Rulemaking process a critical juncture for DOT's auto safety whistleblower program

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In 2015, following a string of high-profile automobile safety issues, such as the Takata airbag recall, Congress looked to bolster the ability of the National Highway Traffic Safety Administration (NHTSA) to detect auto safety concerns and protect the American public. Inspired by the massive success of whistleblower award programs in the areas of tax and securities fraud, Congress included a whistleblower award law (https://bit.ly/3CHlryR) in the Fixing America's Surface Transportation Act (FAST Act).

The law offers monetary awards and anti-retaliation protections to auto manufacturing whistleblowers who report "original information relating to any motor vehicle defect, noncompliance, or any violation or alleged violation ... likely to cause unreasonable risk of death or serious physical injury." By incentivizing auto-manufacturer insiders to blow the whistle on safety issues, the whistleblower provisions of the FAST Act are designed to snuff out auto-safety defects before they harm the public.

In the years following the FAST Act's passage, the Department of Transportation (DOT) failed to fully implement the program. A congressionally set deadline of July 6, 2016, came and went without the DOT publishing any regulations outlining how auto safety whistleblowers can anonymously file safety reports, how whistleblowers are ensured the full protection of confidentiality, and the requirements for qualifying for monetary whistleblower rewards.

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In March 2021, Senators Richard Blumenthal (D-CT) and Edward Markey (D-MA) sent a letter (https://bit.ly/3qKrgZe) to Transportation Secretary Pete Buttigieg demanding that the DOT immediately implement the whistleblower program. "Over the past few years, we have observed increasingly devastating and tragic motor vehicle safety defects, which could have been prevented if the auto manufacturers did not ignore substantial safety concerns that originated during the manufacturing process," they wrote in their letter.

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Now, nearly seven years later, the Department of Transportation has finally published proposed regulations (https://bit.ly/43WaiFG) implementing the Auto-Safety Whistleblower Program. These regulations, which were published on April 14 and are in a public comment period until June 13, will be pivotal in determining the overall success of the Auto Safety Whistleblower Program in incentivizing auto manufacturing insiders and preventing deadly motor vehicle safety defects.

Overall, the rules proposed by the DOT largely mirror the rules of the hugely successful SEC Whistleblower Program. This makes sense given that the whistleblower provisions of the auto-safety whistleblower program were largely modeled off those found in the Dodd-Frank Act, which established the SEC program.

There are three major areas in the proposed rules, however, which could potentially undermine the success of the auto-safety whistleblower program. In their proposal, the DOT requests comments from stakeholders on these areas. The direction the DOT chooses to go will have major consequences.

First, as currently written, the DOT's rules give the NHTSA Administrator the complete discretion to deny a fully qualified whistleblower from receiving an award. "The determination of whether, to whom, or in what amount to make an award shall be in the discretion of the Administrator," the proposed rules state.

Empirical data from the past decades have shown that discretionary whistleblower award programs fail to incentivize whistleblowers. For example, the SEC had a discretionary reward program before the Dodd-Frank Act was signed into law in 2010. The SEC's Inspector

General's audit No. 474 (https://bit.ly/43T0P1R) of that law was highly critical, resulting in the law's outright repeal.

In its proposal, the DOT requests comments "regarding whether the Agency should limit its discretion and, if so, in what way." It even notes that "the Agency's ability to exercise discretion to not grant an award to an otherwise eligible whistleblower could deter some potential whistleblowers."

A second consequential aspect of the proposed rules concerns the filing of a whistleblower disclosure. The DOT proposes that whistleblowers will need to submit their disclosure on a form WB-INFO and identify themselves as a whistleblower in order to be eligible for an award.

The DOT requests comment on "whether this identification should be mandatory at the outset or be permissive given that certain whistleblowers or their legal representatives may simply be unaware of the WB–INFO form before contacting the Agency, may first reach out with questions before submitting a WB–INFO form, or otherwise may have good cause for not immediately submitting a WB–INFO form."

The current proposals do not have an iron-clad rule automatically disqualifying whistleblowers who fail to file a WB-INFO within a certain timeframe. This contrasts with the SEC which has adopted a rule automatically disqualifying whistleblowers who do not file a Form TCR within 90 days of first contacting the SEC with their whistleblower tip. The IRS Tax Court on the other hand has abandoned an automatic disqualification for a more common sense rule.

Lastly, the proposed rules include a provision which disqualifies from awards any whistleblowers who do not report their concern through an internal reporting mechanism. This is based off a mandate in the statute and the DOT notes that "there may be a tension between the statutory requirement to deny awards to whistleblowers who fail to report or attempt to report information though an internal reporting mechanism unless an exception applies and the mandate of 49 U.S.C. 30172(f) for NHTSA to protect any information that could reasonably be expected to reveal the identity of a whistleblower."

The auto-safety whistleblower statute stands out among whistleblower laws because it requires whistleblowers to first report to an "internal compliance mechanism" and not specifically the company's General Counsel. In its final rules, the DOT may clarify whether or not an internal compliance mechanism which serves as an arm of the company's General Counsel qualifies as a required "internal compliance mechanism."

This is a pivotal issue because it is well documented that there is an inherent conflict of interest in internal compliance programs which report to a company's General Counsel. For example, the New York State Bar Association recommends (https://bit.ly/3X3HOHT) that internal compliance programs which report to the general counsel have a disclaimer that the general counsel works in the best interest of the company and not its employees.

In a 2016 congressional hearing on the whistleblower provisions of the False Claims Act, Senator Chuck Grassley (R-IA) spoke bluntly (https://bit.ly/3X1vpEh) when opposing efforts to require employees to communicate with corporate compliance programs: "It doesn't take a pig farmer from Iowa to smell the stench of conflict in that arrangement."

Relatedly, the DOT could follow in the lead of the Sarbanes-Oxley Act (SOX) and require that "internal compliance mechanisms" protect the confidentiality of employees using that process, and also permit anonymous reports. A similar requirement exists in SOX that requires publicly traded companies to have an "audit committee" that accepts confidential and anonymous whistleblower complaints.

Compliance professionals have long advocated for independence from companies' general counsels, and requiring anonymous reporting channels could help address the tension between mandating internal reporting and protecting whistleblowers' identities. How the DOT's rules on internal compliance handle this issue will have an immense consequence on the efficacy of the whistleblower program.

The DOT rightfully highlights that many of these rules will be hugely consequential and thus requests comments from stakeholders. It remains to be seen whether the DOT will learn from other whistleblower award programs and adopt rules which instill the largest levels of faith in the program among whistleblowers.

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About the author

Stephen M. Kohn is a founding partner of the whistleblower law firm **Kohn, Kohn & Colapinto LLP** in Washington, D.C., and the chairman of the board of directors of the National Whistleblower Center. He is the author of the first legal treatise on whistleblowing and the author of "The New Whistleblower's Handbook" (Lyons Press, 2017). The firm can be reached at consult@kkc.com.

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