

Case No. _____

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

STATE OF NEW YORK, STATE OF CALIFORNIA, STATE OF VERMONT,
STATE OF MARYLAND and COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION; JACK
DANIELSON, in his capacity as Acting Deputy Administrator of the National
Highway Traffic Safety Administration; and ELAINE L. CHAO, in her capacity
as Secretary of the United States Department of Transportation,

Respondents.

**PETITION FOR REVIEW OF A FINAL RULE OF THE NATIONAL
HIGHWAY TRAFFIC SAFETY ADMINISTRATION**

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York

MONICA WAGNER
Deputy Chief
Environmental Protection Bureau
120 Broadway
New York, New York 10271
Tel: (212) 416-6351
Email: Monica.Wagner@ag.ny.gov

XAVIER BECERRA
Attorney General of the
State of California

DAVID ZAFT (*Admission Pending*)
Deputy Attorney General
Office of the Attorney General
300 S. Spring St., Suite 1702
Los Angeles, California 90013
Tel: (213) 897-2607
Email: David.Zaft@doj.ca.gov

*Additional Counsel Listed on Signature
Page*

PETITION FOR REVIEW

Pursuant to the Energy Policy and Conservation Act, 49 U.S.C. § 32909, Section 702 of the Administrative Procedure Act, 5 U.S.C. § 702, and Rule 15 of the Federal Rules of Appellate Procedure, the States of New York, California, Vermont and Maryland, and the Commonwealth of Pennsylvania hereby petition this Court to review and set aside a final action taken by Respondents to indefinitely delay the effective date of a final rule increasing the civil penalty rate for violations of the Corporate Average Fuel Economy standards. The rule challenged herein is titled “Civil Penalties ... Final rule; delay of effective date” and was published in the Federal Register at 82 Fed. Reg. 32139-40 (July 12, 2017).

A copy of the challenged final rule is attached as Exhibit A to this Petition.

Dated: September 8, 2017

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York

By: /s/ Monica Wagner
MONICA WAGNER
Deputy Chief
Environmental Protection Bureau
120 Broadway
New York, New York 10271
Tel: (212) 416-6351
Email: Monica.Wagner@ag.ny.gov

*Attorneys for Petitioner State of
New York*

THOMAS J. DONOVAN, JR.
Attorney General of the
State of Vermont

By: /s/ Kyle H. Landis-Marinello
KYLE H. LANDIS-MARINELLO
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609-1001
Tel: (802) 828-3186
Email: Kyle.Landis-Marinello
@vermont.gov

*Attorneys for Petitioner State of
Vermont*

Respectfully submitted,

XAVIER BECERRA
Attorney General of the
State of California
DAVID A. ZONANA
(Admission Pending)
Supervising Deputy Attorney General

By: /s/ David Zaft
DAVID ZAFT (Admission Pending)
Deputy Attorney General
Office of the Attorney General
300 S. Spring St., Suite 1702
Los Angeles, California 90013
Tel: (213) 897-2607
Email: David.Zaft@doj.ca.gov
David.Zonana@doj.ca.gov

*Attorneys for Petitioner State of
California*

JOSH SHAPIRO
Attorney General of the
Commonwealth of Pennsylvania

By: /s/ Jonathan Scott Goldman
JONATHAN SCOTT GOLDMAN
(Admission Pending)
Executive Deputy Attorney General
Office of the Attorney General
Strawberry Square, 15th Floor
Harrisburg, Pennsylvania 17120
Tel: (717) 787-8058
Email: JGoldman@attorneygeneral.gov

*Attorneys for Petitioner Commonwealth
of Pennsylvania*

BRIAN E. FROSH
Attorney General of the
State of Maryland

By: /s/ Steven M. Sullivan
STEVEN M. SULLIVAN
(Admission Pending)
Solicitor General
Office of the Attorney General
200 St. Paul Place
Baltimore, MD 21202
Tel: (410) 576-6427
Email: SSullivan@oag.state.md.us

*Attorneys for Petitioner State of
Maryland*

EXHIBIT A

82 Federal Register 32139

Review) defines a “significant regulatory action,” which requires review by the Office of Management and Budget, as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.”

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any given year. This final rule has no such effect on state, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521).

Catalog of Federal Domestic Assistance

This final rule affects the verification guidelines of veteran-owned small businesses, for which there is no Catalog of Federal Domestic Assistance program number.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Gina S. Farrisee, Deputy Chief of Staff, Department of Veterans Affairs,

approved this document on July 5, 2017, for publication.

List of Subjects in 38 CFR Part 74

Administrative practice and procedures, Privacy, Reporting and recordkeeping requirements, Small business, Veteran, Veteran-owned small business, Verification.

Dated: July 7, 2017.

Michael Shores,

Director, Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

PART 74—VETERANS SMALL BUSINESS REGULATIONS

Accordingly, the interim rule amending 38 CFR part 74 which was published at 82 FR 11154 on February 21, 2017, is adopted as final without change.

[FR Doc. 2017–14600 Filed 7–11–17; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 578

[Docket No. NHTSA–2016–0136]

RIN 2127–AL82

Civil Penalties

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

ACTION: Final rule; delay of effective date.

SUMMARY: NHTSA is delaying the effective date of the final rule entitled “Civil Penalties,” published in the **Federal Register** on December 28, 2016, because NHTSA is reconsidering the appropriate level for CAFE civil penalties.

DATES: As of July 7, 2017, the effective date of the final rule published in the **Federal Register** on December 28, 2016, at 81 FR 95489, is delayed indefinitely pending reconsideration.

FOR FURTHER INFORMATION CONTACT: Rebecca Schade, Office of Chief Counsel, at (202) 366–2992.

SUPPLEMENTARY INFORMATION: On July 5, 2016, NHTSA published an interim final rule updating the maximum civil penalty amounts for violations of statutes and regulations administered by NHTSA, pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Inflation Adjustment Act). The penalty for

exceeding an applicable Corporate Average Fuel Economy (CAFE) standard was among the penalties adjusted for inflation in the interim final rule. In accordance with the Inflation Adjustment Act and guidance on calculating the inflationary adjustment mandated by the Act issued by the Office of Management and Budget, NHTSA increased the civil penalty for failing to meet an applicable CAFE standard from \$5.50 per tenth of a mile per gallon (mpg) to \$14 per tenth of an mpg.

The Auto Alliance and Global Automakers jointly petitioned NHTSA for reconsideration of the interim final rule regarding the inflationary adjustment of CAFE non-compliance penalties (hereafter, the Alliance and Global petition will be referred to as the “Industry Petition”)¹ on August 1, 2016. The Industry Petition argued that NHTSA used the wrong base year to calculate the inflationary adjustment to the CAFE civil penalty and raised concerns about applying the adjusted civil penalty retroactively. The Industry Petition also argued that in the event that NHTSA chose not to adopt the base year suggested in the petition, NHTSA should seek comment on whether NHTSA should adopt a lower penalty level than the one in the interim final rule based on “negative economic impacts,” as permitted by the Inflation Adjustment Act.

On December 28, 2016, NHTSA published a final rule in response to the Industry Petition.² To address concerns raised in the Industry Petition about applying the adjusted penalty retroactively, NHTSA delayed application of the \$14 per tenth of an mpg penalty until the 2019 model year, which begins in October 2018 for most manufacturers. The final rule did not address the other points raised in the Industry Petition.

The December 28, 2016 final rule is not yet effective and would currently become effective on July 10, 2017.³

NHTSA is now reconsidering the final rule because the final rule 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, as estimated in the Industry Petition. Thus, in a separate document

¹ Jaguar Land Rover North America, LLC also filed a petition for reconsideration in response to the July 5, 2016 interim final rule raising the same concerns as those raised in the Industry Petition. Both petitions can be found in Docket No. NHTSA–2016–0075, accessible via www.regulations.gov.

² 81 FR 95489.

³ 82 FR 8694 (Jan. 30, 2017); 82 FR 15302 (Mar. 28, 2017); 82 FR 29009 (June 27, 2017).

published in this **Federal Register**, NHTSA is seeking comment on whether \$14 per tenth of an mpg is the appropriate penalty level for civil penalties for violations of CAFE standards given the requirements of the Inflation Adjustment Act and the Energy Policy and Conservation Act (EPCA) of 1975, which authorizes civil penalties for violations of CAFE standards.⁴ Because NHTSA is reconsidering the final rule, NHTSA is delaying the effective date pending reconsideration.

There is good cause to implement this delay without notice and comment under 5 U.S.C. 553(b)(B) and 553(d)(3) because those procedures are impracticable, unnecessary, and contrary to the public interest in these circumstances, where the effective date of the rule is imminent. Moreover, the agency is, through a separate document, already seeking out public comments on the underlying issues, which may be extensive, and additional time will be required to thoughtfully consider and address those comments before deciding on the appropriate course of regulatory action. A delay in the effective date is therefore consistent with NHTSA's statutory authority to administer the CAFE standards program and its inherent authority to do so efficiently and in the public interest. In addition, no party will be harmed by the delay in the effective date of the rule. On the contrary, the rule does not increase CAFE penalties before Model Year 2019, and therefore, the delay will not affect the civil penalty amounts assessed against any manufacturer for violating a CAFE standard prior to the 2019 model year at the earliest, *i.e.*, until sometime in 2020. Therefore, the increased penalty rate set forth in the rule would not be applied for current violations, so there is no immediate, concrete impact from the delay.

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

Jack Danielson,

Acting Deputy Administrator.

[FR Doc. 2017-14526 Filed 7-7-17; 11:15 am]

BILLING CODE 4910-59-P

⁴ NHTSA incorporates the discussions in the document seeking comment on the appropriate CAFE civil penalties level by reference.

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 578

[Docket No. NHTSA-2017-0059]

Civil Penalties

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).
ACTION: Reconsideration of final rule; request for comments.

SUMMARY: NHTSA seeks comment on whether and how to amend the civil penalty rate for violations of Corporate Average Fuel Economy (CAFE) standards. NHTSA initially raised the civil penalty rate for CAFE standard violations for inflation in 2016, but upon further consideration, NHTSA believes that obtaining additional public input on how to proceed with CAFE civil penalties in the future will be helpful. Therefore, NHTSA is issuing this document to seek public comment as it *sua sponte* reconsiders its final rule regarding the appropriate inflationary adjustment for CAFE civil penalties.

DATES: *Comments:* Comments must be received by October 10, 2017. See the **SUPPLEMENTARY INFORMATION** section below for more information on submitting comments.

ADDRESSES: You may submit comments to the docket number identified in the heading of this document by any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, M-30, U.S. Department of Transportation, West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery or Courier:* U.S. Department of Transportation, West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m. Eastern time, Monday through Friday, except Federal holidays.
- *Fax:* 202-493-2251.

Regardless of how you submit your comments, you must include the docket number identified in the heading of this document. Note that all comments received, including any personal information provided, will be posted without change to <http://www.regulations.gov>. Please see the "Privacy Act" heading below.

You may call the Docket Management Facility at 202-366-9324.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> or the street address listed above. NHTSA will continue to file relevant information in the Docket as it becomes available.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to <http://www.regulations.gov>, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at <https://www.transportation.gov/privacy>. Anyone is able to search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.).

FOR FURTHER INFORMATION CONTACT:

Thomas Healy, Office of the Chief Counsel, NHTSA, telephone (202) 366-2992, facsimile (202) 366-3820, 1200 New Jersey Avenue SE., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

I. Statutory and Regulatory Background

NHTSA sets¹ and enforces² CAFE standards for the United States, and in doing so, assesses civil penalties against vehicle manufacturers who fall short of their compliance obligations and are unable to make up the shortfall with credits.³ The amount of the civil penalty was originally set by statute in 1975, and for most of the duration of the CAFE program, has been \$5.50 per each tenth of a mile per gallon that a manufacturer's fleet average CAFE level falls short of its compliance obligation, multiplied by the number of vehicles in the fleet⁴ that has the shortfall. The basic equation for calculating a manufacturer's civil penalty amount is as follows:

¹ 49 U.S.C. 32902.

² 49 U.S.C. 32911, 32912.

³ Credits may be either *earned* (for over-compliance by a given manufacturer's fleet, in a given model year) or *purchased* (in which case, another manufacturer earned the credits by over-complying and chose to sell that surplus). 49 U.S.C. 32903; 49 CFR part 538.

⁴ A manufacturer may have up to three fleets of vehicles, for CAFE compliance purposes, in any given model year—a domestic passenger car fleet, an imported passenger car fleet, and a light truck fleet. Each fleet belonging to each manufacturer has its own compliance obligation, with the potential for either over-compliance or under-compliance. There is no overarching CAFE requirement for a manufacturer's total production.