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RE: RULEMAKING COMMENTS – AUTO SAFETY WHISTLEBLOWER LAW

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Dear NHTSA:

We appreciate the opportunity to comment on the Whistleblower Act rules proposed by the NHTSA (or “Agency”). As you may know we have represented whistleblowers since 1984, we are the founding directors of the National Whistleblower center, and we have been involved in many of the legislative and policy initiatives that have enhanced whistleblower protections over the years. In 2010-11 we fully engaged in the Dodd-Frank rulemaking process, meeting with all five SEC Commissioners, the responsible Commission Staff, and providing numerous comments addressing issues of concern. We understand that our participation in this process was very helpful to the Commission.

We hope we can similarly engage with the responsible staff from the Agency and contribute to the process of ensuring that the goal of creating a highly effective whistleblower program can be achieved.

Given the serious critical nature of establishing a high-quality whistleblower program, we request an opportunity to meet with the Secretary of Transportation or his designee and the Deputy Administrator of the NHTSA or her designee to further explain the importance of the issues involved in this rulemaking and to further clarify the recommendations set forth below.

We also want to call your attention to the article Reuters published today written by a partner in the firm. We incorporate by reference the concerns and suggestions set forth therein. See https://www.reuters.com/legal/legalindustry/rulemaking-process-critical-juncture-dots-auto-safety-whistleblower-program-2023-06-12/.

Prior Submissions

In regard to the prior submission filed by the National Whistleblower Center, we hereby adopt those recommendations and ask the NHTSA to review them once again when considering comments received in this proceeding.

In regard to the proposal submitted by the Hyundai Motor America Inc., we agree that if subpoenaed an applicant for an award should not be considered “voluntary.” However, if the subpoena is a “friendly” subpoena, the applicant should still be considered voluntary. Furthermore, if a whistleblower is subpoenaed after his or her information is published in the news media, presented to Congress or another federal or state agency, provided to the victims of an auto accident, set forth in testimony in any proceeding, or otherwise voluntarily presented prior to obtaining a subpoena, that person should also be considered voluntary. Additionally, if the whistleblower is subpoenaed after voluntarily providing his or her information to an organizations compliance program, legal organization and/or supervisory personnel within the company (such as a letter to the President of the company, internal auditors, company attorneys, an audit or safety committee, a labor union, the Board of Directors, or at a public shareholders meeting), that whistleblower should also be considered voluntary.

In regard to Hyundai’s suggestion that the filing procedures be modelled on those used by the SEC, we would agree with this suggestion as it relates to the WB-APP application (i.e. the application
used for requesting a reward. However, the SEC’s rules on submitting original information on a
Form TCR are far too restrictive and counter to the intent of the whistleblower law. The public
record demonstrates that the SEC staff often ignores the TCR process and Commission staff
investigating various misconduct sometimes never even look at the TCR. Furthermore, the
Commission has denied rewards despite knowing who the whistleblower is, relying on the
whistleblower’s information, and opening the investigation thanks to the whistleblower’s tip,
simply because the whistleblower failed to file a timely TCR or otherwise comply with a technical
rule of practice. The TCR requirement has been used as a basis for disqualifying otherwise
qualified whistleblowers whose disclosures served the public interest and were the proximate
cause for initiating a successful investigation. This is counter to the plain language of the law, the
Congressional intent behind the law, and the Administrative Procedure Act.

Neither the IRS nor the CFTC follow the SEC’s strict TCR rules. Furthermore, the SEC, on
numerous occasions, has used its authority to waive regulations to approve rewards in
circumstances where a TCR was not filed timely. This waiver provision vests viewpoint-based
discretion with the Commission and leaves the Commission open to allegations of favoritism or
litigation. We strongly recommend that the NHTSA not follow the SEC’s practice, but instead
follows the practice of the IRS – which permits whistleblowers who provide original information
to qualify for a reward if the staff that investigates the violations confirms that the whistleblower
was indeed the source of the original information that was relied upon by the government to issue
the sanction.

Hyundai also asked the NHTSA to enlarge the scope of whistleblower-disqualifications beyond
the language contained in the statute. Adopting this request would be a clear violation of the
Administrative Procedure Act. Any disqualification of a potential whistleblower must conform to
the actual language of the statute. The NHTSA lacks authority to disqualify persons from an award
that Congress did not likewise clearly and unequivocally disqualify.

In regard to disqualifying persons who participated in the wrongful conduct, Hyundai suggested
that such whistleblowers be forced to demonstrate “by clear and convincing evidence that the
company made them commit the alleged violation if that is a defense to disqualification.” This
standard of proof cannot be justified. There is no reason whatsoever to divert from the
“preponderance of the evidence” standard. Furthermore, adopting this standard would place a
significant burden on the whistleblower whose cooperation and information served the public
interest, cause delay in the adjudication of rewards, and discourage potential whistleblowers from
submitting claims due to this burden. Adopting this burden of proof sends the wrong message to
potential whistleblowers, and many potential informants would perceive that standard as a sign
that the agency is hostile to whistleblowers.

Hyundai stated that the “internal reporting requirement” is of “critical importance.” However, the
public record demonstrates that the vast majority of whistleblowers who file retaliation cases were
those who made internal reports to the company. We hereby request an opportunity to address this
issue with NHTSA staff. Crafting a rule implementing the internal compliance requirement in the
law demands that the staff fully understand the empirical data concerning internal reporting and
retaliation, and carefully ensures that the internal reporting requirements do not harm whistleblowers. Instead, creating appropriate standards for an organization’s internal reporting processes to be covered under the law creates an opportunity to ensure that internal whistleblowers are not victimized, and that companies be incentivized to create effective and independent reporting procedures.

Below are additional comments regarding specific rules:

**Proposed Rule § 513.2(b), Collected Monetary Sanctions**

It should be clarified that awards can be paid even if more than $1 million is not actually collected. In this regard, if the sanctions issued in a case exceed $1 million, rewards should be paid on the monies collected, even if the total collections are less than $1 million.

The NHTSA in its rulemaking proposal stated as follows: “The Agency is aware that some stakeholders have advocated for the position that restitution to parties other than the United States ordered in cases should be considered monetary sanctions. The Agency believes that ‘collected monetary sanctions’ cannot reasonably be construed to include such restitution intended to directly compensate victims and other affected third parties (as opposed to penalties paid to the United States).”

We strongly object to this analysis. If a sanction is ordered to be paid, the full sanction must be considered as part of the basis for determining eligibility for any reward. If restitution is required by a statute, paying that restitution was a decision made by the United States Congress in regard to how money owed to the United States should be allocated. For example, the requirement to place certain monies in a victims compensation fund was a decision made by Congress. Congress could very well have decided to allocate those monies to the general treasury. Thus, any sanction paid as a result of an enforcement action, whether it be classified as restitution, disgorgement, or ordered by an agency or court to be paid directly to a victim, must also be considered as part of the basis for qualifying for a reward. Whistleblowers whose information triggers an enforcement action cannot be penalized because Congress (or agency lawyers/investigators) decide to allocate some or all of a sanction to the victims of a crime or safety violation.

Additionally, the NHTSA, in its rulemaking, stated as follows: “Likewise, in some of the Agency's settlements, companies agree to pay a certain amount toward performance obligations, such as investing in safety data analytics or development of a testing laboratory. NHTSA does not view these performance obligations as constituting a “collected” monetary sanction.”

We strongly object to this analysis. How the agency and a wrongdoer decide among themselves to allocate the monies being collected as a result of a whistleblower disclosure is of no import to the whistleblower. The agency may have many reasons for the decisions it makes when adjudicating or settling an enforcement action. But the bottom line is that there is a specific amount of money involved, and regardless of how the agency permits it to be spent, the whistleblower must be entitled to his or her full award. This provision is also open to abuse. Agency officials
would be given the discretion to allocate monies in an enforcement action to manipulate a whistleblower’s eligibility and any amount of an award a whistleblower may get. This sends the wrong message, is counter to the legislative intent, and constitutes a violation of the Administrative Procedure Act. The agency should be in the business of using large rewards to compensate whistleblowers, incentivize others to step forward, and deter wrongdoing. Essentially, the agency is giving money back to a wrongdoer and blocking whistleblowers from obtaining rewards or obtaining the full award they should obtain.

The two proposals above leave open the specter that bias against whistleblowers could impact the amount of an award, or even if any award can be paid. A whistleblowers need for compensation should be subordinate to other interests – interests that the agency decides without any input from the public or the whistleblower and interests that may be impacted by lobbying, insider connections, or prejudice.

**Proposed Rule § 513.2(b), Contractor**

We agree with this proposal.

**Proposed Rule § 513.2(b), Covered Action**

This proposed rule fails to give effect to the term “related action.” The NHTSA justifies limiting the scope of the “related action” provision in a very odd manner, stating that the related action requirement “is given effect by considering two actions under 49 U.S.C. chapter 301.” The two actions referenced are simply two parts of one overall enforcement action taken by the government under the governing statute. All of the other whistleblower laws use the term “related action” to include enforcement actions taken by other agencies under other laws, but based on the same information provided by the whistleblower.

Under this definition, why should an auto safety whistleblower ever cooperate with parallel criminal, civil, or administrative investigations conducted by other agencies, or under other laws that impact auto safety? In fact, such cooperation could be viewed as against the interest of the whistleblower, as sanctions obtained in these related actions could and would reduce the amount of sanctions obtained in covered actions. It is well known that companies often agree to a set amount of fines and penalties to be paid, and have little or no interest in how the government divides these sanctions amongst themselves. Thus, the NHTSA could simply agree to allocate some of the sanctions as payments allocated for other related actions, and consequently use this sleight of hand to deny or limit a whistleblower reward.

Whistleblowers need certainty. They need to know that if they take the risk of becoming a whistleblower and invest the time and energy into helping the government protect the public safety that they will be rewarded. The definition of “covered action” undermines the certainty to induce whistleblowers (especially those who work at high levels in a company and are very aware of the huge risks they would take by stepping forward) to risk their jobs, reputations, and careers to serve the public interest.
For example, if NHTSA pursues two separate enforcement actions for violations of 49 U.S.C. chapter 301, or regulations thereunder, against two different companies (for example, a supplier and a vehicle manufacturer) based on the same facts provided by a whistleblower, in that case, the two separate actions would be related. If the monetary sanctions collected for those two actions exceeded one million dollars in aggregate, the two actions together would be considered a “covered action.”

The NHTSA is misreading the phrase “under this chapter.” The whistleblower law is a law “under this chapter” that requires payments for related actions. Consistent with the way that term is used in all other whistleblower reward laws, including Dodd-Frank, the False Claims Act, and the IRS whistleblower law, a related action must be given its plain meaning. It is an action related to actions “covered under this chapter.”

For example, a criminal action for wire fraud under 18 U.S.C. 1343 is not an action under the Safety Act (49 U.S.C. chapter 301). However, the Agency tentatively believes a criminal action brought under 49 U.S.C. 30170, the criminal penalties provision of the Safety Act, would be a covered action under the Whistleblower Act.\textsuperscript{36}

In its proposed rule the NHTSA states: “Unlike the SEC or CFTC,\textsuperscript{38} NHTSA does not have a fund set aside from which to pay awards. Rather, it appears that the money to pay whistleblowers was intended to come from the entity that paid the penalty. The FAST Act, section 31202, appropriates to the Highway Trust Fund amounts equivalent to ‘covered motor vehicle safety penalty collections.’ The section defines ‘covered motor vehicle safety penalty collections’ as any amount collected in connection with a civil penalty under 30165 of title 49, United States Code, reduced by any award authorized by the Secretary of Transportation to be paid to any person in connection with information provided by such person related to a violation of chapter 301 of such title which is a predicate to such civil penalty (emphasis added). In addition, 49 U.S.C. 30172(b)(2) explicitly provides: ‘Any amount payable [to a whistleblower] . . . shall be paid from the monetary sanctions collected, and any monetary sanctions so collected shall be available for such payment.’ Based on this, it is our view that whistleblowers are paid out of the money collected from the entity that paid a Safety Act penalty or fine.

The obligation of the NHTSA to pay awards does not depend on which fund is used to make the payment, or other procedures that could be implemented, such as making a wrongdoer make a direct payment to a whistleblower. We believe that the agency must ensure that all awards are paid, and use the funds, or other administrative or judicial remedies, to make these payments in a timely manner.

The NHTSA’s proposal also would eviscerate the related action provisions of the law. The Agency points out some administrative issues related to determining the amount of a reward. The agency stated: “As a practical matter, NHTSA also does not have ready access to the information that would be needed to make a decision about an award sought for monies collected from an action brought under a statute other than the Safety Act. For example, NHTSA may be unable to evaluate the significance of the original information provided by the whistleblower to the successful
resolution of a criminal action for wire fraud or other statute outside NHTSA's jurisdiction and expertise. Likewise, NHTSA may be unaware of ‘the degree of assistance provided by the whistleblower and any legal representative of the whistleblower’ in an action brought under statutes outside NHTSA's jurisdiction. NHTSA may have limited or no involvement in such an action. Therefore, NHTSA's ability to make an award determination may have to rely on the Department of Justice to reveal information regarding its internal processes and other information that it ordinarily keeps confidential, over which release NHTSA does not have control. These practical considerations support the plain language reading of the statute as limited to actions under the Safety Act.”

These arguments are frivolous. The SEC, IRS, and CFTC regularly determine “related action” payments in associated criminal proceedings pursued by the Justice Department. Often the related action payments far exceed the rewards paid in direct Commission or IRS proceedings. Moreover, there is nothing on the public record that supports the fears outlined above. Whistleblowers have carefully outlined the contributions they have made toward proceedings conducted by other agencies, and these agencies often confirm or provide additional information to the other whistleblower reward offices. The NHTSA should not confuse some undefined and theoretical difficulties related to proof with a justification for disqualification.

Again, this sends the wrong message and provides a strong disincentive for whistleblowers to work with other agencies.

We agree with the following proposal of the NHTSA, which is consistent with the practices of other agencies under Dodd-Frank: “The proposed definition of ‘covered action’ also clarifies that the over $1,000,000 threshold can be satisfied if the total amount of monetary sanctions paid by multiple defendants or parties and collected by the United States totals more than $1,000,000 in the covered action. That is, the Agency proposes that multiple smaller sanctions paid by different parties in the same action could be added up to exceed the more than $1,000,000 threshold. Similarly, the Agency also believes that multiple smaller sanctions paid by different parties in the related actions (or the same party, such as in the case of an amended consent order that requires payment of additional penalties or later payment of penalties held in abeyance) could be included to exceed the more than $1,000,000 threshold. The Agency does not want to foreclose a whistleblower's eligibility for an award in these situations.”

**Proposed Rule § 513.2(b), Dealership**

We support this proposed rule.

**Proposed Rule § 513.2(b), Employee**

We support the Proposed Rule’s definition of an employee.

We also support including an owner under this definition. It is very clear that the owner of a dealership might be in the best position to identify safety issues caused by a manufacturer. The
owner is in an excellent position to learn about complaints from customers that could have a significant impact on safety. The possibility of an owner blowing the whistle on him or herself is remote at best, but an owner should be incentivized and encouraged to report safety defects he or she learns about that may be caused by others in the supply chain or by the manufacturers.

**Proposed Rule § 513.2(b), Independent Knowledge or Analysis**

We object to this proposed rule. The rule should strictly reflect the plain language of the statute and give that language its plain dictionary meaning(s). The whistleblower community strongly objected to the 2020 SEC rule defining “analysis,” and the NHTSA should carefully study the objections raised to that proposed rule (which was only approved on a 3-2 vote) and over the objections of numerous experts and Members of Congress.

Rules addressing the attorney-client privilege or work product doctrine should be very simple to craft: If the evidence produced by the whistleblower would be admissible in an administrative, civil or criminal proceeding, the information should be considered information upon which a reward can be based. Corporations have abused the attorney-client privilege and nothing in the rules should encourage any company to expand their use of the privilege as a tool for hiding culpability. If a whistleblower’s information would be admissible, it must qualify for a reward.

Including exclusions based on state law is highly problematic, and covers issues related to federal pre-emption and the rules of evidence. For example, the State of Maryland made one-party taping a criminal act. The whistleblower, Linda Tripp, conducted one-party taping in the State of Maryland. However, her taped conversations were admissible in various federal proceedings, and served as a basis for sanctions against the President of the United States. One-party taping is legal under federal law and admissible in federal courts. Although Ms. Tripp was prosecuted in Maryland for her one-party taping, her tapes proved to be invaluable evidence in federal proceedings.

State law cannot undermine the ability of the federal government to obtain evidence of safety violations in the auto industry. States cannot be incentivized to create local laws that undermine the ability of federal regulators or law enforcement officials to obtain evidence and use that evidence in federal court or agency proceedings.

The NHTSA correctly points out the following concern whenever potential wrongdoers are able to use the threat of criminal actions as a means to silence whistleblowers: “it is possible that companies could threaten potential whistleblowers with criminal prosecution for theft, blackmail, extortion, or other such actions if the whistleblower provides or attempts to provide information to NHTSA. Threats of criminal prosecution would likely deter a whistleblower from reporting violations to NHTSA and such deterrence may be contrary to public policy.” This is not only a possibility, but a reality at many workplaces. Whistleblowers must have a safe harbor to deliver information. If that information turns out to be inadmissible due to the manner it was collected, or the content of the information, that is fine. But holding out a potential threat of criminal prosecution for turning in evidence (often by a lay person without the advice of counsel) would
have a tremendous chilling effect. Defendants are fully protected by rules related to admissibility of evidence.

The NHTSA caution that “potential whistleblowers must exercise caution to avoid violating a legally binding order, and may wish to consult with private counsel before providing NHTSA with information.” This caution is inconsistent with the law and will create a chilling effect on disclosures. Whistleblowers should not be forced to hire lawyers simply to make disclosures. Whistleblowers should not have to incur the expense of having lawyers review their submissions in order to prevent evidence from being submitted that may violate an order. In fact, most lawyers would advise against submitting any information that may violate such an order, even if the information turns out to be critically important and was fully admissible. These types of burdens and barriers undermine the purpose of the whistleblower law and will have a chilling effect on reporting.

The best practice is to welcome disclosures and have an agency “taint team” review materials that may be privileged or that may have other issues related to admissibility. Other agencies regularly utilize the “taint team” process, permitting them to welcome disclosures, but also prevent the misuse of information.

The NHTSA states as follows: “The Agency is also aware that companies may try to use confidentiality agreements to prevent whistleblowers from making disclosures to NHTSA, which would also appear to be contrary to public policy.” Such agreements are counter to public policy and could result in an obstruction of justice. Just as the SEC and CFTC have made clear, all such agreements must be voided, and any employer or company that uses such agreements should be sanctioned. Advising whistleblowers who have signed confidentiality agreements to “consult with private counsel” is counterproductive. Many lawyers are not well-versed in whistleblower law or the law on illegal nondisclosure agreements. They often advise their clients to remain silent in order to avoid the risk of a counter-lawsuit. The NHTSA must clearly, unequivocally, and with the force of sanctions, explain that no private contact, employment agreement or settlement agreement can interfere with a whistleblower’s right to inform the NHTSA (or other government agencies) of potential violations of law or safety risks. Only with such a clear and explicit regulation will the lawyers who are asked to provide guidance to their clients understand that they can advise their clients to report safety problems and not risk a malpractice lawsuit.

In its proposal the NHTSA requests comment “on whether there should be other proposed exclusions.” No exclusions that are not explicitly covered under the statute can be approved. Congress provided a list of exclusions, and that list is binding on the Agency. .

We agree with the “Agency's tentative view that it will not exclude potential whistleblowers where the potential whistleblower obtained the information solely because the potential whistleblower was or is an officer, director, trustee or partner of an entity and another person informed the potential whistleblower of allegations relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of 49 U.S.C. chapter 301 or regulation thereunder.” The Agency correctly notes, because the Whistleblower Law at issue
is not predicated on protecting investor assets, but rather protecting the life of human beings, the regulations of the SEC and CFTC should not be followed.

We strongly endorse the following observation made by the NHTSA: “The Agency recognizes that companies may view allowing information learned from participating in or observing established processes to be considered ‘independent knowledge or analysis’ as circumventing or undermining the proper operation of the company's internal processes for investigating and responding to potential violations of law. However, it is critical that the Agency learn important safety information as quickly as it can. We also note that a company's efforts to come into future compliance does not negate prior violations of law.”

This observation is extremely important. Historically, persons who work in compliance functions have been subjected to retaliation. See Digital Realty Trust v. Somers, 138 S.Ct. 767 (2018). The cases identified in the petition for cert. cite to numerous cases where internal whistleblowers where subjected to retaliation. Remarkably, the Chamber of Commerce (which most auto makers are members of) argued that internal whistleblowers should not be protected against retaliation. There are numerous historical examples where internal auditors have been subjected to retaliation. See e.g., Goldstein v. EBASCO, 86-ERA-36 (April 7, 1992), reversed, 986 F.2d 1419 (5th Cir. 1993) (historical example of retaliation against internal whistleblowers); Mackowiak v. University Nuclear Systems, 735 F.2d 1159 (9th Cir. 1984); Kansas Gas & Electric v. Brock, 780 F.2d 1505 (10th Cir. 1985).

The fact that auditors are often pressured to water down reports or cover up violations is well documented. See Institute for Internal Auditors, “Political Pressure Intense on Internal Audit: IIA Research Report Reveals Pervasive Efforts to Influence Internal Audit Findings,” press release (Mar. 10, 2015); The Politics of Internal Auditing by Patricia Miller and Larry Rittenberg, published by the IIA Research Foundation, Altamonte Springs, Florida (2015).

Thus, persons who perform auditing functions, or hold directorships, are often in the best position to identify problems and are often the most valuable and informed whistleblowers.

Furthermore, by permitting these persons to fully participate in the whistleblower program sends an important message to employers: “Don’t shoot the messenger;” “Don’t cover up problems. Don’t slow-walk investigations; and fully invest in honest and independent compliance programs. This message is all the more important as many employees will simply report concerns internally and believe they have done their duty. Those who work in compliance functions may know better.

Proposed Rule § 513.2(b), Motor Vehicle Defect

We support this proposed rule.

Proposed Rule § 513.2(b), Noncompliance

We support this proposed rule.
**Proposed Rule § 513.2(b), Original Information**

The Agency’s definition of “original information” starts with the following analysis: “Proposed rule § 513.2(b) begins with the definition of ‘original information’ in section 30172(a)(3) but adds the word ‘Agency’ for the purposes of clarity. Proposed rule § 513.2(b) defines ‘original information’ as information that is derived from the independent knowledge or analysis of an individual, is not known to the Secretary or Agency from any other source, unless the individual is the original source of the information; and is not exclusively derived from an allegation made in a judicial or an administrative action, in a governmental report, a hearing, an audit, or an investigation, or from the news media, unless the individual is a source of the information.”

We agree with this definition.

The Agency thereafter states that it is modifying the plain meaning of the statute by proposing limitations on the plain meaning of the statute, including its complex and confusing proposed definition of “independent knowledge or analysis.” We object to these limitations based on the plain meaning of the statute. The NHTSA should strictly follow the statutory definition.

**Proposed Rule § 513.2(b), Original Information That Leads to a Successful Resolution**

We agree with this definition.

**Proposed Rule § 513.2(b), Part Supplier**

We agree with this definition.

**Proposed Rule § 513.2(b), Potential Whistleblower**

We believe the better practice is to consider anyone who submits information to the Agency as a whistleblower. The issue of whether the whistleblower is eligible for a reward is a separate analysis. We agree with the proposal to “treat potential whistleblowers as subject to the protections in 49 U.S.C. 30172(f).”

**Proposed Rule § 513.2(b), Related Administrative or Judicial Action**

As outlined above, we object to the proposed definition. Related actions should refer to any other enforcement action undertaken by any agency of the federal government based on the original information provided to the NHTSA. This is how that term is interpreted under other whistleblower reward laws, including the Dodd-Frank Act.

All of the whistleblower reward laws were designed to incentivize whistleblowers to cooperate with the federal government. The definition proposed by the Agency would disincentive whistleblowers from working with other agencies. Furthermore, the provisions of the statute that permit the Department of Transportation to share the whistleblower’s information with other
federal agencies would not make any sense, if in sharing that information was not in a whistleblower’s best interest. The more agencies that are involved in a whistleblower’s case the greater the risk to the whistleblower. There is a greater risk that a whistleblower will be identified and subjected to retaliation. If Congress intended the “related action” provision to have no real meaning, the NHTSA should not share a whistleblower’s information with any other agency and should publicly embrace the idea that a whistleblower who submits information under the auto safety whistleblower law is not entitled to a reward, should the agency provide the information to any other federal regulatory or law enforcement agency. Whistleblowers should be warned of this regulation, and should be explicitly informed that they are not entitled to any compensation whatsoever if the NHTSA shares their information with other agencies.

The United States cannot have it both ways. If “related action” does not relate to actual related actions investigated by other agencies, the United States must accept the fact that a whistleblower’s information cannot be ethically shared with other agencies without directly informing the whistleblower as to this limitation. On the other hand, if the NHTSA implements a rule consistent with the interpretation given to “related action” under other laws, and consistent with the public interest and the clear Congressional intent, whistleblowers should be informed that it is in their best interest to fully cooperate with other law enforcement or regulatory agencies in order to insure maximum accountability.

A whistleblower’s “original information” is a valuable asset, and the regulations should encourage the maximum exploitation of that information.

**Proposed Rule § 513.2(b), Secretary**

We support this proposed rule.

**Proposed Rule § 513.2(b), Successful Resolution**

This rule should also include “related actions” in the definition of a successful resolution.

**Proposed Rule § 513.2(b), Whistleblower**

**FIRST OBJECTION TO AGENCY PROPOSAL (Comments on Definition of “whistleblower”)**

We object to the proposed definition of “whistleblower.” The statute defines that term and the Department of Treasury is required to strictly follow that definition. The statutory definition is as follows:

> WHISTLEBLOWER.—The term ‘‘whistleblower’’ means any employee or contractor of a motor vehicle manufacturer, part supplier, or dealership who voluntarily provides to the Secretary original information relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any
notification or reporting requirement of this chapter, which is likely to cause unreasonable risk of death or serious physical injury.


As the U.S. Supreme Court explained in Digital Realty when a statute defines a term, and uses the word “means” in that definition, that definition is mandatory and binding. It would violate the plain meaning of the statute, Supreme Court precedent, Congressional intent, the Administrative Procedure Act, and the public health and safety to define “whistleblower” in any manner expect as required by Congress.

SECOND OBJECTION TO AGENCY PROPOSAL (Comments on Definition of “whistleblower”)

The following discussion by the Agency completely contradicts the explicit definition of “original information”: “Because the statute requires that that a whistleblower provide information to the Secretary and that the submission be voluntary, it is the Agency’s tentative view that the whistleblower or the whistleblower's legal representative must be the one to directly provide the information to NHTSA.” This statement is absolutely wrong. Congress explicitly understood that the Department of Treasury could obtain original whistleblower information from third parties, and that information would still be classified as “original information” for which a whistleblower could qualify for a reward.

The NHTSA must give full meaning to the definition of “original information.” Original information is defined as follows:

ORIGINAL INFORMATION.—The term ‘original information’ means information that—(A) is derived from the independent knowledge or analysis of an individual; (B) is not known to the Secretary from any other source, unless the individual is the original source of the information; and (C) is not exclusively derived from an allegation made in a judicial or an administrative action, in a governmental report, a hearing, an audit, or an investigation, or from the news media, unless the individual is a source of the information.


As can be seen from the definition of “original information,” Congress clearly understood that the NHTSA may learn allegations related to auto safety issues from a wide variety of sources. If the whistleblower was the source of information to these third parties, that information must, as a matter of law, be considered “original.” The Agency cannot change or apply the definition of the term “whistleblower” or “voluntary” to negate the plain meaning of “original information,” because that would be contrary to Congressional intent in enacting this statute and discourage whistleblowers from reporting safety concerns.
THIRD OBJECTION TO AGENCY PROPOSAL (Comments on Definition of “whistleblower”)

As is explicit or implicit in the definition of “original information” whistleblowers must be able to initially report their safety concerns to a variety of third parties.

In the proposed regulation the NHTSA provides the following “example” of its view that the organizations for which a whistleblower can report a safety concern is extremely limited: “[I]t is the Agency’s tentative view that if a whistleblower provides information to an advocacy group, reporter, or some other third-party and that third-party provides the information to NHTSA, such a submission would not comport with the requirement to voluntarily provide original information to the Secretary.”

This “example” is at war with official United States policy, and undermines the United States Strategy to combat corruption, especially within countries that have no adequate whistleblower protections.

First, this “example” (and numerous other provisions in the rulemaking proposal) fails to take into consideration the fact that auto safety issues that impact the United States can and should be reported by whistleblowers who reside in foreign countries. Not only do numerous automobile foreign manufactures build cars that are sold in the United States, the United States imports over $74 billion per/year in auto parts from foreign countries. See, https://www.worldstopexports.com/automotive-parts-imports-by-country/.

Thus, the Agency must take into consideration that many whistleblowers may reside overseas, yet have valuable information about safety hazards that will impact automobiles made in the United States and automobiles imported into the United States. Many of these countries lack whistleblower protections, and none have whistleblower protections that are as effective as those in the United States.

Take, for example, the three largest importers of auto-parts. In 2021 the top three importer-countries of auto parts into the United States were:

1. Mexico: US$26.2 billion
2. China: $10.2 billion
3. Canada: $9.4 billion


None of these countries have effective whistleblower laws. Consequently, whistleblowers who reside in these countries face radically different issues than those who reside in the United States, where strong whistleblower laws exist protecting auto workers, and under the Sarbanes-Oxley Act, strong requirements governing internal audit and compliance.
It is the official policy of the United States that whistleblowers who reside in countries such as Mexico and China be able to use civil society, including investigative journalists, to raise concerns. [https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf](https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf). The United States Strategy on Countering Corruption mandates that all federal agencies support international anti-corruption organizations and whistleblowers who are working with civil society to report wrongdoing.

It is obvious that a whistleblower in China may seek to leak information to the news media, or work with “advocacy groups” to make the public (and ultimately the NHTSA) aware of safety issues. Although the pressures facing whistleblowers in advanced democracies, such as the United States or Canada may not be as extreme as those facing whistleblowers in China, the same logic applies. Traditionally, whistleblowers have reported concerns to the news media, advocacy groups, and other third parties prior to reporting these concerns to the federal government. This is why the Whistleblower Act, on its face, recognizes that “original information” acted on by the NHTSA may have been initially provided to these third parties, and that the NHTSA may learn these issues from allegations published in the news media or provided to the government by advocacy groups (or other third parties, including plaintiffs lawyers in personal injury cases or the victims of auto accidents).

The issues facing whistleblowers in foreign countries that import auto parts (or sell cars) into the United States is extremely problematic. First, any requirement that whistleblowers who reside outside the United States report safety concerns to their bosses (or otherwise report concerns within their countries to any entities) opens these employees to severe threats to their jobs, their careers and their safety. Whistleblowers in these countries should be encouraged to report their concerns to advocacy groups or investigative journalists that may provide them with protection (and provide them with confidentiality) within their home countries, or via respected human rights organizations used by human rights defenders (including whistleblowers) that work outside their countries.

The lack of protections for whistleblowers within countries that import auto parts into the United States is best understood by looking at the top three importers and the status of whistleblower protection in their homelands.

The largest importer into the United States is Mexico. Mexico has been highly criticized by the Organization for Economic Cooperation and Development (OECD) because it has “not adopted specific legislation on whistleblower protections.” These lack of protections have a negative impact on all anti-corruption and safety matters, and likewise impact on internal compliance. As explained by the OECD in its Phase 4 Audit of Mexico:

> Many participants at the on-site from the public and private sectors and civil society highlighted that a consistent legislative framework for whistleblower protection was essential to encourage whistleblowers to speak up and report violations. Indeed, they were unsure how potential whistleblowers could be guaranteed effective protections through company whistleblower programs in the
absence of a supporting legislative framework that would protect them in the event of violations of company rules.

(emphasis added)

In its 2022 follow-up report on Mexico the OECD noted that Mexico had repeatedly failed to implement any whistleblower protections, despite ten-years of audits and recommendations from the OECD: “Almost ten years after the Working Group’s initial recommendation to strengthen whistleblower protection at the time of Phase 3, Mexico has still not enacted specific legislation to protect public and private sector employees” See, https://one.oecd.org/document/DAF/WGB(2022)30/REV1/en/pdf.

China is the second largest importer of auto parts into the United States. China outrageous treatment of whistleblowers and anyone who voices dissent hardly needs to be discussed. But some examples make this point. The World Press Freedom Index ranked China 179th out of 180 countries for freedom of the press, noting that only North Korea was more repressive. See https://rsf.org/en/index. Physicians for Human Rights, looking at China’s reaction to whistleblowers who exposed public safety issues, found that they were “unfairly silenced” “punished” and even killed. See https://phr.org/our-work/resources/the-death-of-a-chinese-whistleblower/. In regard to imports into the United States, China sentenced a whistleblower to two years imprison for blowing the whistle on violations related to products sold to Amazon. The whistleblower went to jail even though Amazon confirmed the accuracy of the whistleblower’s allegations. See https://www.business-humanrights.org/en/latest-news/china-amazon-forced-labour-whistleblower-sentenced-to-two-years-in-jail-for-breaking-business-secrets-law/.

Amnesty International reported that China “continued to imprison” “human rights defenders,” and in 2023 Human Rights Watch reported that “repression” against whose willing to speak out in China had “deepened across China.” See, https://www.amnesty.org/en/location/asia-and-the-pacific/east-asia/china/report-china/ and https://www.hrw.org/world-report/2023/country-chapters/china. Likewise, the Guardian newspaper reported that “persecutions” “targeting whistleblowers” had worsened under China’s current President Xi Jinping. https://www.theguardian.com/world/2021/jan/13/china-in-darkest-period-for-human-rights-since-tiananmen-says-rights-group. The respected NGO, Chinese Human Rights Defenders concerned that there was “reason to fear that the detained protesters are at high risk of being subjected to enforced disappearance and torture, especially in view of the government’s recent track record of detaining and penalizing whistleblowers . . . subjecting them to enforced disappearance, torture, and depriving them of due process rights including denying them access to lawyers of their choice.


The prospect of denying a whistleblower from China who reported a major auto safety issue an award simply because he or she informed an advocacy group or an investigative journalist as to the problems would be shocking. Likewise, any suggestion to international whistleblowers who
reside in countries that lack whistleblower protections such as those in the United States, that they should report concerns within their company, instead of directly to U.S. authorities, investigative journalists, or civil society organizations, would be fundamentally in conflict with the official anti-corruption policies of the United States.

Advanced democracies also share many of the problems caused by the lack of whistleblower protections and the lack of a culture that respects whistleblowers within the workplace. For example, outside the United States the United Kingdom is recognized as having the most comprehensive whistleblower law. However, over the 20-years that law has been in use there has been mounting criticism of the law, and currently there are major proposals pending in the UK Parliament to fix the law. But currently the most comprehensive study of the UK’s whistleblower law concluded that the “UK Law does not – and cannot – adequately protect whistleblowers.” Report of the Thompson Reuters Foundation, https://www.trust.org/contentAsset/raw-data/7161e13d-2755-4e76-9ee7-fff02f6584db/file.

Finally, the third largest importer of auto parts into the United States is Canada. Like Mexico and China, Canada lacks effective whistleblower protections. The Toronto Star reported on June 5, 2023 that an international study of fifty country’s whistleblower laws ranked Canada tied to last place in the “bottom ranking,” tied only to Lebanon. https://www.thestar.com/opinion/contributors/2023/06/05/canada-must-strengthen-its-woefully-weak-whistleblower-legislation.html. Transparency International in Canada outlined the long-recognized problems in Canada’s whistleblower law: “Canada’s current legal framework for whistleblowing is outdated and out of step with internationally recognized best practices. The most serious deficiencies are 1) lack of protection for public sector whistleblowers . . . 2) an almost complete lack of coverage of the private sector. See https://open.canada.ca/en/idea/enhancing-whistleblower-protection.

Given the lack of protections in these three countries over numerous whistleblowers from these jurisdictions have filed confidential Dodd-Frank cases in the United States, and many international whistleblowers have obtained rewards under that law. It is critical that the Agency adjusts its regulations to the fact that non-U.S. whistleblowers lack the protections necessary to encourage them or require them to make any reports within their home countries, least of all to the company they work for.

Furthermore, based on these facts the Agency must review all of its proposals in light of following two policy objectives:

First, the Agency must give full force to the broad definition of “original information” set forth in 49 U.S.C. 30172(a)(3) and harmonize that definition with the definition of “whistleblower.” Whistleblowers who trigger or contribute to NHTSA investigations or enforcement actions based on “original information” the government learns from various third parties, must be deemed qualified for a reward. Obviously, the whistleblower would bear the burden of proving that he or she was the original source to the third party in order to become eligible for an award, but the Agency simply cannot negate these policies and provisions of the law. The result of narrowing
the definitions of “whistleblower” and “original information” would have adverse consequences, including the Agency relying on the whistleblower’s information to take an enforcement action only to later deny the whistleblower an award for failing to jump through all of the technical hoops. This is compounded by the fact that many whistleblowers who work in the auto industry are foreign workers residing in foreign countries who may not initially have access to lawyers in the United States when they are raising concerns covered by the statute, and who likely are not proficient in the English language. By denying whistleblowers the right to awards in such situations for hyper-technical reasons would defeat the purpose of the law and have a “chilling effect” to discourage whistleblowers from reporting safety concerns in the future.

Second, the requirement to report issues to internal compliance programs must be tempered with a recognition that any such requirement in a country that does not have protections for internal whistleblowers at least equal to those in the United States be exempted from that requirement as a matter of a per se rule. This would protect international whistleblowers from facing retaliation within a legal context that does not adequately protect their rights, and also acts to incentivize these obstructionist countries to improve their whistleblower laws. Furthermore, these countries must have more than simple “paper” protections for whistleblowers. In order to expect any whistleblower to report internally the country at issue must also have a proven track record of protecting these whistleblowers and providing them rights equal to those in the Auto Safety whistleblower law administered by the U.S. Department of Labor.

FIRST AGREEMENTS WITH AGENCY PROPOSALS (Comments on Definition of “whistleblower”)

The Agency requested comments on whether a whistleblower “has to provide original information related to the company that employed or contracted with the whistleblower or whether the employee or contractor of any motor vehicle manufacturer, part supplier, or dealership can report original information regarding any motor vehicle manufacturer, part supplier or dealership.”

We agree with the Agency’s proposal “that competitors, partners, employees of another separate corporate entity, and the like often have insight into the automotive market” and that they should be fully entitled to a reward. We believe this is consistent with the plain meaning of the statute. Congress clearly did not imply that every entity would have an internal compliance program, as many companies or entities covered under the law have no compliance program. Coverage is designed to enhance safety, and the goal of having whistleblowers cooperate with compliance investigations where there is no evidence that a company is engaging in retaliation or a cover-up was designed to ensure faster reports of safety violations where appropriate.

In this regard the following justification for this proposal is logical and clearly supported under a plain meaning of the law: “The Agency is aware that employees and contractors in the motor vehicle industry often have knowledge regarding other corporate entities. This often includes companies with a relationship, such as a motor vehicle manufacturer and its dealers, a parts supplier and the companies that purchase its parts, a related corporate entity (for example, a parent and subsidiary) or a partner company. The Agency also believes that competitors often have
valuable insight into their competitors' actions in the market. For example, a company that has been undercut on price because its competitor improperly certifies its products as complying with applicable FMVSS certainly may have valuable information for the Agency and may be further incentivized to inform the Agency if a whistleblower award may be possible. In some cases, competitors may conduct ‘tear downs,’ or other investigations of a product as part of their normal business practices, which may lead to their conclusion that the competitor's product may contain a safety-related defect or noncompliance with an applicable FMVSS. NHTSA believes that competitor-provided information could be a rich source of data. However, based on the language of the statute, it appears that the company could not make the claim on its own behalf and be considered a ‘whistleblower.’ It does appear that an employee or contractor of the competitor company could make the report and still qualify under the statutory definition of ‘whistleblower.’"

We also believe that the Agency’s position on trade groups is fully consistent with the plain meaning of the law’s text and the legislative intent behind the law. We support the Agency’s “tentative conclusion” on this matter: “[W]hile trade groups themselves cannot be whistleblowers, the employees or contractors with the companies within the trade group's membership can be whistleblowers, provided they fall into the definition of motor vehicle manufacturer, part supplier, or dealership. This best effectuates the purpose of the statute in incentivizing those with access to information on safety issues and violations of law to bring them to the Agency's attention.”

We also agree with the Agency’s resolution of the hypothetical “concern” that “some unscrupulous actors may anonymously or improperly provide information to the Agency not because they think there is a safety-problem, but rather with the motive to harm the competitor or entity by making false or inaccurate allegations.” In addition to the protections against false allegations reflected in 49 U.S.C. 30172(g) and proposed rule § 513.8, in order to be an anonymous whistleblower the whistleblower must hire an attorney, and that attorney can be held accountable for any frauds on the government. Furthermore, if the “whistleblower” purses the case in his or her own name, that person can also be held accountable for providing false or misleading information to the government. Additionally, in the most comprehensive study conducted of fraud detection, the University of Chicago Booth School of Business published a highly respected article [linked at: https://kkc.com/wp-content/uploads/2020/03/whistle.pdf] concluding that whistleblower reward laws do not trigger the types of problems some fear: “Monetary incentives seem to work well, without the negative side effects often attributed to them.”

SECOND AGREEMENT AND ADDITIONAL COMMENT ON AGENCY PROPOSAL (Comments on Definition of “whistleblower”)

The Agency discusses the internal reporting requirements under the Whistleblower Act with two comments. First the Agency correctly notes that “under 49 U.S.C. 30172(c)(2)(E)(iii), the Secretary may, for good cause, waive the requirement to report or attempt to report the information through the internal reporting mechanism.” Based on this authority the Agency stated that it would, in most cases, make the decision to waive the requirement on a “case-by-case basis.”
While we agree that the waiver issue can in many cases be resolved on a case-by-case basis, we believe that the Agency should adopt a number of blanket exemptions in order to clarify to whistleblowers their reporting obligations, and to properly protect and incentivize reporting. These exceptions should include: (1) no internal reporting required if the whistleblower is not an employee of the entity; (2) no internal reporting required if the entity does not have an internal compliance program that guarantees confidentiality, is not independent from line-management, is not managed as an arm of the Office of General Counsel, and has independent authority to report directly to the company’s Chief Executive Office, Board of Directors and/or Audit Committee; (3) no internal reporting requirement in countries that lack legal protections for internal whistleblowers at least as effective as the autoworker’s anti-retaliation law is codified at 49 U.S.C. § 30171, and its implementing regulations are located at 29 C.F.R. § 1988.

Also see the comments related to internal reporting discussed in the section defining the term “whistleblower.”

If the Agency permits lawyer-managed compliance programs to be included in the mandatory internal reporting requirements contained in the law the Agency must ensure that these attorney-managed programs are managed in an ethical manner. This would include providing employees who contact these entities with the warnings recommended by the New York State Bar. See New York State Bar Association Committee on Professional Ethics Opinion 650, July 30, 1993 (ethical rule discussing the ethics attorneys are supposed to follow when participating in compliance programs and investigations). The import of mandating compliance with strict ethical rules is highlighted by these two articles written by defense attorneys: Sara Kropf, “Upjohn Warnings from Both Sides of the Table,” Kropf Moseley (Mar. 30, 2017); Simon and Song, “Upjohn and the ‘Corporate Miranda Warnings’ During Government Investigations,” Kirkland & Ellis.

We fully support the NHTSA suggestion that “claims made by employees or contractors of other motor vehicle manufacturers, part suppliers, or dealerships” be “automatically” exempted “from the requirements to report” concerns “to the internal reporting mechanism of the motor vehicle manufacturer, part supplier, or dealership.” As stated above, it would be inconsistent with the law and Congressional intent to bar whistleblowers from coverage because there is no internal entity for which they can file a concern.

**Proposed Rule § 513.3—Representation**

We support this proposal.

**Proposed Rule § 513.4—Procedures for Submitting Original Information**

We have no objection to the administrative procedures set forth in this proposal. However, the submission or non-submission of the form cannot be used, standing alone, as a basis for denying a reward.

Our concerns and/or objections to this rule are based on two factors.
First regards the timing of the submission of a form WB-INFO. The Agency should follow the practice of the Internal Revenue Service as mandated under Tax Court decisions. The leading Tax Court decision on this issue is extremely important, as it is the only judicial decision that concerned whether the late filing of a required whistleblower reward law form can disqualify a whistleblower from a reward.

The facts of the case are precisely on-point with the issue of whether or not a whistleblower’s information needs to be provided to the government on a mandatory form. The IRS uses a Form 211 that is very similar to the SEC’s TCR form and very similar to the proposed WB-INFO form being proposed by the Agency. After hearing arguments from all sides the Tax Court decided that if the IRS could determine that the whistleblower was indeed the source of the information behind the successful enforcement action, that whistleblower was entitled to a reward, even if the Form 211 was filed years after the investigation was initiated, and after the IRS completed its investigation and collected the fines. The logic of that decision is compelling, consistent with the legislative history, and consistent with the statutory text.


The importance of following this Tax Court decision was explained, in detail, in a letter sent to the SEC by our firm. This letter should be carefully reviewed on considering this rule. It is linked here: https://kkc.com/wp-content/uploads/2019/11/s71618-6268078-193177.pdf.

We cannot emphasize the importance of the Agency following this well-reasoned decision. In this regard it should be noted that the Agency’s discretion is not without limits. The Whistleblower Act requires that any rules approved by the Agency must be “consistent with this section.” The law requires that whistleblowers whose original information results in a qualified enforcement action be paid an award. The Agency does not have the discretion to use a requirement to submit information on a specific form, regardless of any other factor, as a justification to deny an otherwise qualified whistleblower. This is not only just plain wrong, it is inconsistent with the goals of the law.

Second, whistleblowers must be able to initially submit information to the Agency through third parties, such as the news media, referrals from Congress or other investigatory agencies, civil society organizations, international anti-corruption or law enforcement authorities, among other entities. As explained above, this process is explicitly permitted under the law. The Department of Treasury can learn of a whistleblower’s “original information” from third parties, and the whistleblower must be given full credit, if the whistleblower was the original source of that information.

The key is that the Department of Treasury learn the safety concerns raised by whistleblowers. Thereafter, if the failure of a whistleblower to file the WB-INFO form results in the Agency not being able to determine the contribution made by the whistleblower, that burden would fall upon
the whistleblower. The form is used to help the investigatory process, not to be used as a tool to deny rewards to whistleblowers who can prove that they are fully qualified under the substantive provisions of the law.

When Congress introduced the Whistleblower Act it clearly understood the public benefits to alerting the general public to facts related to auto safety. The initial Senate Sponsor of the Whistleblower Act said it clearly: “The American people have a right to know about the story behind this airbag recall. And so that’s why we’re here today.” [https://www.commerce.senate.gov/2014/11/examining-takata-airbag-defects-and-the-vehicle-recall-process](https://www.commerce.senate.gov/2014/11/examining-takata-airbag-defects-and-the-vehicle-recall-process) (Statement of Senator Nelson). In fact, Senator John Thune, who would become the main Senate sponsor in the next Congress, pointed to information published in the *New York Times* as providing information worthy of being investigated: “In this case, many would especially like to know whether the allegations reported in the *New York Times* that Takata knew of and hid risks related to air bags years ago are true.” *Id.*

The wisdom of Congress requiring the Department of Transportation to credit information the Department learned from the news media or other sources as “original information” eligible for a reward is fully documented by the facts that were well known during the time period the Whistleblower Act was drafted and approved. Specifically, the key whistleblower in the Takata case explained that one of the most important steps undertaken in the entire scandal was his willingness to go public and thereafter share his information with the Justice Department and FBI. Mark Lillie explained:

> Lillie also shared his information with the U.S. Department of Justice, the Federal Bureau of Investigation and the media.

> "I think that that was an important role that I was able to play by going public," said Lillie, who went on the record with the media, including The New York Times.

> "There were a couple of other whistleblowers but none of them would go public, and until someone would actually put their name behind the report" the media would not publish, he said.

See, [https://english.kyodonews.net/news/2018/04/257816b66f02-takata-whistleblower-says-air-bag-warning-was-ethical-duty.html](https://english.kyodonews.net/news/2018/04/257816b66f02-takata-whistleblower-says-air-bag-warning-was-ethical-duty.html).

The Agency would commit a grave mistake if it ignored how the Takata whistleblowers actually engaged in their whistleblowing. Like numerous whistleblowers throughout recent history they did reported their concerns to the news media and federal agencies beyond the agency with direct regulatory responsibility. In the Takata case this included Congress, the DOJ and the FBI. Congress acknowledged the importance of covering this type of whistleblowing in the Whistle Act, and the Agency must also accommodate this type of third-party whistleblowing in its regulations.

In regard to reporting to public interest organizations, the auto industry’s first major whistleblower made his critical report to a non-governmental auto safety group. Again, Congress recognized the utility of such disclosures both when it debated creating whistleblower protections for auto workers, and thereafter within the definition of “original information” incorporated into the Whistleblower Act. https://www.autosafety.org/safety-firebrand-refuses-relent/ (confirming that whistleblower was anonymous source to non-governmental safety organization). Also see https://archive.org/stream/gov.gpo.fdsys.CHRG-111shrg66783/CHRG-111shrg66783_djvu.txt (role of whistleblower in Congress’ recognition that auto workers needed protection).

**Proposed Rule § 513.5—Confidentiality**

We agree with most of this proposal, except as discussed below.

In its proposal the Agency discusses the following “example” of an individual who would not be afforded confidentiality or anonymity: “[I]f the individual is an employee or contractor of a motor vehicle manufacturer, if the information they are disclosing relating to a motor vehicle defect, noncompliance, or violation of notification or reporting requirement is not likely to cause unreasonable risk of death or serious physical injury, then that person is not a whistleblower and is not entitled to the statutory protection contained in 49 U.S.C. 30172.

This is counter to the Whistleblower Act and will have a chilling effect on disclosures. Whistleblowers must be assured that their communications with the Agency when filing a whistleblower claim under the Act will remain fully confidential. If the Agency determines that this confidentiality can be waived because they did not file a claim that results in an enforcement action, or the facts they relied upon turned out not to be raise a series safety issue, whistleblowers would widely avoid filing any claims with the Agency. Whistleblowers cannot take a risk that the Agency will waive their rights to confidentiality on the basis set forth above, and it would be better to avoid a process that opens them to harm.

We completely agree with Proposed Rule 513.5(e) that exempts whistleblower information from disclosure under the provisions of 5 U.S.C. 552 to the fullest extent permitted by law. This is consistent with the decision of D.C. Circuit in Montgomery v. IRS, Case No. 21-5168 (D.C. Cir. Jul. 19, 2022) (case finding that IRS not required to disclose any information about a tax whistleblower case under the Freedom of Information Act).
Proposed Rule § 513.6—Prerequisites to the Consideration of an Award

The Department of Transportation should exercise its discretion and make the payment of an award mandatory if the statutory requirements for a reward are met, and none of the disqualifying conditions are in play. The denial of a reward to an otherwise fully qualified whistleblower will create a chilling effect on other whistleblowers, undermine the deterrent effect of the law, and completely discredit the Agency. It would undermine trust in the program if a whistleblower did everything the law required, risked his or her career (of safety), served the public interest, suffered retaliation, and thereafter was denied a reward – literally at the whim of the Agency.

This issue is further discussed in comments to Proposed Rule § 513.10—Award Determinations.

Proposed Rule § 513.7—Whistleblowers Ineligible for an Award

Our objections to this rule are set forth below and also in the Comments to Proposed Rule § 513.2(b), Whistleblower.

The Agency requested “comment on whether it should limit the criminal conviction bar to only those cases decided by a U.S. Federal or State court or whether it should consider convictions issued by courts in other countries.” This limit should be limited to United States prosecutions only. Whistleblowers are often prosecuted in other countries, and there is simply no way to weigh whether or not the prosecution was retaliatory or whether the whistleblowers due process rights were violated. Additionally, if foreign governments or officials knew that convicting a whistleblower in their courts could disqualify them for an award, this would encourage retaliatory prosecutions. Finally, the plain meaning of the statute clearly intended for this provision to include only U.S. prosecutions. Other whistleblower reward laws contain criminal-conviction disqualifications (including the IRS law, False Claims Act and Dodd Frank Act), yet none of these permit disqualification based on foreign criminal actions.

In regard to the “internal report” disqualification, we have addressed issues related to this provision of law elsewhere in these comments. The difficulty with this provision of law starts with an understanding of what is an “internal reporting mechanism in place to protect employees from retaliation.” We are not aware of any such procedures. How can an internal reporting mechanism provide adequate protection for an employee? These mechanisms are based on internal audit procedures, not employment discrimination procedures. Paper protections are simply unacceptable. If a company simply states that it will not retaliate, such statements should be given no credence whatsoever. What are the internal procedures that provide a whistleblower with the types of protections and due process rights as set forth in a reasonable anti-retaliation law such as 49 U.S.C. § 30171?

The only such mechanism would be a procedure that guarantees complete confidentiality. But this would require that corporate attorneys never be made aware of the identity of the whistleblower, as these attorney must represent the best interests of the company, and the law is absolutely clear that corporate counsel can throw a whistleblower under the bus. Additionally, just how a corporate
compliance program can guarantee complete confidentiality consistent with the confidentiality rules in the Whistleblower Act is a mystery, and in practice would be very difficult if not impossible to achieve.

Additionally, the proposed rules do not take into consideration the negative impact and chilling effect a liberal interpretation of this rule would have on whistleblowers and the public interest. For example, a whistleblower reports a major safety concern directly to the Department of Transportation and thereafter works with the government for 1-3 years in building a case. The enforcement action is successful and it is conceded that the information provided by the whistleblower saved lives, recovered millions for the government, provided millions in restitution payments for the victims of the safety violations, caused wrongdoers to go to prison, and resulted in the recall of a very unsafe product.

Based on these facts what type of internal mechanism would result in disqualifying this true American hero from a reward? What procedures must be in place to provide a real and effective anti-retaliation internal process? What protections must exist in such a procedure? What damages could a harmed employee recover? Who would pay the whistleblower’s attorney’s fees? How would the protections be enforced? What if the whistleblower claims that he or she is not getting promotions? What if the whistleblower alleges a hostile work environment? How does the corporate program define an adverse action? What if the company implements this procedure, but rules against the employee – what is the appeal? How can a corporate program be subjected to judicial review?

Additionally, what constitutes a “report.” How detailed does a report have to be? Can it be made anonymously? What if the whistleblower’s information would identify him or her, and thereafter render a confidential report to the government practically impossible? As part of the report does the whistleblower have to reveal all of his or her information?

If the Agency is going to have a regulation that would disqualify a fully qualified whistleblower from a reward based on this provision, the Agency must clearly define the obligations on an employer to meet the due process requirements this provision of law implicitly mandates.

**Proposed Rule § 513.8—Provision of False Information**

We have no objection to this proposal.

**I. Proposed Rule § 513.9—Procedures for Making a Claim for a Whistleblower Award**

We have no objection to the process of posting a “Notice of Covered Action” similar to that used by the SEC and CFTC. However, we do believe that if the Agency investigators are aware of a qualified whistleblower related to the case (which in almost every case they will know the identity of this person and the contribution the made), the Agency should contact this person and make them aware of the Notice.
Furthermore, at the time the Notice is published (or before) the responsible investigators should be required to submit a form similar to the form used by the IRS. This form would state whether the investigators relied upon information from an individual, and explain the contributions that individual make. Based on this form (or affidavit) the Agency should be able to render a preliminary or final decision on the award application in a short period to time.

The Agency should be required to make a preliminary determination of a reward within 180 days of the posting of the Notice, and a final decision within 1-year of the publication of the Notice. If the Agency obtains the statements from its own staff concerning who the whistleblowers were and what contributions they made at the time the Notice is published these deadlines should easily be met.

Email filings should be permitted. If the 90th day falls on a weekend or a federal holiday, the deadline should be the next business day.

We support the use of the WB–AWARD form. This form will provide whistleblowers who are fully qualified to obtain a reward to make their case and provide proof of eligibility. This form can provide a whistleblower who failed to file a timely initial claim an opportunity to explain why they are the real whistleblower and should be rewarded. Agency staff will be able to evaluate this application form and make a valid award decision.

The Agency’s proposal to make foreign nationals eligible for a whistleblower award is fully supported by the plain meaning of the statute and the fact that all other whistleblower reward laws, including the IRS law, the False Claims Act and the Dodd-Frank laws all permit foreign nationals to obtain rewards. It would violate the law, the public interest, the legislative intent, and the Administrative Procedure Act to disqualify foreign nationals.

Furthermore, Congress set forth the precise grounds upon which an individual can be denied a reward, and the citizenship of the individual was not among the grounds for disqualification. We strongly support the findings of the Agency that the “automotive industry is a global industry” and covering foreign nationals will in fact “help prevent deaths and serious bodily injury on U.S. roadways.” See https://www.commerce.senate.gov/2014/11/examining-takata-airbag-defects-and-the-vehicle-recall-process. The Agency correctly pointed to the importance of rewarding non-U.S. citizens under the Dodd-Frank Act, but also foreign nationals have played a key role in the IRS offshore tax compliance efforts.

The Agency is correct to point to the Takata air bag scandal, which concerned a Japanese supplier, as further evidence of Congressional intent. The public record unquestionably supports a finding that it was the actions of this Japanese supplier that was the “major motivation” for the whistleblower law. When the Whistleblower Act was first introduced its initial Senator Nelson, the initial Senate sponsor of the Act, explained that one of the goals of the Senate Commerce Committee was to “investigate the link between defective [Takata] airbags and the numerous injuries and deaths across the country – indeed, across the globe.” https://www.commerce.senate.gov/2014/11/examining-takata-airbag-defects-and-the-

Proposed Rule § 513.10—Award Determinations

The Agency has requested comment regarding whether the NHTSA should “limit its discretion to determine whether, to whom, or in what amount to make an award.”

In weighing the cost benefit analysis of limiting the Agency’s discretion to deny rewards, and ensuring that a minimum reward of 10% is granted to all eligible whistleblowers it is critical to review the public benefits obtained from the deterrent effect of mandatory reward laws. These benefits were outlined in the following article addressing an SEC proposal to limit rewards: https://www.natlawreview.com/article/will-see-s-proposed-whistleblower-rules-undermine-deterrent-effect-dodd-frank-act. After hearing from stakeholders the SEC completely abandoned its proposal to limit rewards, and ultimately approved a new rule citing, in part, to the deterrent effect of paying large mandatory rewards.

The extensive public record created over the past 35 years regarding the benefits of mandatory reward laws demonstrates that the theoretical concerns expressed by the Agency that could possibly justify permitting the Department of Transportation to deny otherwise fully qualified whistleblowers a reward are not empirically supported.

In regard to the Agency’s reference to judicial review as a safety valve to preventing an abuse of the Agency’s discretion to deny rewards for any reason (“We also note that the Agency's exercise of discretion would not be unbounded and would still be subject to judicial review.”), we simply do not believe that the Courts would overturn denials based on the unlimited discretion set forth in the proposed rule.

Additionally, the Agency should not, under any circumstances, “review information from outside persons, such as the company that was liable for the civil penalties” when weighing the payment of an award.

We strongly agree with the Agency's tentative view that “outside parties should not be able to insert themselves into the award process.” In addition to the reasons set forth in the proposed rule, outside parties simply have no standing to object or comment on a whistleblower reward decision. The issue of granting a reward is strictly between the whistleblower and the Agency. The sanctioned company has no standing. Furthermore, permitting outside parties to patriciate in any manner in a reward determination is at war with the confidentiality requirements of the law. Finally, it should be expected that companies would use this process to attack the whistleblower and drum up derogatory information (true or not) which would convert the entire reward process into a dispute between the employee and the employer. This is precisely what the reward laws are designed to prevent. If an employer could participate in the reward adjudication process we would strongly advise whistleblowers NOT to use the Whistleblower Law.
Proposed Rule § 513.12—Procedures Applicable to the Payment of Awards

Rules should be adopted that provide for the full adjudication of reward applications within one year. Procedures that can accomplish this goal were outlined above.

Proposed Appendix A—Form WB–INFO

The form should conform to any changes made to the proposed rules.

Proposed Appendix B—Form WB–RELEASE

We object to this release form as it may be used as a means to have whistleblowers waive important rights. Whistleblowers may interpret this release form as something they should do to please investigators, and investigators may present these forms as a matter of course.

Any waiver of confidentiality should be considered carefully, on a case-by-case basis, with no pressure (direct or indirect) placed on a whistleblower. The IRS, SEC and CFTC programs work well without such release forms.

Respectfully submitted,

/s/

Stephen M. Kohn

On Behalf of the whistleblower rights law firm of Kohn, Kohn, and Colapinto