious impact on the economy of the United States, a State, or a region of a State."[12] However, EPCA prohibits the Secretary from raising the penalty rate multiplier above $10.[13]

III. Inflation Adjustments to the CAFE Penalty

The CAFE penalty rate was not identified in the Executive branch's initial report and catalog of civil monetary penalties.[14] Nevertheless, the penalty rate was included in a report issued pursuant to the 1990 Act[15] and, pursuant to the 1996 Act, NHTSA adjusted the CAFE penalty rate from the $5 to $5.50 on February 4, 1997.[16] Next, on July 5, 2016, NHTSA issued an interim final rule, to adjust the civil monetary penalties it administers for inflation pursuant to the 2015 Act.[17] This action included adjusting the rate for violations of NHTSA's CAFE program from $5.50 per tenth of a mile per gallon over the applicable standard to $14. Upon reconsideration, on December 28, 2016, NHTSA issued another final rule establishing the rate at $5.50 until the 2019 model year at which point the $14 was to take effect.[18] Before this final rule became effective, however, NHTSA issued a final rule on July 12, 2017, maintaining the rate at $5.50 while NHTSA reconsidered whether and to what extent any increase would be appropriate.[19] NHTSA simultaneously sought public comment on that action. The Second Circuit recently vacated the July 2017 final rule, because, the court held, NHTSA finalized the rule in advance of public comments without good cause.[20] During those proceedings, NHTSA issued an NPRM seeking comment on, among other things, its tentative assessment that the $5.50 penalty rate is not subject to inflation adjustment under the 2015 Act.[21] Now NHTSA has received public comment on its July 2017 and April 2018 actions and plans to finalize the penalty rate at $5.50.

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[11] 49 U.S.C. § 32912(b).
[12] *Id.* § 32912(c).
[13] *Id.* § 32912(c)(1)(B).
[14] PRESIDENT'S COUNCIL ON INTEGRITY AND EFFICIENCY, CIVIL MONETARY PENALTIES (June 30, 1988).
[15] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIVIL MONETARY PENALTY ASSESSMENTS AND COLLECTIONS 1990 REPORT TO CONGRESS AND CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORT (July 1991).
[16] 62 Fed. Reg. 5167, 5168 (Feb. 4, 1997).
[17] 81 Fed. Reg. 43,524 (July 5, 2016).
[18] 81 Fed. Reg. 95,489 (Dec. 28, 2016).
[19] 82 Fed. Reg. 32,139 (July 12, 2017); 82 Fed. Reg. 32140 (July 12, 2017).
[20] *Nat'l Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 113–15 (2d Cir. 2018).
[21] 83 Fed. Reg. 13,904 (Apr. 2, 2018).

IV. The 2015 Act Does Not Apply to the CAFE Penalty

In light of a combination of several statutory provisions of the 2015 Act, contemporaneous evidence about the scope of the 2015 Act and the 1996 Act, and the unique statutory structure of civil penalties calculated using the CAFE civil penalty rate, OMB concurs that the 2015 Act does not apply to the CAFE civil penalty rate.

Our analysis begins with the text of the 2015 Act and EPCA. The 2015 Act defines a "civil monetary penalty" as "any penalty, fine, or other sanction that," among other requirements, "is for a specific monetary amount as provided by Federal law" or "has a maximum amount provided for by Federal law."[22] The "penalty, fine, or other sanction" must also be "assessed or enforced by an agency pursuant to Federal law" and "assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts."[23]

The rate and rate cap do not fall into these categories. First, the rate is not a "penalty, fine, or other sanction" that "is for a specific monetary amount." EPCA draws a distinction between the rate, the "amount ... used in calculating a civil penalty," and the "civil penalty" itself, which is the outcome of the statutory formula of which the rate is a part.[24] Any *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 credits the manufacturer earns, may earn in the future, purchases from third parties, and chooses to apply. Consequently, there is no set penalty. The fact that a manufacturer sells a car that exceeds the fuel economy standards—or even many such cars—does not result in 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. This feature distinguishes the CAFE penalty rate from civil monetary penalties that are incurred for each violation. In such cases, a single violation results in liability, regardless of future conduct. Under the CAFE regime, however, a manufacturer's liability is determined, not based on the sale of any one vehicle, but on the whole of the manufacturer's conduct (and planned future conduct) over the course of the model year. Thus, before the end of the model year, it is impossible to know with certainty what a manufacturer's penalty will be, even if it has sold cars that do not meet the fuel economy standards. A manufacturer may sell cars in violation of the fuel economy standard, and owe a lesser penalty, no penalty, or even earn money by selling credits, if it later sells a sufficient number of fuel efficient vehicles (or otherwise acquires credits).[25] Although the penalty rate is "a specific monetary amount," the penalty itself is indeterminate. It therefore falls outside the scope of the 2015 Act.

The CAFE penalty also has no "maximum amount provided for by Federal law." There is no limit to the penalty that can be imposed under EPCA, because there is no limit under EPCA to the number of cars a manufacturer could sell or the amount of gasoline they could consume. Nor can the $10 cap on the penalty rate be construed as the maximum amount, because it limits

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[22] 28 U.S.C. § 2461, note § 3(2) (2018).

[23] *Id.*

[24] 49 U.S.C. § 32912(c)(1)(A) (2018).

[25] NHTSA has informed us that some manufacturers of fuel-efficient vehicles generate regular revenue by selling credits to manufactures of less fuel-efficient vehicles and that the vast majority of potential CAFE liability is eliminated through the private purchase of credits, not through payments to the Government.

the "amount ... used in calculating a civil penalty," not the "civil penalty" itself.[26] The "maximum amount provided for by Federal law" describes penalties that have a maximum amount that can be "assessed or enforced" at the time of the violation. The $10 cap cannot itself be "assessed or enforced." Instead, it serves as a limitation on the agency's authority to alter the penalty rate.[27]

The statutory structure of EPCA also strongly indicates that Congress did not intend the 2015 Act to apply to the CAFE penalty rate. Congress has given the Secretary of Transportation discretion to adjust the penalty rate, after making particular findings, subject to a $10 cap.[28] To increase the rate under EPCA, the Secretary must decide that the increase "will result in, or substantially further, substantial energy conservation for automobiles in model years in which the increased penalty may be imposed and will not have a substantial deleterious impact on the economy of the United States, a State, or a region of a State."[29] Moreover, the Secretary can find that an increase will not have "a substantial deleterious impact" "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."[30] By contrast, under the 2015 Act, the initial catch-up adjustment goes into effect automatically unless the Secretary determines that 1) increasing the civil monetary penalty by the otherwise required amount would have a negative economic impact or 2) the social costs of increasing the civil monetary penalty by the otherwise required amount outweighs the benefits.[31] The Secretary has no power to prevent regular future adjustments. Thus, under EPCA, there is no automatic increase in the penalty rate, the burden is on the Secretary to demonstrate an absence of economic harm before increasing the rate, and any increase is capped at $10. Under the 2015 Act, increases are automatic, the Secretary has the burden of demonstrating economic harm to stop an initial increase and no power to stop future increases, and the potential penalty increases are unlimited. Quite simply, the two adjustment regimes are in conflict. It is highly unlikely that Congress intended to shift from discretionary to automatic rate adjustments, flip the burdens of proof necessary for making or stopping adjustments, and eliminate the cap on adjustments with the general provisions of the 2015 Act and without any reference to EPCA.

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[26] *Id.*

[27] For example, the "general penalty" under EPCA provides for "a civil penalty of not more than $10,000 for each violation." *Id.* § 32912(a). NHTSA has the authority, in particular cases, to assess or enforce the $10,000 maximum general penalty for each violation, or a lesser amount. Such a reading helps ensure that penalties with defined ranges for a violation, but no fixed amount, are nevertheless adjusted for inflation. In contrast to the general penalty described above, a manufacturer's potential liability for violating CAFE standards is highly variable—the more cars manufactured, the greater the possible penalty—and NHTSA has no discretion to set the penalty rate at anything other than the existing statutory or regulatory amount for a particular violation. Any changes to the cap affect all future violations and are effectuated via rulemaking, not enforcement. For that reason, the $10 cap should not be understood as a maximum amount provided for by Federal law.

[28] 49 U.S.C. § 32912(c)(1)(A).

[29] *Id.*

[30] *Id.* § 32912(c)(1)(C).

[31] 28 U.S.C. § 2461, note § 4(c)(1).

This conclusion is reinforced by another unique feature of EPCA. Under EPCA, instead of requiring a formulaic increase in the penalty rate, Congress required the Secretary of Transportation to regularly increase the fuel efficiency standards based on, among other things, developing technology.[32] Thus, even without an inflation adjustment, this feature of EPCA helps ensure that the statute becomes stricter over time. It would be strange for Congress to subject automobile manufacturers to *both* ever increasing fuel economy standards (in EPCA) *and* ever increasing penalties for failing to comply with those standards (in the 2015 Act) without saying so explicitly. "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[33]

V. Other Considerations

We also have considered several facts and arguments that counsel in favor of applying the 2015 Act to the CAFE penalty rate, but find them unpersuasive. First, in 2016 NHTSA determined that the CAFE penalty rate and cap fell within the 2015 Act's definition of "civil monetary penalty." Our opinion today is inconsistent with that determination. However, NHTSA's 2016 action was taken without consultation with OMB, which has responsibility for overseeing implementation of the 2015 Act.

Moreover, NHTSA's 2016 decision was merely the latest in a series of inconsistent interpretations of the term "civil monetary penalty" and its applicability to the CAFE rate and cap adopted by the Executive branch across different administrations and without any analysis. First, in 1988 during the development of the 1990 Act, the President's Council on Integrity and Efficiency prepared a report for the Senate Committee on Governmental Affairs cataloging administrative "civil monetary penalties" using effectively the same definition Congress ultimately adopted in the 1990 Act, the 1996 Act, and the 2015 Act.[34] The Council found

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[32] 49 U.S.C. § 32902(b)(2)(B) (requiring the average fuel economy for model years 2021 through 2030 to be the "maximum feasible" standard for the model year). When deciding "maximum feasible" fuel economy, the Secretary shall consider, among other things, "technological feasibility." *Id.* § 32902(f).

[33] *See Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).

[34] The Council used the following definition when it performed its assessment:

> [A]ny 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; (B) is enforceable by an agency pursuant to Federal law; and (C) is enforced pursuant to an administrative proceeding or a civil action in the courts.

PRESIDENT'S COUNCIL ON INTEGRITY AND EFFICIENCY, CIVIL MONETARY PENALTIES 2 (June 30, 1988). It qualified that definition by noting that "we are not including CMPs enforced pursuant to a civil action in the Federal courts." *Id.* The final definition that Congress adopted for "civil monetary penalty" was very similar:

> [A]ny 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). The Council's surveys included only those penalties that were "administrative" penalties and thus did not include those penalties "enforced pursuant to a civil action in

hundreds of civil monetary penalties across a wide range of statutes, including several penalties in the Motor Vehicle and Cost Savings Act.[35] Though the $5 CAFE civil penalty rate had been established 13 years before, it is not discussed in the report and is omitted from the list of penalties appended to it. Later, when OMB published a list of civil monetary penalties pursuant to the 1990 Act, we included the CAFE penalty rate, but not the rate cap.[36] When NHTSA made an adjustment to civil monetary penalties pursuant to the 1996 Act, NHTSA likewise adjusted the rate, but not the cap.[37] Neither NHTSA or OMB offered any rationale for including the rate but excluding the cap. Finally, in implementing the 2015 Act—and again interpreting the term "civil monetary penalty"—NHTSA adjusted *both* the CAFE penalty rate *and* the CAFE penalty rate cap. In short, until the instant rulemaking, neither OMB nor NHTSA has ever explained whether or why the CAFE penalty rate is a "civil monetary penalty." And, since Congress first considered inflation adjustments for "civil monetary penalt[ies]," the Executive branch has at various points implicitly adopted at least three different interpretations of the term—one under which neither the rate nor the cap is a "civil monetary penalty," one under which the rate is, but the cap is not a "civil monetary penalty," and one under which both are "civil monetary penalt[ies]." Accordingly, we see little basis to adhere to NHTSA's 2016 decision.[38]

We also considered the Second Circuit's recent opinion in *Natural Resources Defense Council v. NHTSA*, explaining its vacature of NHTSA's indefinite delay of the $14 inflation adjustment.[39] There, the court held that NHTSA did not have the authority to issue the indefinite delay without following the notice and comment procedures of the Administrative Procedure Act (APA). In a footnote responding to NHTSA's argument that its authority to administer the CAFE standard gave it the inherent authority to delay the rate adjustment, notwithstanding the APA, the court stated that the 2015 Act applies to the CAFE penalty rate, because the 2015 Act applies to all agencies.[40] Although, the 2015 Act undoubtedly applies to all agencies, that fact has no bearing on the definition of a "civil monetary penalty" or whether the CAFE penalty rate is one. Moreover, the question of the definition of a "civil monetary penalty" was not before the Court. No party briefed this question. Indeed, NHTSA told the Court that it instituted the delay and instant rulemaking, in part, to consider that very issue.[41] The court itself acknowledged that its "review [was] limited to the rationales offered by NHTSA" for the delay and that, under the APA, it could "only enter a judgment upon the validity of the grounds upon which [NHTSA] itself based its action."[42] Accordingly, the Second Circuit's statement was incorrect and dicta, in any event.

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the Federal courts." PRESIDENT'S COUNCIL ON INTEGRITY AND EFFICIENCY, *supra*, at 2. It is our understanding that the CAFE civil penalty rate and associated penalty are administrative in nature.

[35] *Id.*, app. B.

[36] OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIVIL MONETARY PENALTY ASSESSMENTS AND COLLECTIONS 1990 REPORT TO CONGRESS AND CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORT (July 1991).

[37] 62 Fed. Reg. 5167, 5168 (Feb. 4, 1997).

[38] To be sure, the conclusion that the 2015 Act does not apply to the CAFE penalty rate is arguably inconsistent with NHTSA's action to adjust the rate for inflation under the 1996 Act. NHTSA may reconsider that decision in a separate rulemaking. *See* 83 Fed. Reg. 13,904, 12,908 n.23 (Apr. 2, 2018).

[39] *See Nat'l Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95 (2d Cir. 2018).

[40] *Id.* at 113 n.12.

[41] Brief for Resp'ts at 28–29, *Nat'l Res. Def. Council*, 894 F.3d 95 (2d Cir. 2018), ECF No. 168.

[42] *Nat'l Res. Def. Council*, 894 F.3d at 111 (internal quotation marks omitted).

Finally, we are not aware of another penalty scheme with the unique features of the CAFE penalty. In light of (1) EPCA's distinction between the penalty rate and the penalty itself, (2) the incompatibility of the structure of the CAFE penalty scheme and the 2015 Act, and (3) the inconsistent treatment of the CAFE penalty rate under inflation adjustment schemes over time, we concur with NHTSA's assessment that the 2015 Act's does not apply to the CAFE civil penalty rate. We express no view as to whether the 2015 Act would apply to another penalty scheme where one of these factors were altered or absent.[43]

Sincerely,

Russell T. Vought
Acting Director

[43] In its NPRM for the instant final rule, NHTSA stated that it would also consider eliminating the penalty increase imposed pursuant to the 1996 Act, in order to give interested parties the full and separate opportunity to comment on this change, particularly in light of the above determinations.