

# Memorandum



U.S. Department of Transportation  
National Highway Traffic Safety  
Administration



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**Subject:** ACTION: Ex-Parte Communication with Constantine Cannon      **Date:**

**From:** Dylan Voneiff  
Trial Attorney  
Litigation and Enforcement      **Reply to** NCC-100  
**Attn. of:**

**To:** Docket No. NHTSA-2023-0014  
NPRM - Rules for Implementing the  
Whistleblower Provisions of the Vehicle  
Safety Act

**Thru:** Kerry Kolodziej  
Assistant Chief Counsel  
Litigation and Enforcement

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On April 21, 2021, the law firm of Constantine Cannon LLP had a virtual discussion with NHTSA regarding the above-referenced rulemaking.

The following is a list of meeting attendees from NHTSA and Constantine Cannon LLP.

NHTSA: Ann Carlson, Kerry Kolodziej, Sarah Sorg

Constantine Cannon LLP: Ari Yampolsky, Mary Inman, Sarah Poppy Alexander, Eric Havian, Hallie Noecker

The discussion covered the major whistleblower award programs in the United States, empowering international whistleblowers to help the U.S., and facts and figures to support the assertion that whistleblower award programs work. Constantine Cannon presented a PowerPoint during the April 21, 2021 virtual meeting, and a copy is enclosed.

In addition, on May 6, 2021 a letter written to Ann Carlson from Ari Yampolsky summarized several principles that Constantine Cannon believes should guide NHTSA as it develops rules for the whistleblower program. A copy is enclosed.

Enclosures

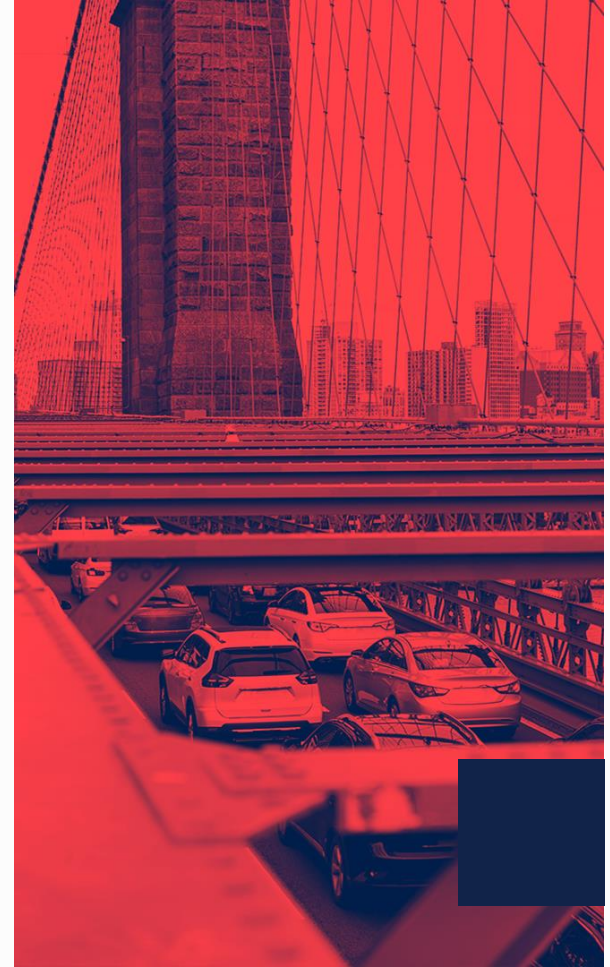


# A GUIDE TO U.S. WHISTLEBLOWER REWARD PROGRAMS

# 01.

# U.S. REWARD PROGRAMS

A brief introduction to the main whistleblower reward programs in the U.S.



# MAIN U.S. WHISTLEBLOWER REWARD PROGRAMS



**FCA**



**1986**

Foundation of the U.S. whistleblower reward system. Whistleblowers report fraud and misconduct in federal government contracts and programs. Some states and cities have FCAs.



**SEC**



**2010**

Encourages those with knowledge of violations of U.S. securities laws or bribery of foreign government officials to share this information with the SEC.



**CFTC**



**2010**

Encourages those with knowledge of violations of the U.S. Commodity Exchange Act to share this information.



**IRS**



**2006**

Incentivizes people to report evasion, underreporting, and other tax law violations.

# MAIN U.S. WHISTLEBLOWER REWARD PROGRAMS



**DOT**



**2015**

Encourages those with knowledge of vehicle safety violations to share this information with the DOT.



**TREASURY**



**2021**

Encourages those with knowledge of violations of U.S. Bank Secrecy Act/money laundering to share this information with the Treasury Department.

# FALSE CLAIMS ACT

## FEDERAL FALSE CLAIMS ACT

- Medicare fraud
- Defense fraud
- Customs fraud
- International aid fraud

## STATE & LOCAL FALSE CLAIMS ACTS

- State Medicaid fraud
- Procurement fraud

Allows private persons, known as relators, to bring *qui tam* lawsuits on the government's behalf, with the promise of a potential reward of between **15% and 30%** of any fines imposed by the government.

## STATE FCAs [31]

California	North Carolina
Colorado	Oklahoma
Connecticut	Puerto Rico
Delaware	Rhode Island
District of Columbia	Tennessee
Florida	Texas
Georgia	Vermont
Hawaii	Virginia
Illinois	Washington

Indiana  
Iowa

Louisiana  
Maryland  
Massachusetts  
Michigan  
Minnesota  
Montana  
Nevada  
New Hampshire  
New Jersey  
New Mexico  
New York

## Local FCAs [8]

Bay Harbor Islands, FL  
Broward County, FL  
City of Hallandale Beach, FL  
Miami-Dade County, FL  
Chicago, IL  
New York City, NY  
Allegheny, PA  
Philadelphia, PA

# SECURITIES & EXCHANGE COMMISSION | KEY COMPONENTS

**1** A whistleblower may submit information about possible **violations of federal securities laws and/or bribery of foreign government officials** that have occurred, is ongoing, or is about to occur.

**2** Whistleblowers can be **international** and do not have to be U.S. citizens or even residents.

**3** Whistleblowers must voluntarily provide the SEC with "**original information**", meaning information that is not publicly available or information obtained as a result of the whistleblower's independent analysis of public information.

**4** SEC whistleblowers are entitled to **protection from retaliation** and may file **anonymously**.

**5** Information must lead to a **successful enforcement action of over \$1m** for a whistleblower to be eligible for a reward.

**6** Whistleblowers may receive awards of **between 10% and 30% of any government recovery**.



# SECURITIES & EXCHANGE COMMISSION | PROCESS





# SECURITIES & EXCHANGE COMMISSION | EXAMPLES OF VIOLATIONS

## MISREPRESENTATIONS AND OMISSIONS

Securities historical performance, profitability or losses/ “guaranteed” returns.

Intended use of investor funds and investment strategy.

Inflation of assets.

Data breach and cybersecurity incidents.

Failure in AML and SAR filing programs.

## REGULATORY VIOLATIONS

Unregistered offerings.

## DUTIES OWED TO INVESTORS

Conflicts of interests.

## DARK POOLS

## MISAPPROPRIATION OF FUNDS

Ponzi schemes and pyramid schemes.

Cryptocurrency schemes.

EB-5 immigrant investor program.

## FOREIGN CORRUPT PRACTICES ACT VIOLATIONS

## ACCOUNTING FRAUD

## INSIDER TRADING



# COMMODITY FUTURES TRADING COMMISSION

**Commodity Futures Trading Commission (CFTC)** encourages those with knowledge of violations of U.S. Commodity Exchange Act to share this information with the CFTC.

**Mirrors the SEC Program**  
same requirements

Whistleblowers may receive awards of **between 10% and 30% of any fine or penalty imposed by the CFTC**



## MISREPRESENTATIONS AND OMISSIONS

Commodities' profitability or losses/  
"guaranteed" returns.

Hidden mark-ups.

Inaccurate reporting of positions in  
futures.

False reporting of benchmark rates such  
as LIBOR.

Offering retail investors complex  
financial products such as structured  
notes.

Sales and advisory practices  
Failure in AML and SAR filing programs.

## FCPA VIOLATIONS

That affect the commodities market.

## DECEPTIVE/MANIPULATIVE PRACTICES

Spooling.

Pump and Dump.

Straw Man Purchases.

Naked Short Selling.

Illegal Wash Trades.

## DARK POOLS

Selective disclosure of orders types  
made only to certain customers, creating  
non-level playing field

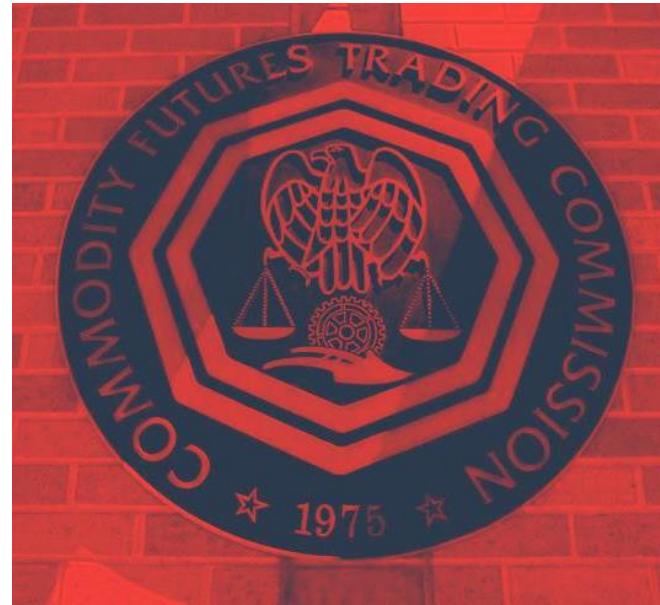
## REGISTRATION VIOLATIONS

Off exchange fraud.

## MISAPPROPRIATION OF FUNDS

Ponzi Schemes.

Cryptocurrency Schemes.



# CFTC | ACTIVE RECRUITMENT OF WBS AT INDUSTRY CONFERENCES



# INTERNAL REVENUE SERVICE



The Tax Relief and Health Care Act 2006 created an IRS Whistleblower Office dedicated to working exclusively with whistleblowers

Whistleblowers must provide **specific and credible evidence** that a taxpayer is avoiding or underpaying a tax obligation to the federal government



The information must substantially contribute to the recovery of at least \$2m, including interest and penalties to be eligible for an award.

Guarantees to the whistleblower **at least 15%, and up to 30%**, of government tax collections that result from the whistleblower's reporting to the IRS



# INTERNAL REVENUE SERVICE

## UNDERREPORTING INCOME

Due to investments in offshore tax havens.

## CIRCULAR TRANSACTIONS

To generate artificial tax benefits

## TRANSFER PRICING SCHEMES

## CRYPTOCURRENCY TAX FRAUD

## MANIPULATION OF REVENUE

### ABUSIVE TAX SHELTERS

Guam trusts.

Debt straddles.

Lease in/lease out transactions.

Offshore deferred compensation arrangements.

## FRAUDULENT TAX CREDIT CLAIMS



# 02. EMPOWERING INTERNATIONAL WHISTLEBLOWERS TO HELP U.S.



# TYPES OF WHISTLEBLOWER

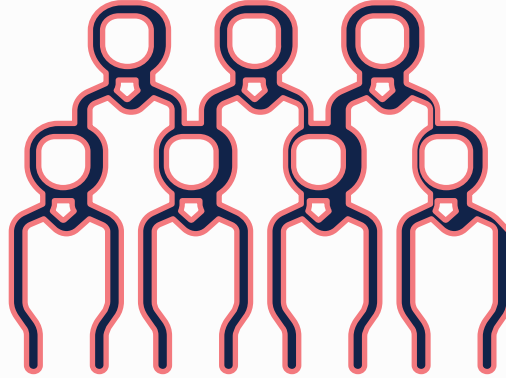
**INSIDER**

**FORMER EMPLOYEE**



**PARTICIPANT**

Planners or initiators may receive a reduced reward



**EMPLOYEE**

**ROGUE**

**INTERNATIONAL**

No need to be a U.S. citizen or resident to receive a reward

Fraud must have a U.S. nexus but need not occur in the U.S.





**“PAST WHISTLEBLOWER AWARD RECIPIENTS  
HAIL FROM SEVERAL DIFFERENT PARTS OF THE  
UNITED STATES, AND FIFTEEN RECIPIENTS WERE  
FOREIGN NATIONALS OR RESIDENTS OF FOREIGN  
COUNTRIES...”**

**SEC 2019 WHISTLEBLOWER PROGRAM ANNUAL REPORT TO CONGRESS**

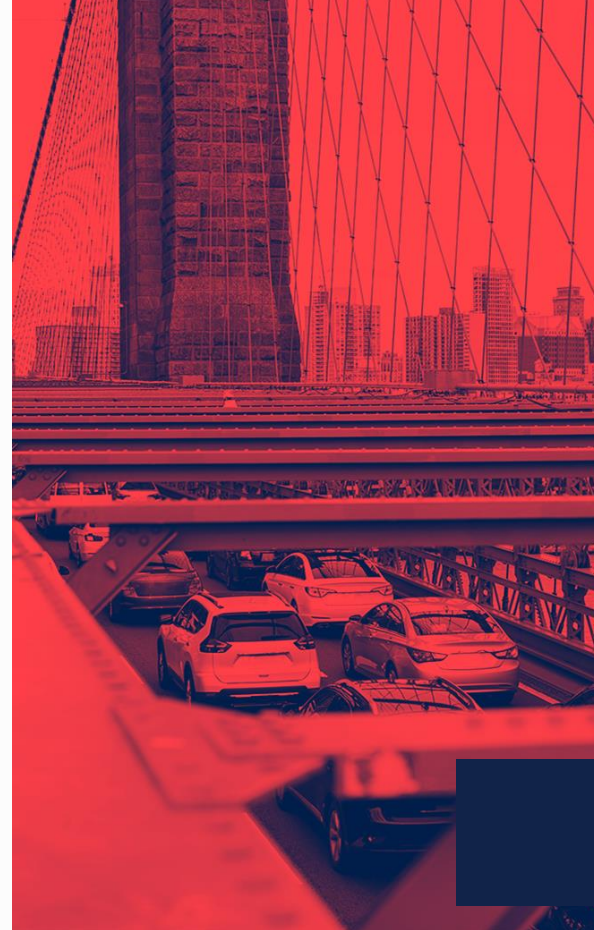
## FOREIGN COUNTRIES WITH MOST WB TIPS

	2012	2013	2014	2015	2016	2017	2018	2019	2020	TOTAL
UK	74	66	70	72	63	84	85	44	84	<b>642</b>
CANADA	46	62	58	49	68	73	89	71	91	<b>607</b>
CHINA	27	52	32	43	35	39	40	32	67	<b>367</b>
AUSTRALIA	21	15	29	29	53	48	45	28	29	<b>297</b>
INDIA	33	18	69	33	20	14	26	27	43	<b>283</b>
GERMANY	8	11	13	8	16	19	29	44	25	<b>129</b>

*(Source: SEC 2012-2020 Annual Reports to Congress on the Whistleblower Program)*

# 03. WHISTLEBLOWER REWARDS WORK

Facts & Figures from the U.S. programs



# 1987-2020 DOJ (FCA)

**\$64,333,894,248**

Total collection by DoJ

**\$46,436,084,844**

**72%**

Total collection as a result of **Qui Tam** whistleblowers

**\$7,706,935,707**

**17%**

Total amount of whistleblower awards

(US DOJ 1987 to 2020 fraud statistics overview)

**PRE-DODD FRANK SEC  
WHISTLEBLOWER PROGRAM  
(1989-2010)**

**\$159,537**

Paid to whistleblowers under the SEC's *discretionary* program.

<https://www.sec.gov/files/474.pdf>

**POST-DODD FRANK SEC  
WHISTLEBLOWER  
PROGRAM (2010+)**

**\$812 MILLION**

Total amount of whistleblower awards to 151 individuals; *mandatory* program.

**>\$3 BILLION**

Total recovery due to whistleblower tips

SEC Press release 2021-60, April 9, 2021

2020 SEC Annual Report to Congress

# SEC WB PROGRAM FISCAL YEAR 2020 FIGURES

**\$175,000,000**

Awarded to 35 whistleblowers

**6,000**

Number of tips

**192%**

Increase in whistleblower awards compared to FY 2019

## 2020 Examples

**\$114,000,000**

October – single largest award (\$62M came from a related action)

**\$10,000,000**

October

**\$50,000,000**

July

# CFTC WB PROGRAM

**\$950,000,000**

Total Monetary Sanctions

**\$120,000,000**

Awarded to over 15  
whistleblowers since 2014

**40%**

of active CFTC investigations  
involve whistleblowers

**\$9,000,000**

July 2020

**\$6,000,000**

June 2020

**\$2,500,000**

June 2019 – Overseas whistleblower

**\$30,000,000**

July 2018 – largest single award

# IRS WB PROGRAM FY 2007-2020

**\$6.14 BILLION**

Proceeds collected as a result of  
whistleblower informant tips

**\$1.02 BILLION**

Total amount of whistleblower  
awards

**~16.5%**

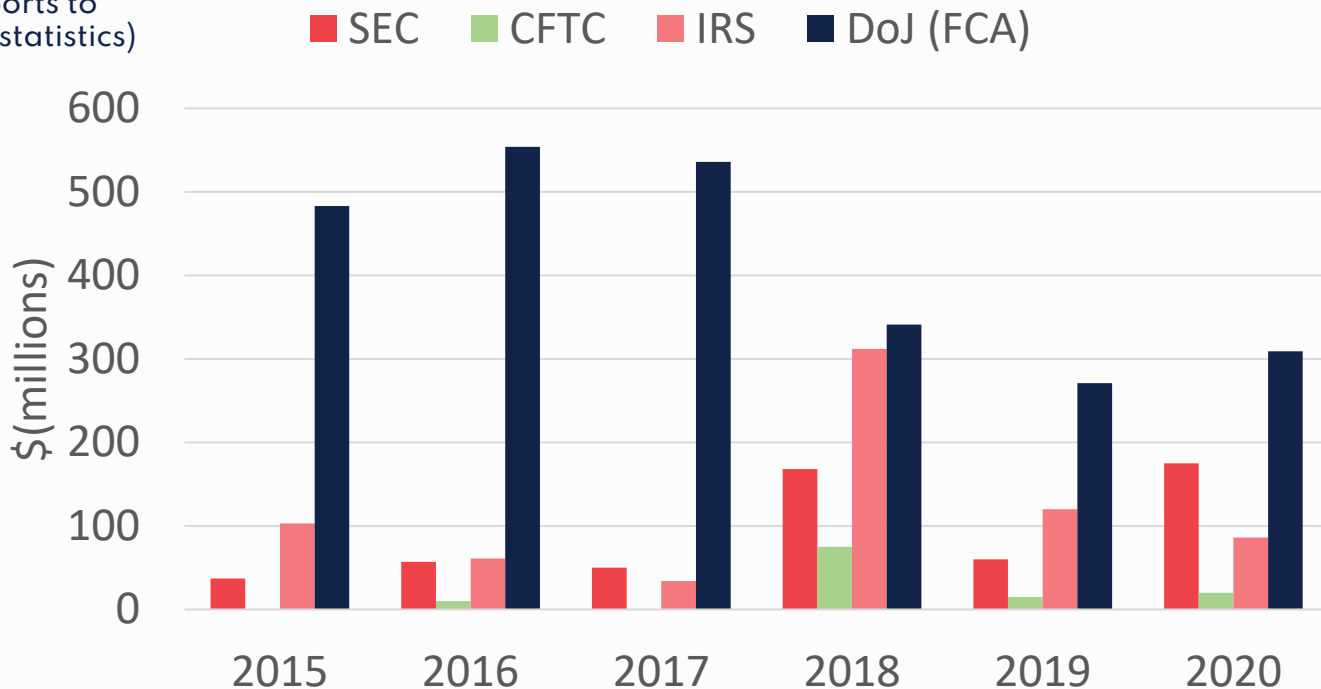
Whistleblower awards  
percentage of total proceeds  
recovered

(IRS 2020 whistleblower program annual report to Congress)



# U.S. PROGRAM WB AWARDS BY YEAR

(Data from SEC, CFTC and IRS annual reports to Congress & DOJ statistics)



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May 6, 2021

BY ELECTRONIC MAIL

Ann Carlson, Chief Counsel  
Department of Transportation  
National Highway Traffic Safety Administration  
1200 New Jersey Avenue SE  
Washington, DC 20590

Re: Motor Vehicle Safety Whistleblower Act

Dear Ms. Carlson:

Thank you and your staff for meeting with my colleagues and me recently to discuss the Motor Vehicle Safety Whistleblower Act, 49 U.S.C. § 30172, which created NHTSA's whistleblower-reward program. We greatly appreciated the opportunity to review with you several principles for NHTSA's anticipated rulemaking for the program. Our recommendations are rooted in Constantine Cannon's deep experience representing whistleblowers and advising public officials on the design of whistleblower programs.

This letter summarizes the key points we discussed. In addition, we are providing the slides we presented on the successes of other whistleblower programs.

Background

NHTSA's core responsibilities are to issue and enforce safety standards concerning the manufacture of motor vehicles and motor-vehicle equipment, and to investigate defects in those goods. The law that initially gave NHTSA this authority "was necessary because the industry was not sufficiently responsive to safety concerns." *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 49 (1983) (discussing the National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. 89-563, 80 Stat. 718 (codified as amended at 49 U.S.C. ch. 301 (1994))).

Nearly 60 years later, congressional investigations into historic industry failures—including Takata's air-bag scandal, Toyota's cover-up of unintended-acceleration defects, and General Motors's deceptions related to deadly ignition switches—found that the auto industry

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was still not forthcoming about grave safety risks. Industry's propensity to bury known safety defects resulted in too many avoidable deaths and injuries, and a deep erosion in public trust.

In the wake of these historic failures, Congress enacted the Whistleblower Act, creating NHTSA's whistleblower program. Its main purpose is to enhance vehicle safety by encouraging insiders to bring to light vital information about defective products that automakers prefer to hide. In this way, the whistleblower program promises to help NHTSA hold industry accountable for public safety.

NHTSA's program holds enormous promise. It is unique in the pantheon of whistleblower programs in that it is focused exclusively on public safety. Other whistleblower programs recover money that investors lose, or protect taxpayer funds from fraud and abuse. But only NHTSA's program is designed to motivate insiders to take enormous risks to protect the safety of the entire public. In this regard, NHTSA's program is squarely of a piece with the Administration's emphasis on promoting public health and safety.

### Principles for establishing NHTSA's whistleblower program

NHTSA now has the opportunity to set up its whistleblower program to maximize the contributions of insiders to ensuring public safety. NHTSA can do so if two ingredients are present in its program—ingredients on which all whistleblower programs rise or fall: clear program rules that encourage individuals to blow the whistle, and supportive agency culture. In developing its program, NHTSA will have to make countless choices. When NHTSA issues its Notice of Proposed Rule Making for the program, Constantine Cannon will provide detailed comments. For now, we offer three principles that should guide NHTSA as it decides how to implement the law, both in rulemaking and everyday agency practice.

*Principle 1: To foster active use of the program, NHTSA must maximize the pool of people who can be whistleblowers and not impose impediments to award eligibility.*

NHTSA's interpretation of key statutory terms should, consistent with the law's text, adopt an expansive view of who qualifies as a whistleblower. The following are non-exhaustive examples of how program rules can accomplish that.

*“Employee or contractor.”* The statute defines a “whistleblower” in part as “any employee or contractor of a motor vehicle manufacturer, part supplier, or dealership.” 49 U.S.C. § 30172(a)(6). The statute does not, however, specify whether a “whistleblower” has to be a current “employee or contractor” or may also be a former “employee or contractor.” Owing to the risks of retaliation, many individuals with knowledge of industry violations only come forward after they leave their jobs; others come forward after they have been fired in connection with raising issues about safety violations internally. To increase the flow of high-quality information insiders will bring to NHTSA, the statutory term “whistleblower” must include current and former employees and contractors.

Related to this, the statute also does not say whether, to be eligible for an award, a whistleblower must be an “employee or contractor” of the entity against which NHTSA brings an enforcement action. The answer should be no, for at least two reasons. Manufacturers have complex corporate structures, and NHTSA should want all industry insiders with knowledge of safety defects to come forward, regardless of the specific corporate entity that employs them. For example, an employee of an automaker's foreign parent company should be eligible for an

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award if NHTSA brings an enforcement action against the automaker's domestic subsidiary. In addition, industry employees along the supply chain often have pertinent information about companies other than their own employers. An engineer for a part supplier may know that an automaker is aware of a safety defect in a vehicle system; if NHTSA penalizes the automaker for concealing the defect, the engineer should be eligible for an award, even if NHTSA does not penalize the part supplier.

At bottom, the rules should define the term "employee" expansively to encourage "any employee or contractor" in the industry who knows about safety risks to bring that information to NHTSA. No other whistleblower program requires a whistleblower to be an employee; NHTSA must take care to construe the phrase "employee or contractor" broadly to ensure the agency does not lose out on valuable safety information.

*"Original information" and "original source."* In order to be eligible for an award, the statute requires that a whistleblower provide to NHTSA "original information" that leads to the successful resolution of a covered action. *Id.* § 30172(b). The statute defines "original information" in part as information "not known to the Secretary from any other source, unless the individual is the original source of the information." *Id.* § 30172(a)(3)(B).

But what if NHTSA knows some information related to a problem with a particular type of vehicle, and a whistleblower comes forward with additional information about it? This hypothetical may come up with frequency. For example, NHTSA mines consumer complaints and other data to identify potential defects. Before a whistleblower comes forward, the agency may already be aware of a recurring problem, or even suspect a defect. In that situation, if a whistleblower later supplies critical details regarding the defect or the automaker's failure to report it, is the whistleblower the "original source," and has the whistleblower thus provided "original information" to NHTSA?

The answer should generally be yes. Like other whistleblower programs, NHTSA's rules should consider a whistleblower the "original source" of information if the whistleblower's disclosure "materially adds" to the information NHTSA possesses. *See, e.g.*, 17 C.F.R. § 240.21F-4(b)(6) (SEC regulations defining "original source"). The principle, again, is to expand—rather than to limit—the sources of information about critical safety defects who will take the risks to report to NHTSA.

*"Monetary sanctions."* The statute says that a whistleblower may be awarded if her information leads to an action that results in "monetary sanctions" over \$1 million, and defines "monetary sanctions" as "monies, including penalties and interest, ordered or agreed to be paid." 49 U.S.C. § 30172(a)(1)–(2). NHTSA may then pay a whistleblower between 10 and 30 percent of the monetary sanctions. *Id.* § 30172(b)(1). The regulations will need to answer whether NHTSA will include in "monetary sanctions" amounts an automaker agrees to pay to someone other than the United States Treasury. This may arise when a NHTSA settlement includes civil penalties that require an automaker to spend funds on safety investments, in addition to paying funds to the Treasury. *See, e.g., In re: Daimler Trucks North America, LLC*, AQ18-002 (Dec. 31, 2020) (of a total \$30 million civil penalty that the automaker "shall pay," \$5 million "shall be expended" by the automaker on specific projects to enhance safety).

The statute does not limit the monetary sanctions on which NHTSA calculates a whistleblower award to funds paid to the Treasury; the regulations must not do so either.

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NHTSA should be able to fashion a wide range of remedies to serve the public interest. But the whistleblower program rules need to ensure that insiders whose disclosures result in successful enforcement actions can get an award based on all forms of relief NHTSA obtains.

*Internal reporting.* The statute requires that most whistleblowers first report suspected violations of the Safety Act internally. *See* 49 U.S.C. § 30172(c)(2)(E). NHTSA should interpret the internal-reporting requirement narrowly and in a manner that reflects practical workplace realities.

For example, while the statute suggests a whistleblower must “attempt to report” information internally if an automaker “has an internal reporting mechanism in place to protect employees from retaliation,” *id.*, the text does not explain whether a whistleblower will have satisfied the requirement by reporting to a supervisor (or another designated first-line recipient) or will have to first exhaust all internal procedures. Likewise, NHTSA should recognize that whistleblowers who submit anonymous internal reports can satisfy the internal-reporting obligation, whether or not an automaker’s internal-reporting system allows anonymous reporting; this would reduce the risk that would-be whistleblowers who reasonably fear retaliation would not come forward. And related to the definition of “employee or contractor” discussed above, the rules should not require a whistleblower who provides information to NHTSA about a company where the whistleblower is no longer employed, or that never was the whistleblower’s employer, to satisfy the internal-reporting requirements. Separately, the rules will need to clarify requirements related to the timing or sequencing of internal reporting in relation to a disclosure to NHTSA.

NHTSA’s internal-reporting rules should be flexible and not create traps for the unwary. Congress gave NHTSA authority to waive internal-reporting requirements for “good cause,” *id.* § 30172(c)(2)(E)(iii), and the rules should use that power expansively. The rules should recognize that reporting internally is futile and perilous when high-level management is involved in the alleged wrongdoing.

For perspective, no other program requires internal reporting; in fact, the SEC rejected a similar requirement when industry urged it in rulemaking for that agency’s whistleblower program. *See* 76 Fed. Reg. 34,300, 34,301 (June 13, 2011) (noting, in issuing final rule, that commenters were “sharply divided” on the issues raised by a requirement that whistleblowers report through internal-compliance processes as a prerequisite to eligibility for an award). More recently, the drafters of the European Union’s new Whistleblowing Directive, which sets the standard for whistleblower protections in Europe, also rejected a mandatory internal-reporting requirement; while it may be valuable to promote internal reporting, they recognized that inflexibly demanding internal reporting would discourage whistleblowers.

At bottom, if NHTSA’s program rules expand who can be awarded, this crucial whistleblower program is likely to succeed. On the other hand, the more impediments NHTSA builds into the rules, the less successful the program will be.

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*Principle 2: The requirements to receive an award must be clear, so whistleblowers know, when deciding whether to submit information to NHTSA, that they will get an award if they fulfill those requirements.*

NHTSA must clarify the circumstances in which qualifying whistleblowers will be guaranteed an award, as well as the limited, exceptional circumstances in which a whistleblower who meets *all the legal requirements* will *not* get an award. Every successful whistleblower program—including the False Claims Act, and the programs run by the SEC, CFTC, and IRS—guarantees that whistleblowers who meet clearly articulated criteria will receive a monetary award of at least 10%. This certainty is paramount to motivating whistleblowers to bear the often extraordinary risks of coming forward.

Concretely, NHTSA’s rules should articulate a presumption of award entitlement to whistleblowers who meet established requirements, and describe the specific circumstances in which that presumption will be overcome. Only by doing so can NHTSA effectively create the relative certainty whistleblowers require.

If NHTSA retains discretion to deny an otherwise qualifying whistleblower an award for any reason or no reason at all, the whistleblower program will fail. A whistleblower greatly concerned about public safety, but equally fearful of retaliation and industry black-balling, will not disclose to NHTSA information about a critical safety defect if she cannot count on the benefit of a monetary award. Potential whistleblowers perform a cost-benefit analysis when deciding whether to come forward. And if the risks outweigh the rewards—which they nearly always will if whistleblowers cannot know the circumstances in which they will qualify for, but still be denied an award—insiders will not come to NHTSA.

*Principle 3: NHTSA and DOT leadership must demonstrate that whistleblowers play a key role in the agency’s enforcement work.*

Clear and consistent messaging from NHTSA and DOT leaders reinforcing the importance of whistleblowers is critical to the program’s success. Whistleblowers and their counsel, agency personnel, and industry will take cues from NHTSA and DOT. Every stakeholder should understand that NHTSA has embraced the whistleblower program and intends to take full advantage of whistleblowers as a source of information to protect public safety. There are at least three areas in which NHTSA and DOT can make headway on this goal.

First, NHTSA must make it simple for a potential whistleblower to blow the whistle. Right now, NHTSA and DOT’s websites contain no information about the whistleblower program or how to report suspected safety violations. That can be fixed. NHTSA should have a website and a telephone hotline for whistleblowers to submit information, learn about the whistleblowing process, and their rights under the law. NHTSA should also consider creating a dedicated whistleblower office, or at least dedicating staff to the whistleblower program. The SEC, IRS, and CFTC all have professionally managed whistleblower offices that are the entry point and hub for whistleblowers. NHTSA should do the same. Either way, NHTSA should anticipate that the volume of reports of violations from industry insiders will significantly increase once the agency establishes a whistleblower program; NHTSA should determine now how its staff will field inquiries and prioritize whistleblower submissions.

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Second, NHTSA and DOT leaders must publicly support the whistleblower program. NHTSA recently said the whistleblower program is a priority for the Biden Administration. See Ben Foldy, *Whistleblower Program for Auto Safety Has Yet To Launch, Years After Congress Mandated It*, WALL ST. JOURNAL (April 4, 2021), <https://on.wsj.com/3xvsSFd> (reporting that a NHTSA spokeswoman “said the new administration has made the [whistleblower] program a priority and is working on making rules for it”). Given that, both the NHTSA Administrator and the Secretary of Transportation should promote the program internally and externally, explaining how it helps NHTSA protect public safety and inviting insiders to come forward. Leadership support speaks not only to would-be whistleblowers and industry, but also to agency personnel. NHTSA leaders should anticipate some level of institutional resistance to whistleblowers within the agency that, if left unaddressed, can hobble the whistleblower program and sap its promise.

Other agencies with whistleblower programs regularly voice support for whistleblowers. For instance, the former chairwoman of the SEC, publicly heralded the SEC’s program as a “game changer.” Mary Jo White, *The SEC as the Whistleblower’s Advocate*, Speech at Ray Garrett, Jr. Corporate and Securities Law Institute-Northwestern University School of Law Chicago, Illinois (April 30, 2015), <https://bit.ly/3vthg41>. And the SEC often touts the “transformative effect” of the whistleblower program on that agency’s enforcement activity. See SEC, 2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program at 1, <https://bit.ly/2RYhBwS>. The CFTC, for its part, deploys agency staff to conferences, trade shows, and other industry gatherings to publicize its whistleblower program. See CFTC, 2020 Annual Report on the Whistleblower Program and Customer Education Initiatives at 9–10, <https://bit.ly/3tVII0t>. These actions show all stakeholders—would-be whistleblowers, industry, and agency staff—that regulators view whistleblowers as a key part of their enforcement efforts.

NHTSA leaders similarly should seek opportunities to publicize the whistleblower program. Program successes are low-hanging fruit: When NHTSA issues a whistleblower award, it should share that information in press releases and on social media. NHTSA should also publicly report data concerning its whistleblower program, such as the numbers of tips received and awards paid, like other agencies do. Such reports help the public understand the state of an agency’s program and let the agency tout its accomplishments. Success begets success—and creates opportunities to inform and attract other potential whistleblowers.

Finally, NHTSA should maximize the knowledge and resources whistleblowers have to offer. Successful whistleblower programs are built on the notion of whistleblowers collaborating with the government in the investigation and prosecution of legal violations. Whistleblowers often have technical expertise NHTSA can draw on; they are also frequently familiar with corporate recordkeeping practices, communications protocols, and decision-making hierarchies. With respect to foreign automakers, whistleblowers can access evidence overseas that is either unknown to or beyond the reach of U.S. investigators. Whistleblowers can help NHTSA draft document requests, craft questions for witness interviews, and evaluate responses from regulated entities. Such knowledge and assistance can be invaluable in investigations, and can save NHTSA significant resources.

In addition, NHTSA should leverage the resources of the specialized whistleblower bar. Every day, whistleblower lawyers work with the government on investigations, reviewing records, synthesizing facts, and analyzing legal issues. Also, because experienced whistleblower

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counsel select the strongest matters and provide focused and actionable information to regulators, NHTSA can expect such lawyers to help triage the information the agency receives.

NHTSA has existing legal authority to collaborate in this manner with whistleblowers and their counsel. *See* 49 U.S.C. § 30167(a)(2) (authorizing NHTSA to disclose confidential information it obtains in a safety-defect investigation “when relevant” to such an investigation, and vesting NHTSA with discretion to determine when such disclosure is “relevant”); *see also id.* § 30172(c)(1)(B)(iii) (contemplating that a whistleblower will provide assistance to NHTSA, and basing the amount of the whistleblower’s award in part on the “the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the covered action”). Because whistleblowers can provide valuable assistance to NHTSA, the agency should use this authority to maximize its investigative resources.

NHTSA’s program rules should make clear the agency can and will collaborate with whistleblowers in this way. It would seriously hamper the power of the program for NHTSA to conceive of it as a one-way street by which the agency merely takes in information from insiders, with no further role for whistleblowers or their counsel to play.

In sum, what NHTSA says and what NHTSA does matters. From top to bottom—in regulations, in leadership messaging, and in everyday agency practices—NHTSA should make clear that whistleblowers are central to the agency’s enforcement efforts.

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NHTSA’s whistleblower program can meaningfully advance the agency’s mission of ensuring vehicle safety. If it is to succeed, the program must be built properly. We stand ready to assist NHTSA in any way we can to establish an effective whistleblower program that will help protect the public. We look forward to working with you and your staff in this endeavor.

Sincerely,



Ari Yampolsky

Enclosure: Presentation