COHENMILSTEIN

Gary L. Azorsky
(267) 479-5702
(267) 479-5701
gazorsky@cohenmilstein.com

June 12, 2023

Via Fax

Docket Management Facility
U.S. Department of Transportation
1200 New Jersey Avenue SE
West Building, Ground Floor
Room W12-140
Washington, DC 20590
Fax: (202) 493-2251

Re: ***Comments on Proposed Rules Implementing the Whistleblower Provisions of the Vehicle Safety Act***
Docket No. NHTSA-2023-0014
RIN 2127-AL85

Dear Sir or Madam:

We respectfully submit these comments in response to the National Highway Traffic Safety Administration's ("NHTSA" or the "Administration") proposed rules implementing the whistleblower provisions of the Vehicle Safety Act (the "Proposed Rules").

As counsel for whistleblowers, we are appreciative of the Administration's acknowledgement of the critical role of whistleblowers and its efforts to establish an effective and transparent whistleblower program. Our experience highlights the importance of implementing clear rules that enable individuals to weigh the costs and benefits of the decision to become a whistleblower. The opportunity to receive an award is a significant incentive to whistleblowing, and therefore the incidence of whistleblowing will increase when rules are adopted that provide comfort to individuals that they will be entitled to an award if they satisfy the eligibility criteria and the government obtains a successful enforcement outcome based on their information. Conversely, rules that have the effect of making it less likely or predictable that an individual will receive an award will result in fewer individuals deciding to become whistleblowers and a less effective whistleblower program.

In this context, we respectfully offer below our comments and suggestions regarding the Proposed Rules.

Collected Monetary Sanctions:

Proposed Rule 513.2(b) would define "collected monetary sanctions" as "monies, including penalties and interest, ordered or agreed to be paid and that have been collected by the United States, pursuant to the authority in 49 U.S.C. 30165 or under the authority of 49 U.S.C. 30170."

This proposed rule would substantially narrow the scope of collected monetary sanctions that is covered by the plain language of the statute, which does not require that monetary sanctions be collected *by the government*, only that they be collected before an award is made. Cf. 49 U.S.C. §§ 31072(a)(2) and (b)(1).

The definition of "collected monetary sanctions" has important implications for whistleblowers because the government may choose to require a company to take action in lieu of making a monetary payment to the government itself in order to further its policy goals. For instance, the government may demand as part of a settlement that the company make payments to compensate victims of safety violations. The government might also demand that a company invest in or otherwise improve an aspect of its safety operations. In situations where a company is obligated to pay money to a third-party as a condition of a settlement agreement with the government, the better approach would be that such payment is in lieu of a payment (of an equal amount) to the government and is collected (for award purposes) when it is paid by the company. In situations where a company pays money to the government subsequent to the execution of a settlement agreement and due to non-performance of an obligation of that agreement, we agree with the commentary to the Proposed Rule that such payment should also be viewed as collected when paid.

In the above scenarios, the government's choice of how to structure the settlement of an enforcement action does not bear on the usefulness of the whistleblower's information and a whistleblower should not be penalized by a smaller (or no) award merely because the government made a policy decision to obligate a company to pay third-parties rather than itself or to make a payment to the government at a later date as a result of non-performance of a related obligation.

Related Actions:

Proposed Rule 513.2(b) would define "related administrative or judicial action" as "an action that was brought under 49 U.S.C. chapter 301 by the U.S. Department of Justice, the U.S. Department of Transportation, or the Agency and is based on the original information provided by the whistleblower."

This proposed definition overlaps entirely with the definition of "covered action" and would exclude from the whistleblower program a wide range of government enforcement measures that serve similar purposes and remedy similar laws as covered actions. Such a narrow definition would effectively write "related action" out of the statute. This is illustrated by the example offered in the commentary to the Proposed Rules – two enforcement actions against two companies based on the same facts supplied by the whistleblower – in which both actions would appear to qualify as "covered actions" under the statute without recourse to a separate "related action" definition.

A definition of "related action" that covers government enforcement activity that is substantially related to covered actions is particularly important in the largest cases and those that involve the most egregious conduct, as those are most likely to involve multiple government agencies and the prospect of criminal charges. Such cases are also likely to pose additional professional and personal risks and hardships to those who report violations, which makes the availability of a proportionate incentive critical in encouraging individuals to become whistleblowers.

It is noteworthy that the Securities and Exchange Commission has emphasized in its own whistleblower rulemaking that the incentives provided to whistleblowers should not be diminished because of the manner in which the government chooses to proceed in enforcing the laws that are the subject of the whistleblower's information. As the SEC explained in the course of adopting rules that included criminal Deferred Prosecution Agreements and Non-Prosecution Agreements within the set of "actions" on which whistleblower awards will be based: "whistleblowers who voluntarily provide original information that leads to such enforcement should not be disadvantaged because DOJ, a state attorney general in a criminal case, or the Commission, in the exercise of enforcement discretion, may elect to proceed in a form that does not include the filing of a complaint … or the institution of an administrative proceeding." 83 F.R. 34706 (July 20, 2018).

The commentary to the Proposed Rules mentions that the Administration would not have possession of all relevant information about the assistance that a whistleblower had provided to other government agencies in support of successful related actions. However, the SEC and other agencies with established whistleblower programs are in similar situations and yet include a wide range of government activity in their respective definitions of "related actions." Other government agencies, as well as whistleblowers and their counsel, are able to provide the Administration with sufficient information regarding the whistleblower's contribution to the resolution of other government actions to enable the Administration to determine the appropriate whistleblower awards for related actions.

Award Eligibility:

Proposed Rule 513.10 states that "[t]he determination of whether, to whom, or in what amount to make an award shall be in the discretion of the Administrator," and includes as one of a number of factors upon which the Administrator's determination will be based "such additional factors as the Administrator considers relevant."

This Proposed Rule greatly increases the discretion of the Administrator beyond that provided for by statute. In contrast, the statute expressly limits this discretion by making it "subject to the provisions in subsection (b)(1)," which contains the statutory range for awards of 10-30% of collected monetary sanctions. 49 U.S.C. § 30172(c)(1)(A).

As explained in the Proposed Rules, the Administration intends for this proposed rule to allow the Administrator to determine, for any reason she chooses, to override any or all eligibility and award provisions in the statute and elsewhere in the implementing regulations. Such extraordinary discretion would significantly impair the whistleblower program incentives because potential whistleblowers would be unable to make an informed decision whether they would be entitled to an award upon a successful enforcement action based on their information. Individuals considering the costs and benefits of becoming a whistleblower would have to factor into their calculus the possibility that even if they satisfy all eligibility criteria in the statute and elsewhere in the regulations, they may nonetheless be denied an award for unspecified reasons.

The commentary to the Proposed Rules identifies two examples of "rare and unusual" circumstances under which the Administration might utilize this unbounded discretion to deny an award to a whistleblower that is otherwise eligible. Both of these scenarios, which involve a whistleblower who has violated certain laws, are already contemplated and addressed by other eligibility provisions of the statute that expressly limit award disqualification to situations in which the whistleblower's own violations relate to the violations that are the subject of the enforcement action (see 49 U.S.C. §§ 30172(c)(2)(A) and (B)). In addition, the statutory floor of a whistleblower award of 10% of the collected monetary sanctions would become meaningless if the Administrator could determine that an otherwise eligible whistleblower should instead receive no award at all (0%).

The wide discretion suggested by Proposed Rule 513.10 would effectively re-write or eliminate these (and other) statutory provisions and would undermine the incentive structure of the whistleblower program.

Appeal Procedures:

Proposed Rule 513.11 would prohibit the payment of any whistleblower award in a covered action for which an award determination is the subject of a pending judicial appeal. The rationale for this Proposed Rule is that an award that is subject to appeal may impact the amount of an award to another whistleblower for the same covered action.

This Proposed Rule is overbroad in two ways. First, there is no reason to withhold payment of any uncontested portion of a whistleblower award determination during an appeal if there is only one potentially eligible whistleblower. For example, the sole eligible whistleblower in a matter might receive an award determination of $1 million for a particular covered action and might appeal the denial of an award for a second covered (or related) action. In this scenario, the $1 million award is not contested by the appeal and no other whistleblower has a potential claim on that amount, payment of which should not be withheld pending appeal.

Second, even in a multiple whistleblower scenario, there is no reason to withhold payment of a minimum uncontested amount to each whistleblower while withholding payment of any additional amounts that might be impacted by the outcome of a judicial appeal. For instance, if Whistleblower #1 receives an award determination of 20% of $10 million in collected monetary proceeds and Whistleblower #2 appeals a determination that denied her award application, the Agency should proceed to make an initial payment to Whistleblower #1 of the amount to which she would be entitled regardless of the outcome of the appeal (for example, one-half of the 20% whistleblower award) and subsequently make additional payments to Whistleblower #1 and/or Whistleblower #2 at the conclusion of the appeal.

Modifying this Proposed Rule to allow for the payment of uncontested award amounts notwithstanding judicial appeals would strengthen the incentives of the program and increase the rewards for individuals who report safety violations.

***

Thank you in advance for your consideration of the views expressed in this letter. Should you have any questions regarding the points we have raised, or any other issues related to the NHTSA's Whistleblower Program, please contact the Chair of our Whistleblower practice, Gary L. Azorsky, or Raymond M. Sarola at (267) 479-5700.

Sincerely,

/s/ Gary L. Azorsky
Gary L. Azorsky
Raymond M. Sarola