

December 23, 2020

James Owens
Deputy Administrator
National Highway Traffic Safety Administration
1200 New Jersey Avenue, SE
Washington, DC 20590
Via E-mail: james.owens@dot.gov

RE: Alliance for Auto Innovation Petition Concerning CAFE Civil Penalties, RIN 2127-AM32

Dear Deputy Administrator Owens,

We are writing to address our concerns regarding a petition for rulemaking that apparently has been received by the National Highway Traffic Safety Administration ("NHTSA") and upon which the agency appears poised to act.

In two mid- December entries on the Office of Management and Budget's ("OMB") Fall 2020 Unified Agenda of Regulatory and Deregulatory Actions website, NHTSA acknowledges the receipt of a petition for rulemaking from the Alliance for Automotive Innovation ("Alliance") concerning the effective date of the inflation adjustment to the CAFE civil penalty.¹ More specifically, the OMB website indicates near-term DOT/NHTSA action in response to the petition stating:

This action responds to a petition for rulemaking from the Alliance for Automotive Innovation regarding the effective date of an increase to the civil penalty rate applicable to automobile manufacturers that fail to meet applicable corporate average fuel economy (CAFE) standards and are unable to offset such a deficit with compliance credits.

The regulatory agenda entry also states that the action is "Economically Significant" and at a "Final Rule Stage." It further indicates that the agency's planned action is an Interim Final Rule. However, NHTSA has not yet made the Alliance petition available to the public.

Tesla is a regulated party under the NHTSA fuel economy program. By stating that the agency will issue an Interim Final Rule, it appears NHTSA intends to grant the Alliance petition and alter the effective date of the inflationary adjustment to the CAFE penalty without seeking comment from the public. Through a non-public rulemaking process such as this, Tesla and other affected parties have been denied an opportunity to be heard, even though the rulemaking petition raises significant new legal issues, circumvents a recent unanimous court decision on the current status of the civil penalty, and creates new uncertainty across the automotive industry, state governments, and public interest stakeholders as to the final resolution of the civil penalty rate issue.

In response to the recent OMB website agenda entries, Tesla twice contacted NHTSA's listed representative via phone messages and e-mails asking to obtain a copy of the petition.² NHTSA replied to Tesla's second e-mail stating, "Consistent with NHTSA's practice, the petition will be made available on the public docket on regulations.gov in the course of responding to the petition."³ Tesla also contacted the Alliance seeking a copy of the petition, but did not receive a response.⁴ Despite these numerous communications, the substantive petition upon which the agency intends to act remains behind a wall of secrecy and unobtainable through the agency or

¹ See OMB, Fall 2020 Unified Agenda of Regulatory and Deregulatory Actions entries:
<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202010&RIN=2127-AM32>; and
<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202010&RIN=2127-AM16>

² Phone message left for Michael Kuppersmith Attorney-Advisor, Department of Transportation on December 10, 2020 and December 11, 2020. Email messages sent to Michael Kuppersmith, Attorney-Advisor, Department of Transportation dated December 9, 2020 and December 11, 2020.

³ Email received from Michael Kuppersmith, Attorney-Advisor, Department of Transportation, dated December 11, 2020.

⁴ Email sent to Julia Rege, Vice President, Energy & Environment, Alliance for Automotive Innovation, dated December 10, 2020.

the petitioners. The agency's procedural posture fails to provide all regulated entities and stakeholders any substantive notice of the pending action and the basis for any pending action. At minimum, this denigrates the agency's requirements to hew to regulatory and procedural norms, and Tesla requests that the agency make the Alliance petition immediately available to the public.

As you are aware, on August 31, 2020, in *New York v. Nat'l Highway Traffic Safety Admin.*, 974 F.3d 87 (2d Cir. 2020), the Second Circuit issued a unanimous opinion vacating NHTSA's 2019 Civil Penalties Final Rule. In referencing the Second Circuit's earlier 2018 ruling in *NRDC v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95 (2nd Cir. 2018), the court stated at page 101: **"As we have stated before: The Civil Penalties Rule, 81 Fed. Reg. 95,489, 95,489–92 (Dec. 28, 2016), raising the CAFE base penalty rate to \$14, is now in force."** (emphasis added).

Subsequently, the Second Circuit's mandate in the case was issued on November 9, 2020. It is important to highlight that the OMB regulatory agenda entry lists expected NHTSA action to occur "11/00/2020" indicating that the agency was already actively pursuing actions to circumvent the court's ruling before the mandate issued and the court proceedings were completed. This secretive regulatory planning does a disservice to the very regulated parties that NHTSA serves and are, still to this day, not privy to the Alliance's petition that forms a basis for the agency's planned action. If there is any action NHTSA should be taking in this matter it is to reinstate immediately the effective date of the inflation adjustment to the civil penalty for MY 2019 and beyond consistent with the 2016 final rule. Accordingly, Tesla requests the agency cease action on the Alliance petition and immediately direct the Office of Federal Register to provide a note to the online version of 49 C.F.R. 578.6(h)(2) indicating that, as currently published, the fine amount of \$5.50 per .1 of a mile does not reflect the Second Circuit's August 31, 2020 decision and the 2016 final rule, thereby correcting the penalty to \$14 per .1 of a mile, effective January 27, 2017.

In addition, NHTSA is not positioned to conclude that there is any "good cause" to act on the Alliance petition and make such a response immediately effective through Interim Final Rule. To the contrary, there can be no basis here for applying the narrowly construed good cause exception. Indeed, there is also no basis on which the agency can claim that notice and comment is impractical, unnecessary, or contrary to the public interest. To the extent the Alliance petition asks NHTSA to change the effective date of the inflation adjustment to the CAFE civil penalty that was established by the 2016 final rule (effective January 27, 2017), such action would expressly circumvent and contravene the Inflation Adjustment Act Improvements Act of 2015, which directs adjustments to civil penalties be made by July 1, 2016. It also would circumvent and contravene the Second Circuit's unanimous ruling that upheld and enforced the 2016 final rule. Moreover, doing so through a non-public interim rule making process is not permitted under these circumstances.

Tesla disputes the merits of any agency finding of economic hardship or infeasibility supporting the Alliance petition. As a regulated and impacted party, Tesla is entitled to be heard and comment prior to any agency action contemplated in response to the petition. Tesla has invested in technology to comply with this standard, as have other electric and alternative fuel automakers. Any NHTSA change to the CAFE civil penalty without notice does not enable these companies to modify their own business plans accordingly. Indeed, since 2016, the civil penalty amount has been clear. No company can say they were unaware of what the law and regulations required. Further, and to the contrary, this change would economically harm some automakers to the benefit of others. Companies that establish long-term plans to comply with the law should not be penalized by the intransigence of others to adjust their business within the confines of what is regulatorily required.

If NHTSA acts in response to the Alliance petition behind closed doors, Tesla and other parties and stakeholders will have been foreclosed and deprived from even commenting on the petition prior to the issuance of a rule with direct impact upon them. Indeed, in the face of NHTSA's continuous illegal agency action on the civil penalties issue,⁵ some manufacturers have relied for years upon on the actual direction of Congress and sound legal foundation of the unanimously upheld 2016 final rule.

Moreover, NHTSA has been warned about foreclosing notice and public comment on this very topic. As the 2nd Circuit stated in its 2018 decision finding the agency's withdrawal of the 2016 final rule illegal:

⁵ [NRDC v. Nat'l Highway Traffic Safety Admin.](#), 894 F.3d 95 (2nd Cir. 2018)

[I]t was not in the public interest to suspend notice and comment. Notice and comment are not mere formalities. They are basic to our system of administrative law. They serve the public interest by providing a forum for the robust debate of competing and frequently complicated policy considerations having far-reaching implications and, in so doing, foster reasoned decisionmaking. These premises apply with full force to this case. This is not a situation of acute health or safety risk requiring immediate administrative action. And it is not a situation in which surprise to the industry is required to preempt manipulative tactics. 894 F.2d at 115.

Indeed, NHTSA should adhere to the court's direction, and cease any action on the Alliance petition without first adhering to the normal, transparent nature of accepting public comment before any response has an immediate effect.

In sum, we request the agency embark on a course of action that recognizes and implements the Inflation Adjustment Improvements Act and the Second Circuit's decisions, and ensures that any further regulatory actions related to the civil penalty, if they take place, proceed in a manner that is open, transparent, legal, and fair to all stakeholders.

Sincerely,

A handwritten signature in blue ink, appearing to read "Joseph Mendelson".

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