Institute *for* Policy Integrity

NEW YORK UNIVERSITY SCHOOL OF LAW

September 20, 2021

To: National Highway Traffic Safety Administration

Subject: Comments on "Civil Penalties," 86 Fed. Reg. 46,811 (Aug. 20, 2021) (Docket No. NHTSA-2021-0001-0027)

The Institute for Policy Integrity at New York University School of Law ("Policy Integrity")[1] respectfully submits the following comments on the National Highway Traffic Safety Administration's ("NHTSA") supplemental notice of proposed rulemaking entitled *Civil Penalties* ("Supplemental Notice"),[2] which proposes to rescind NHTSA's January 2021 interim final rule of the same name ("Interim Final Rule").[3] The Interim Final Rule purports to delay application of NHTSA's 2016 inflation adjustment ("2016 Adjustment") that increased the penalty for violating the corporate average fuel economy ("CAFE") standards.[4] Specifically, the Interim Final Rule deems the 2016 Adjustment inapplicable to Model Years 2019, 2020, and 2021, and instead provides that the 2016 Adjustment will apply beginning with Model Year 2022.[5]

Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Harnessing this expertise, we have in recent years submitted public comments and legal briefs describing the economic and environmental impacts of NHTSA's numerous attempts to delay and rescind the 2016 Adjustment, none of which have survived judicial review. In January of this year, Policy Integrity submitted comments detailing several of the Interim Final Rule's considerable legal deficiencies.[6] Our comments explained that the Interim Final Rule was untimely under the Federal Civil Penalties Inflation Adjustment Act

[1] This document does not purport to represent the views, if any, of New York University School of Law.

[2] 86 Fed. Reg. 46,811 (Aug. 20, 2021) (Docket No. NHTSA-2021-0001-0027).

[3] 86 Fed. Reg. 3016 (Jan. 14, 2021) (Docket No. NHTSA-2021-0001-0010).

[4] 81 Fed. Reg. 43,524 (July 5, 2016), *modified by* 81 Fed. Reg. 95,489 (Dec. 28, 2016).

[5] 86 Fed. Reg. at 3019 ("[T]he CAFE civil penalty rate will increase to $14 beginning with model year 2022.").

[6] Inst. for Pol'y Integrity, Comments on "Civil Penalties," 86 Fed. Reg. 3016 (Jan. 14, 2021), Docket No. NHTSA-2021-0001-0011 (Jan. 25, 2021), https://downloads.regulations.gov/NHTSA-2021-0001-0011/attachment_1.pdf.

("Inflation Adjustment Act"), whose deadlines to amend the initial catch-up inflation adjustment expired long before the promulgation of the Interim Final Rule.[7] Our comments also explained that, even assuming that NHTSA was authorized to delay the 2016 Adjustment, the agency failed to rationally justify the Interim Final Rule because it did not consider critical impacts following from the rule, including excess fuel consumption and environmental harm.[8] Finally, our comments noted that the dubious retroactivity concerns articulated in the Interim Final Rule did not justify or supply a reasonable basis for the regulation.[9]

Yet these are not the Interim Final Rule's only flaws. The Interim Final Rule is also deficient because, while the rule places great weight on certain automakers' asserted reliance interest in NHTSA's unlawful attempts to delay and rescind the 2016 Adjustment, the Interim Final Rule wholly fails to consider the reliance interests of automakers whose credits for exceeding the CAFE standards became less valuable as a result of the rule.

NHTSA now proposes to rescind the Interim Final Rule and restore the 2016 Adjustment's applicability to Model Years 2019, 2020, and 2021. For the reasons articulated above and further expounded below, Policy Integrity supports the Supplemental Notice. We finally note that, in rescinding the Interim Final Rule, NHTSA should explicitly address the lack of any meaningful reliance interest in the Interim Final Rule.

The Interim Final Rule Was Severely Untimely

The Interim Final Rule was plainly untimely under the Inflation Adjustment Act, as confirmed by the United States Court of Appeals for the Second Circuit in vacating one of NHTSA's earlier attempts to rescind the 2016 Adjustment.

The Inflation Adjustment Act provides what the Second Circuit characterized as a "highly circumscribed schedule for penalty increases."[10] Specifically, the statute required agencies to implement the initial, "catch-up" inflation adjustments to all civil monetary penalties by August 1, 2016,[11] unless an agency determined through notice-and-comment rulemaking that an enumerated exception applied.[12] After making the catch-up adjustment, agencies were then required to adjust their civil penalties for inflation annually by January 15 of every year thereafter.[13] Subsequent annual adjustments are nondiscretionary and not subject to the enumerated statutory exceptions, which applied only to the initial catch-up adjustment.

Putting these requirements together, the Second Circuit concluded that, even if an agency had some leeway to reconsider its initial catch-up adjustment, "the window for that

[7] *Id.* at 2-3.

[8] *Id.* at 3-6.

[9] *Id.* at 6-7.

[10] *New York v. Nat'l Highway Traffic Safety Admin.*, 974 F.3d 87, 100 (2d Cir. 2020).

[11] 28 U.S.C. § 2461, note Sec. 4(b)(1)(B).

[12] 28 U.S.C. § 2461, note Sec. 4(c)(1). These exceptions apply if "(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."

[13] 28 U.S.C. § 2461, note Sec. 4(a).

reconsideration was narrow and limited to the year 2016 — or more precisely, two weeks into the next year, before the next required increase due by January 15, 2017."[14] Accordingly, the Second Circuit held that NHTSA's attempt in 2019 to invoke the "negative economic impact" statutory exception and rescind the 2016 Adjustment was untimely and thus unlawful, since it occurred long after the January 2017 deadline.[15]

The Interim Final Rule, published more than a year after the stricken 2019 rescission rule, was untimely for the same reason. Indeed, the Interim Final Rule attempts to justify delaying the 2016 Adjustment by pointing to its alleged adverse impacts on the automotive sector—a justification that closely resembles the "negative economic impact" exception provided in the Inflation Adjustment Act. The Interim Final Rule, in fact, occasionally claims that the 2016 Adjustment, if timely enforced, would exacerbate "negative economic impacts" currently confronting the automotive industry.[16] But the deadline for NHTSA to invoke the "negative economic impact" exception passed four years before the Interim Final Rule was issued, as the Second Circuit explained. Such considerations were therefore plainly untimely and no longer applicable to NHTSA's enforcement of the 2016 Adjustment.

Unable to locate any support for its delay in the Inflation Adjustment Act, NHTSA pointed to the Energy Policy and Conservation Act's ("EPCA") requirement that any increase in the civil penalty pursuant to that statute not take effect until "the model year beginning at least eighteen months after the regulation stating the higher amount becomes final."[17] The Second Circuit, however, has made clear that discretionary penalty increases under EPCA are distinct from and "capable of co-existence" with the mandatory penalty inflation adjustments under the Inflation Adjustment Act, with each process subject to the different requirements of each statute.[18] Thus, the eighteen-month lead time required for EPCA discretionary penalty increases is not applicable to penalty adjustments under the Inflation Adjustment Act. In any case, even assuming that the EPCA requirement somehow applies, the 2016 Adjustment did in fact "become[] final" more than eighteen months before Model Year 2019.[19] That NHTSA later made unlawful attempts to undo the 2016 Adjustment does not change that fact. Indeed, the 2016 Adjustment—finalized in December 2016 and effective as of January 27, 2017—remains "in force."[20] NHTSA's attempted reliance on EPCA is therefore doubly unavailing.

For these reasons, the Interim Final Rule was untimely under the Inflation Adjustment Act and without lawful basis. NHTSA should therefore finalize its proposal to rescind the rule.

---

[14] *New York*, 974 F.3d at 101.

[15] *Id.*

[16] *See, e.g.*, 86 Fed. Reg. at 3022 (explaining "that a decision to apply the civil penalty of $14 vehicles prior to [model year] 2022 would only aggravate [the industry's] financial hardships").

[17] *Id.* at 3021 (quoting 49 U.S.C. § 32912(c)(1)(D)).

[18] *New York*, 974 F.3d at 100 (internal quotation marks omitted).

[19] 81 Fed. Reg. 43,524 (finalizing, effective August 4, 2016, the initial catch-up adjustment to the civil penalty for CAFE violations); 81 Fed. Reg. 95,489 (final rule, effective January 27, 2017, providing that the initial catch-up adjustment would apply beginning with Model Year 2019).

[20] *New York*, 974 F.3d at 101.

The Interim Final Rule Would Increase Fuel Consumption, Consumer Fuel Expenditure, Tailpipe Pollution, Fuel Production, and Upstream Emissions

In the Interim Final Rule, NHTSA pointed to potential adverse economic impacts on the automotive sector as a basis for its action.[21] There are several problems with this argument. As an initial matter, NHTSA failed to explain how and why such economic considerations are relevant given that, as noted above, the window to invoke the Inflation Adjustment Act's "negative economic impact" exception closed years ago and NHTSA did not invoke it in the Interim Final Rule. In any event, even if NHTSA had discretion to belatedly consider economic impacts in assessing the catch-up inflation adjustment, the Interim Final Rule's one-sided treatment of regulatory effects overlooks substantial economic and environmental costs to delaying the 2016 Adjustment. Those costs now justify rescinding the Interim Final Rule.

Under EPCA, the statute from which the Interim Final Rule attempts to draw support,[22] "the need . . . to conserve energy" is a crucial consideration in administering the CAFE program.[23] Pollution prevention is another key consideration when administering energy-efficiency programs under EPCA.[24] While the Interim Final Rule did not consider the potential fuel-conservation and environmental harms flowing from that action, basic economics dictates that the Interim Final Rule, by reducing the penalties for noncompliance, will likely reduce automaker compliance with the CAFE standards for Model Years 2022 and beyond, thereby increasing fuel usage, consumer fuel expenditure, and tailpipe pollution. These adverse environmental and consumer impacts supply another justification to rescind the Interim Final Rule, even assuming that NHTSA somehow had authority to issue that rule in the first place.

In essence, the Interim Final Rule's substantial reduction of the noncompliance penalty for Model Years 2019–2021 incentivizes automakers to pay the noncompliance penalty for those years rather than use their available credits. The result is that automakers will have more credits in the future than they would absent the delay. These additional credits will then instead be used for CAFE compliance in the future, thus reducing the effective stringency of the standards that manufacturers face and allowing them to implement lower fuel-economy.[25] In other words, because automakers will have these additional credits banked, they will need to meet lower fuel-economy targets in those future years (after Model Year 2021) since they will have more credits to make up for failing to meet the legally prescribed targets in those future years. This lower fuel economy will result in greater fuel consumption and, consequently, higher tailpipe emissions,

---

[21] *See* 86 Fed. Reg. at 3,022 ("NHTSA believes that applying the adjustment to the CAFE civil penalty rate beginning in model year 2019 'may inhibit economic recovery.'").

[22] *See* 86 Fed. Reg. at 3021 (applying EPCA's eighteen-month delay requirement for penalty increases). As detailed above, Policy Integrity disputes EPCA's applicability.

[23] *See* 49 U.S.C. § 32902(f).

[24] *Zero Zone, Inc. v. United States Dep't of Energy*, 832 F.3d 654, 677 (7th Cir. 2016).

[25] Under the CAFE program, automakers receive credits for overcompliance that they can apply to any of the three years before or five years after the credit is earned. 49 U.S.C. § 32902(a). Automakers whose fleets fail to meet the target standard in a given year have the option between paying the noncompliance penalty or using available credits to make up the shortfall. 49 C.F.R. § 536.5(d)(2). Manufacturers may purchase credits from one another. 49 U.S.C. § 32902(f).

increased fuel production, and more upstream emissions. The decrease in fuel economy will also deprive consumers of highly valuable fuel savings.[26]

By making noncompliance cheaper and credits more available, the Interim Final Rule will also reduce the market price of credits that manufacturers purchase from one another—a fact the Interim Final Rule implicitly acknowledges.[27] As a result, automakers that have invested heavily in fuel economy (including hybrid leaders like Toyota and Honda) will be less incentivized to over-comply with the CAFE standards in future years because doing so will earn them credits that are now worth less on the market. At the same time, automakers on the other end of the fuel-economy spectrum will have less incentive to invest in efficiency because they will be able to more cheaply comply with the CAFE standards through the purchase of credits. Consequently, fuel economy for future fleets will decline across the board, causing the very increases in fuel usage, consumer fuel expenditure, and pollution that EPCA (and, in seeking to "maintain the deterrent effect" of existing regulatory programs, the Inflation Adjustment Act[28]) was designed to avoid.

These impacts will likely be substantial. As Policy Integrity explained in its regulatory comments on NHTSA's 2018 proposal to rescind the 2016 Adjustment (attached), NHTSA's own publicly-available model (which Policy Integrity ran) confirmed that reducing the CAFE penalty would greatly weaken program compliance. Specifically, the model found that the 2019 rescission would have produced an additional 54 billion gallons of fuel consumed domestically through Model Year 2032 while reducing fleetwide fuel efficiency by nearly five miles per gallon.[29] That additional fuel consumption would not only have cost consumers at the pump (potentially over $120 billion), but would have also resulted in nearly 480 million metric tons of tailpipe carbon dioxide emissions causing over $25 billion in climate damage according to then-current social cost valuations from the Interagency Working Group on the Social Cost of Greenhouse Gases.[30] While the effects of the Interim Final Rule will admittedly be smaller

[26] While there may be some beneficial economic effects of lower fuel economy from reduced purchase prices for new vehicles, NHTSA has consistently determined that fuel-economy standards create private benefits on the whole—meaning that long-term consumer fuel savings exceed upfront-cost increases. *See, e.g.*, 85 Fed. Reg. 24,174, 24,180–81 tbls.I-5 & I-6 (Apr. 30, 2020) (concluding that higher fuel-economy standards increase average purchase price by $977–$1,083 while lowering fuel costs by $1,110–$1,461 per vehicle).

[27] *See* 86 Fed. Reg. at 3021 ("Increasing the [penalty] rate [through the 2016 Adjustment] is likely to lead to an increase in the price of credits.").

[28] 28 U.S.C. § 2461, note Sec. 2(b)(2).

[29] Inst. for Pol'y Integrity, Comments on "Civil Penalties," 83 Fed. Reg. 13,904 (Apr. 2, 2018), Docket No. NHTSA-2018-0017-0017, at 7–8 (May 2, 2018), https://downloads.regulations.gov/NHTSA-2018-0017-0017/attachment_1.pdf.

[30] Amicus Brief of the Institute for Policy Integrity at 20–22 & n.11, *New York v. Nat'l Highway Traffic Safety Admin.*, 974 F.3d 87 (2d Cir. 2020). Policy Integrity arrived at this $25 billion damage figure by multiplying 480 million metric tons of carbon emissions by $53.40, which represented our calculation of the Interagency Working Group's then-current, central social cost of carbon estimate of $42 (in 2007$) adjusted for inflation. *Id.* at 22 n.11. The Interagency Working Group has since issued updated technical guidance that presents an interim value for the social cost of carbon dioxide of $51 (in 2020$) per metric ton emitted in 2020 using a 3% discount rate. Interagency Working Group on the Social Cost of Greenhouse Gases, *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990*, at 24 tbl.1 (2021). The social cost of

because it delays the 2016 Adjustment rather than rescinds it permanently—and because the technological choices for some affected model years have already been made— the magnitude of the vacated rescission's impacts provides a basic sense of the scale of Interim Final Rule's adverse effects.

Thus, even assuming that NHTSA had authority to issue the Interim Final Rule in the first place, that rule's substantial environmental and consumer harms—which the agency did not consider, but were highlighted by various commenters—now supply an independent basis for rescinding that rule.

By Exempting Model Years 2019–2021, the Interim Final Rule Undercut Certain Automakers' Legitimate Reliance on the 2016 Adjustment

Relatedly, the Interim Final Rule undercut certain automakers' reliance interest in the 2016 Adjustment's applicability to Model Years 2019–2021. As discussed above, the Interim Final Rule will reduce the market price of credits that manufacturers purchase from one another. The Interim Final Rule thus undermined the reliance interests of any automakers who, in the wake of the 2016 Adjustment, invested in outperforming the CAFE standards based on the expectation that the value of the credits thus earned would increase. Similarly, the Interim Final Rule prejudiced automakers who factored the expected increase in credit value into their financial forecasting and decisionmaking. These were, to borrow one of NHTSA's justifications for the Interim Final Rule, "serious reliance interests" that it "[was] unfair and improper" to disregard.[31] Yet the Interim Final Rule did precisely that, failing to even acknowledge or mention these reliance interests.[32] The need to remediate these harms supplies an additional reason why NHTSA should follow through on the Supplemental Notice's proposal to rescind the Interim Final Rule.

Retroactivity Concerns Do Not Compel or Support the Interim Final Rule, and NHTSA's Reliance on This Rationale Upset Congress's Mandate in the Inflation Adjustment Act

The Interim Final Rule also asserts as a justification that enforcing the 2016 Adjustment in the wake of the Second Circuit's vacatur of its rescission would "raise serious retroactivity concerns."[33] But the rule musters virtually no factual or legal support for this theory. As a factual matter, characterizing the 2016 Adjustment's applicability to Model Years 2019–2021 as "retroactive" is both nonsensical and misleading, because violations of the CAFE standards for

---

greenhouse gases increases in subsequent years, *id.*, when most of the emissions from the rescission rule would have occurred.

[31] 86 Fed. Reg. at 3021.

[32] *See* 86 Fed. Reg. at 3021 (taking into account noncompliant automakers' purported reliance interest in the vacated 2019 rescission and $5.50 rate, but omitting any discussion of outperforming automakers' reliance interest in the 2016 Adjustment's applicability to Model Years 2019–2021); *see also* Tesla, Comments on Civil Penalties, 86 Fed. Reg. 3016 (Jan. 14, 2021), Docket No. NHTSA-2021-0001-0012 (Jan. 25, 2021) ("[I]n the [Interim Final Rule,] NHTSA wholly ignores the reliance interests of those manufacturers who properly planned and invested around outperforming the CAFE standards (and the 2016 civil penalty rule) so that their continued performance would be rewarded and create an ability for future investment in their businesses."), https://downloads.regulations.gov/NHTSA-2021-0001-0012/attachment_1.pdf

[33] 86 Fed. Reg. at 3020.

those model years would have occurred *after* the 2016 Adjustment was finalized and became effective.[34] Illustrating the ample notice that the 2016 Adjustment afforded automakers for Model Years 2019 and beyond, Fiat Chrysler acknowledged in an October 2019 SEC filing that, prior to NHTSA's attempted rescission of the penalty increase in July 2019, it had been setting aside money for CAFE penalties based on the $14 rate.[35]

The Interim Final Rule's dubious retroactivity justification is also not supported by the case law. The Interim Final Rule posits generally that "retroactivity is not favored in the law."[36] However, it also acknowledges Supreme Court precedent stating that retroactivity is mandated when "congressional enactments . . . require[] this result."[37] As explained above, the Inflation Adjustment Act requires application of the 2016 Adjustment to Model Years 2019–2021 and does not permit its delay years after the fact. Thus, even granting the Interim Final Rule's suspect claim that applying the 2016 Adjustment to model years that *subsequently* began development would constitute retroactive application, such retroactivity is mandated by Congress and not within NHTSA's authority to change.

The Interim Final Rule risks setting a dangerous precedent. It ignores the plain language of the Inflation Adjustment Act and justifies delaying the penalty increase's applicability by pointing to alleged reliance interest in NHTSA's since-vacated attempts to delay and rescind the 2016 Adjustment. Left to stand, such an approach suggests that agencies may avoid enforcing statutory mandates by undertaking unlawful regulatory action and then asserting reliance on that illegal action. But Congress explicitly directed agencies including NHTSA to begin immediately enforcing the Inflation Adjustment Act back in 2016 in order to "maintain the deterrent effect of civil monetary penalties," "promote compliance with the law," and "improve the collection by the Federal Government of civil monetary penalties."[38] Those critical goals should not be further delayed as a result of NHTSA's repeated unlawful action.[39] Indeed, the Supreme Court has held that estoppel does not strictly apply against federal agencies, as "the conditions defined by Congress" prevail over any "serious hardship" that may be caused by an agency's subsequent

[34] Moreover, despite NHTSA's failed attempts to nullify the 2016 Adjustment, the penalty increase has been effective for nearly half the time since the 2016 Adjustment became final. In total, the 2016 Adjustment was in effect for the affected model years for at least 739 days (more than two years), spanning three separate time periods. First, the 2016 Adjustment was effective for 209 days from its promulgation on July 5, 2016, 81 Fed. Reg. 43,524, until NHTSA's first delay on January 30, 2017, 82 Fed. Reg. 8694 (Jan. 30, 2017). Next, the 2016 Adjustment was effective for 393 days from the Second Circuit's decision on June 29, 2018, vacating its suspension, *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95 (2d Cir. 2018), until NHTSA's final rule on July 26, 2019 rescinding the adjustment, 84 Fed. Reg. 36,007 (July 26, 2019). Finally, the 2016 Adjustment was effective for 137 days from the Second Circuit's decision of Aug. 31, 2020, vacating the rescission, *New York*, 974 F.3d 87, until the promulgation of the Interim Final Rule on January 14, 2021.

[35] Nat. Res. Def. Council & Sierra Club, Comments on Civil Penalties, 86 Fed. Reg. 3016 (Jan. 14, 2021), Docket No. NHTSA-2021-0001-0013 (Jan. 25, 2021) (citing Fiat Chrysler Automobiles N.V., Form 6-K Interim Report, EX-99.1, at 61 (Oct. 31, 2019)), https://downloads.regulations.gov/NHTSA-2021-0001-0013/attachment_1.pdf.

[36] 86 Fed. Reg. at 3020 (quoting 81 Fed. Reg. 95,489, 95,490 n.8 (Dec. 28, 2016) (brackets omitted)).

[37] *Id.* at 3020 n. 39 (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994)).

[38] 28 U.S.C. § 2461, note Sec. 2(b)(2)–(3).

[39] NHTSA's attempts to suspend and then rescind the 2016 Adjustment were both vacated by the Second Circuit. *See Nat. Res. Def. Council*, 894 F.3d 95; *New York*, 974 F.3d 87.

erroneous legal interpretation of those conditions.[40] Applying these principles, the clear mandates and deadlines of the Inflation Adjustment Act prevail over any reliance interests that automakers may face.

For these reasons, as well, Policy Integrity supports the Supplemental Notice's proposal to rescind the Interim Final Rule.

There Are No Substantial Reliance Interests That Would Be Impaired by NHTSA's Rescission of the Interim Final Rule

The Supreme Court has held that "[w]hen an agency changes course," as NHTSA proposes to do here, "it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account."[41] As an initial matter, the Interim Final Rule cannot fairly be characterized as a "longstanding polic[y]." Whereas the policy at issue in *Department of Homeland Security v. Regents of the University of California* had been effective for more than five years prior to its rescission,[42] and the policy at issue in *Encino Motorcars, LLC v. Navarro* for more than three decades,[43] the Interim Final Rule was effective for only seven months before NHTSA issued its proposal to withdraw it. Thus, the requirement that NHTSA consider reliance interests engendered by longstanding policies arguably does not apply here.

Even so, assuming that NHTSA must "be cognizant" of potential reliance interests in the Interim Final Rule, further consideration reveals that such interests are exceedingly slight, if they exist at all. First, as discussed above, the Interim Final Rule incentivizes noncompliant automakers to pay the $5.50 penalty for violations in Model Years 2019–2021 rather than use their credits; save those credits for use in future years in which the $14 penalty applies; and consequently invest less in future compliance than they otherwise would because their banked credits blunt the financial impact of noncompliance. Automakers planning to use these windfall credits in lieu of investing in efficiency and compliance could thus potentially be said to have a reliance interest in the Interim Final Rule. However, assuming 18 months' lead time (as NHTSA previously has),[44] planning for Model Year 2023 (and any related reliance on the Interim Final Rule) would have been underway for less than five months at the time NHTSA issued its August 20, 2021 Supplemental Notice proposing to rescind the Interim Final Rule. This brief period during which noncompliant automakers believed their noncompliance would be less costly is of limited import, and pales in comparison to, for example, the five years during which the DACA

---

[40] *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 420 (1990) (internal quotation marks omitted).

[41] *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1913 (2020) (internal quotation marks omitted) (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016).

[42] *See Regents*, 140 S. Ct. at 1901–03.

[43] *See Encino Motorcars*, 136 S. Ct. at 2126.

[44] *See* 81 Fed. Reg. at 95,491 ("[T]he 18-month lead time for increases in the stringency of fuel economy standards provides a reasonable proxy for appropriate advance notice of the application of substantially increased . . . civil penalties.").

recipients in *Regents* "started businesses," "purchased homes," and took other productive steps in reliance on the DACA program.[45] While virtually every rule will engender some reliance interests, the reliance interests at stake here are not particularly significant.

Second, and perhaps more importantly, given the regulatory history of the 2016 Adjustment and the Interim Final Rule's manifest disregard for the Inflation Adjustment Act's "highly circumscribed schedule,"[46] the Interim Final Rule is clearly legally suspect. No stakeholder could have reasonably proceeded in its affairs by unreservedly relying on the Interim Final Rule and failing to account for the substantial likelihood that it would be administratively rescinded or judicially vacated. Indeed, in a recent SEC filing discussing, *inter alia*, legal and regulatory risks that affect the company's "vehicle engineering and design attention," Stellantis—the corporation formed as a result of the January 2021 merger between Peugeot S.A. and Fiat Chrysler—acknowledged as early as March 4, 2021, that "[s]everal non-governmental organizations and state attorneys general have initiated litigation to overturn NHTSA's [I]nterim [F]inal [R]ule."[47]

Finally, assuming *arguendo* that noncompliant automakers have a reliance interest in the Interim Final Rule, NHTSA would be well within its authority to "conclude that reliance interests in [a rule] that it views as unlawful are entitled to no or diminished weight" or "that other interests and policy concerns outweigh any reliance interests."[48] The agency is required only to make that conclusion explicit in articulating its reasons for rescinding the Interim Final Rule.[49] NHTSA should ensure that these reliance considerations are adequately addressed should the agency finalize rescission of the Interim Final Rule, which Policy Integrity strongly supports.

Respectfully,

Lance Bowman, Attorney
Meredith Hankins, Attorney
Max Sarinsky, Senior Attorney

---

[45] *Regents*, 140 S. Ct. at 1914.

[46] *New York*, 974 F.3d at 100.

[47] Stellantis N.V., Annual Report and Form 20-F, at 103 (Mar. 4, 2021), https://www.sec.gov/Archives/edgar/data/0001605484/000160548421000032/stellantis-20201231.htm.

[48] *Regents*, 140 S. Ct. at 1914.

[49] *Id.*

Attachments:

Inst. for Pol'y Integrity, Comments on "Civil Penalties," 86 Fed. Reg. 3016 (Jan. 14, 2021), Docket No. NHTSA-2021-0001-0011 (Jan. 25, 2021)

Inst. for Pol'y Integrity, Comments on "Civil Penalties," 83 Fed. Reg. 13,904 (Apr. 2, 2018), Docket No. NHTSA-2018-0017-0017 (May 2, 2018)