Michael Kuppersmith
Office of Chief Counsel
National Highway Traffic Safety Administration
Department of Transportation
1200 New Jersey Ave. SE
Washington, DC 20590

January 25, 2021

RE: Civil Penalties (Docket # NHTSA-2021-0001)

Dear Mr. Kuppersmith,

We, the undersigned organizations, are writing to comment on NHTSA's illegal and ill-advised delay of the increase in fuel economy penalties required to go into effect for the 2019 model year. This decision in the waning days of the previous Administration flies in the face of multiple judicial decisions finding such delays illegal and amounts to a government hand-out to polluters who have refused to improve fuel economy.

Below we describe in detail the numerous failings of this action. We therefore demand that the agency withdraw this final rule and allow the mandated penalty increase to go into effect as required by law.

This action is an end-around clearly adjudicated cases that deemed such delay illegal

First and foremost, there is no lawful basis for this interim final rule. NHTSA was required by statute to increase the penalties for automakers' failure to comply with fuel economy regulations to reflect decades of reduction related to inflation. The agency finalized such adjustment in 2016, increasing the penalty from $5.50 per 0.1-mpg-per-vehicle to $14. This increase was then *twice* the subject of litigation, during which the courts held that NHTSA had exceeded its authority in trying to delay or avoid the required adjustment.[1]

Delaying the penalty *again* flies in the face of a clear adjudication establishing such delays as illegal. The agency lacks the authority to delay this rule and must, therefore, withdraw it immediately.

NHTSA's rationale for delay is without merit

The Administration bases the decision for further delaying the increase under the belief that "it is [not] appropriate to impose a higher civil penalty rate for model years when doing so would not have incentivized improvements to fuel economy," deeming such penalty "retroactive punishment."[2] It also

[1] See *New York v. NHTSA*, 974 F.3d 87, 100-01 (2d Cir. 2020); *NRDC v. NHTSA*, 894 F.3d 95, 108-13 (2d Cir. 2018).
[2] *Federal Register* **86** (9), 3020.

claimed that such penalty “may inhibit economy recovery” and that delay is warranted “for the purpose of promoting job creation and economic growth.”[3] Both arguments were used in the Administration’s attempts to previously (and illegally) delay and reduce CAFE penalties. Moreover, not only have they been previously adjudicated, but they are substantively baseless.

The penalty is not retroactive—manufacturers planned around the MY2019 increase

Contrary to assertions by both petitioners and NHTSA, automakers planned on the $14 increase. According to NHTSA’s interpretation, a rule affecting model year 2019 would have to be finalized by April 1, 2017.[4] NHTSA did not finalize a rule reducing the penalty to $5.50 until July 26, 2019 and had not even proposed such adjustment until July 12, 2017.[5] Therefore, automakers would have been expected to consider the December 28, 2016 final rule requiring a $14 increase in their vehicle production plans.

Automakers’ own financial statements demonstrate this fact. The only automaker who has paid any penalties for non-compliance with the corporate average fuel economy (CAFE) regulations since the 2014 model year is Fiat-Chrysler (FCA). In its financial filing with the Securities and Exchange Commission (SEC) following the (illegal) final rule reducing the penalty to $5.50, Fiat-Chrysler wrote:[6]

> *“On July 12, 2019, the U.S. Department of Transportation’s National Highway Traffic Safety Administration (“NHTSA”) announced a final rule that retains the current fine rate applicable to automobile manufacturers that fail to meet Corporate Average Fuel Economy (“CAFE”) standards through achievement of the targeted fleet fuel efficiency or remittance of CAFE credits.* ***Prior to this final rule, FCA recorded a provision for estimated CAFE civil fines relating to 2019 model year vehicles for which CAFE credits were not expected to be available at the previously announced civil fine rate.*** *As a result of the announced final rule, under IAS 37, the reduction of the civil fine rate resulted in a change in the estimated provision of €158 million relating to 2019 model year vehicles sold prior to March 31, 2019, which has been recognized as a reduction to Cost of revenues within the Interim Condensed Consolidated Income Statement for the nine months ended September 30, 2019.”* [emphasis added]

This establishes quite clearly that the penalty increase to $14 is not “retroactive”—manufacturers’ own plans assumed its existence, and they accrued a cost liability during this period equal to the higher fine. That FCA decided to recognize those accrued costs as revenue in 2019 does not alter the fact that FCA planned for the increased penalty between 2016 and 2019.

The increase would not result in substantial economic harm

Manufacturers planned for the $14 penalty to apply beginning in model year 2019, so there is no basis for NHTSA to suppose that manufacturers would be ill-prepared. However, this is even more clear when one examines the economic argument underpinning the agency’s actions, particularly in light of the structure of the CAFE program and its many flexibilities.

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[3] *Federal Register* **86** (9), 3022.

[4] *Federal Register* **86** (9), 3023.

[5] Dockets NHTSA-2017-0059-0001 and NHTSA-2018-0017-0020.

[6] See *Fiat Chrysler Automobiles N.V. Form 6-K Report of Foreign Private Issuer Pursuant to Rule 13a-16 or 15d-16 of the Securities Exchange Act of 1934 for the month of October 2019* (Commission File No. 001-36675), p. 61. Available online at https://fcagroup.gcs-web.com/static-files/e66a2dc5-1350-4bb6-8395-97b1841e4209.

First and foremost, while NHTSA tries to raise significant concerns about the auto industry because of COVID-19 and the coronavirus, particularly relying upon automaker comments,[7] there is little evidence of a significant and long-lasting impact on the industry[8]—in fact, by the end of the year, the industry overall had rebounded to see year-over-year growth *in spite of* the pandemic.[9]

Moreover, the industry has historically been quite cyclic, and in the United States was coming off a record-breaking sales streak, topping 17 million in sales for five straight years,[10] leaving the industry well-prepared for the next downturn.[11] In fact, General Motors said that the U.S. industry needs to sell just 10 to 11 million vehicles a year to break even[12]—the industry sold well more than that in 2020 (14.6 million vehicles).[13] Moreover, these vehicles were sold at record high transaction prices, topping $40,000 in December, based on a mix of vehicles heavily weighted towards high profit pick-up trucks and utility vehicles.[14]

In addition to the far rosier broad economic picture than claimed by NHTSA and industry, the effect of the increased penalty is likely far less significant than claimed. In recent years only a single company, FCA (now Stellantis, after its merger with Groupe PSA), has paid penalties related to the CAFE standards.[15] In its filings with the SEC, FCA noted the anticipated value of the increase in fines as "up to €500 million"–for comparison, FCA will pay €2.9 billion to its shareholders as a result of the merger with Groupe PSA and an addition dividend of €1.1 billion, values which far surpass even the greatest potential impact of the increased fines.[16]

NHTSA has relied almost entirely on biased input from auto manufacturers in its erroneous claims of economic harm, while independent data show quite clearly that the agency's legally required increase in penalty will not result in significant economic impact. NHTSA must therefore withdraw its rule.

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[7] *Federal Register* **86** (9), 3022.

[8] Stoddard, Haig. 2021. "North America: Looking Ahead from Pandemic-Smacked 2020." Market Analysis, Wards Intelligence/LMC Automotive. Online at https://wardsintelligence.informa.com/WI965384/North-America-Looking-Ahead-from-Pandemic-Smacked-2020.

[9] Boston Consulting Group. 2020. "COVID-19 Automotive Demand, November 2020." https://www.bcg.com/en-us/publications/2020/covid-automotive-industry-forecasting-scenarios.

[10] https://www.cnbc.com/2020/01/06/us-auto-sales-down-in-2019-but-still-top-17-million.html

[11] https://www.cnbc.com/2020/05/11/coronavirus-detroits-automakers-have-enough-cash-to-last-the-year-without-a-bailout.html

[12] *Ibid.*

[13] Wards Intelligence. 2021. U.S. Light Vehicles Sales, December 2020. Online at https://wardsintelligence.informa.com/WI965360/US-Light-Vehicle-Sales-December-2020--UPDATED.

[14] https://www.bloomberg.com/news/articles/2021-01-06/pandemic-sharpens-split-between-have-and-have-not-car-buyers.

[15] See footnotes 9 and 10: NHTSA. 2019. MY2011-2019 Industry CAFE Compliance. Online at https://one.nhtsa.gov/cafe_pic/MY%202011%20-%20MY%202019%20Credit%20Shortfall%20Report_v08_new.pdf.

[16] See pages 18 and 48, in *Fiat Chrysler Automobiles N.V. Amendment No. 2 to Form F-4 Registration Statement under the Securities Act of 1933*, as filed with the Securities and Exchange Commission on November 5, 2020 (Registration No. 333-240094). Online at https://fcagroup.gcs-web.com/static-files/45f814b1-ed42-470e-9b58-5da68a2b1f49.

The fines are already too low, and further delay would cause undo harm to consumers and workers

NHTSA appears to have drawn the wrong conclusions from industry behavior with respect to the CAFE program—that the penalty has continued to be an insufficient deterrent is a reason for Congress to increase the penalty, not for the agency to refuse to administer it.

For example, Ferrari claims that applying the penalty increase to $14 as legally required "would save no fuel, instead serving only as a wealth transfer to the manufacturers that have surplus CAFE credits."[17] Yet as already established, Ferrari had adequate notice in advance of the 2019 model year and would have, like FCA, planned its 2019 (and 2020, and so on) production levels in anticipation of a $14 penalty for non-compliance. Moreover, manufacturer-to-manufacturer credit trading is a compliance flexibility designed to reduce overall costs for compliance—a manufacturer like Ferrari decides in advance whether to purchase credits in lieu of adding technology, and the manufacturer selling the credits must have earned those credits by exceeding the statutory requirements of the program—this is where the additional fuel savings are accrued and valued. The extent to which credit trading results in a wealth transfer is solely due to the degree with which a company like Ferrari chooses to comply with the CAFE regulations via application of technology or credit accrual, and ultimately if Ferrari is concerned about a wealth transfer to its competitors, it can again choose not to comply with CAFE, as it did for decades, a long-standing indicator of the lack of deterrent posed by a $5.50 penalty.[18] The $14 penalty is meant to incentivize the application of fuel reduction technologies by *the industry overall*—the nature of Ferrari's particular compliance strategy (or lack thereof) is not the point, and it had (and will continue to have) ample time to consider the degree to which it relies on other manufacturers' over-compliance.

Similarly, FCA has shown that—under the outdated $5.50 penalty—it would prefer to pay fines for non-compliance with the minimum domestic passenger car standard rather than comply with the law. As a result, FCA's domestic passenger cars are actually *less* efficient today than they were in 2012.[19] This is not the unanticipated result of consumer action—this was a decision first made in 2015,[20] and continued to be made annually, as FCA refused to improve the fuel efficiency of its offered vehicles and instead reduced production of its most efficient vehicles. The $14 penalty incentivizes FCA to abandon this course of action.

FCA's refusal to improve the efficiency of its vehicles has cost consumers tremendously. Through MY2018, we estimate that FCA will have paid about $240 million in non-compliance with the minimum domestic passenger car standard—this amounts to just $200 per vehicle in fines. Had FCA instead complied with the domestic passenger car standard, its consumers would have saved approximately 1.2 billion gallons in fuel over the lifetime of those vehicles, at reduced fuel costs of more than $2,500 per

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[17] *Federal Register* **86** (9), 3022.

[18] See, e.g., U.S. Government Accountability Office. 2007. "Vehicle Fuel Economy: Reforming Fuel Economy Standards Could Help Reduce Oil Consumption by Cars and Light Trucks, and Other Options Could Complement These Standards." Report to the Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate. GAO-07-921.

[19] Compare public CAFE data (https://one.nhtsa.gov/cafe_pic/CAFE_PIC_Mfr_LIVE.html) with projected fuel economy levels for 2019, the most recent available (Manufacturer Projected Fuel Economy Compliance Report, https://one.nhtsa.gov/CAFE_PIC/MY%202018%20and%202019%20Projected%20Fuel%20Economy%20Performance%20Report_v07%20-%20Final.pdf).

[20] Letter from Paul Mendrick to NHTSA Administrator, December 23, 2015. NHTSA-2016-0032-0009.

vehicle.[21] Even under the new penalty rate in MY2019, FCA would pay a fine of just $1,200 per vehicle while costing its customers nearly $4,400 per vehicle in excess fuel costs.[22]

The behavior of automakers like FCA and any other manufacturer paying CAFE penalties for non-compliance is bad for consumers—the CAFE program is designed to *increase* efficient options for consumers across all vehicle types, and yet FCA has continued to pay penalties and purchase credits in lieu of this. It is also a potential concern for the company's workers—the minimum domestic passenger car standard serves as a backstop to avoid the type of catastrophic layoffs that occurred when gas prices rose significantly back in the mid-2000s, and FCA's flouting of this rule could lead to a repeat of this historic error.

And yet NHTSA finds itself encouraging manufacturers to make these poor, societally detrimental decisions in part because of the agency's longstanding refusal to implement the fines required by Congress. It is long past due for the penalties to be increased and encourage manufacturers to make production decisions more consistent with societal and environmental objectives. NHTSA must withdraw this unlawful, detrimental interim final rule to avoid perpetuating this mistake.

Conclusion

NHTSA illegally delayed the increase in fines for non-compliance with the CAFE program for a number of years. In spite of clear judicial rulings requiring the implementation of the Congressionally mandated increase in the penalty to $14, NHTSA is once again trying to ignore the law and bail out companies like FCA that are costing their customers billions of dollars while simultaneously undermining national security and increasing environmental damages through increased petroleum usage.

Manufacturers have repeatedly made the choice to sell inefficient vehicles, despite ample notice to adjust production for the years in question—they have simply chosen not to. As such, they must pay the penalty. Doing so will not cause economic harm—and one hopes that maybe it will finally serve as a sufficient deterrent to encourage companies like FCA to comply with the regulations as written.

It is long past time for NHTSA to implement the penalty increase—NHTSA must withdraw the interim final rule and assess manufacturers' penalties at $14 beginning with the 2019 model year, as legally required.

Respectfully,

American Council for an Energy-Efficient Economy
Center for Auto Safety
Center for Biological Diversity
Consumer Federation of America
Consumer Reports
The Ecology Center (Michigan)
Environmental Law and Policy Center
Interfaith Power & Light
Sierra Club
Union of Concerned Scientists

[21] Based on vehicle sales for MY2016-MY2018, a 77% CAFE>label shortfall, lifetime mileage assumed by the regulation of 195,264 miles for passenger cars, and average fuel cost of $2.50 per gallon, consistent with the weekly average price since October 1, 2015, through today, according to the Energy Information Administration.
[22] Estimate based on estimated MY2018 sales volumes and projected MY2019 compliance values.