

AUTOMOTIVE**THE AUTO INDUSTRY'S SAFETY WHISTLEBLOWER PROGRAM: WHAT YOU NEED TO KNOW**

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The Motor Vehicle Safety Whistleblower Program that originally passed through the U.S. Senate last summer but stalled in the House of Representatives has finally been signed into law by President Obama as part of the Fixing America's Surface Transportation Act, a/k/a the FAST Act. Here's what every automotive original equipment manufacturer, parts supplier and dealership needs to know:

What is the Motor Vehicle Safety Whistleblower Program?

The MVSWP is a new "bounty" program designed to incentivize potential whistleblowers to report companies for attempting to cover up or failing to comply with reporting requirements for defects that are "likely to cause unreasonable risk of death or serious physical injury." The "bounty" is that the whistleblower can receive financial rewards for information that leads to a "successful resolution."

A bounty program? Is this new?

No. Federal bounty programs have been around since Abraham Lincoln signed the False Claims Act that created qui tam cases. Congress also created a similar program for securities crimes – The Dodd-Frank Whistleblower Program – in 2010.

This program is very similar to the Dodd-Frank program, but there are some differences. For instance, the Dodd-Frank program is much more expansive than the MVSWP, which is limited to defects that are likely to cause unreasonable risk of death or physical injury.

How does it work?

The program isn't incredibly complicated, at least as far as federal programs are concerned. It doesn't add new liabilities to auto companies. Nor does it increase reporting requirements. Simply put, the MVSWP provides cover – and a potential reward – to an automotive company employee or contractor who voluntarily provides original information about a motor vehicle defect, "noncompliance" or required reporting violation "likely to cause unreasonable risk of death or serious physical injury."

Sounds like a lot of qualifiers...

There are. If you were to outline the statutory requirements to be considered a "whistleblower" under the MVSWP, it would look something like this:

A whistleblower is

1. An employee OR contractor
2. Of an automotive manufacturer or supplier

3. VOLUNTARILY provides
4. ORIGINAL INFORMATION
5. Relating to a motor vehicle defect OR noncompliance OR any violation or alleged violation of
6. Any notification or reporting requirement
7. Which is likely to cause unreasonable risk of death OR serious physical injury.

What is "original information?"

The statute defines "original information" as "deriv[ing] from the independent knowledge or analysis of the individual" that wasn't already known from another source and is not "exclusively derived from an allegation made in a judicial or an administrative action, a hearing, an audit, or an investigation, or from the news media, unless the individual is a source of the information."

In other words, the person can't merely be reciting things that he heard from an original source. It must be first-hand information. And the whistleblower must be the first to report it.

Assume we have a whistleblower. Can we find out who it is?

The identity of the whistleblower, along with what information he provided, will be confidential unless it's required to be disclosed as part of a public hearing, the whistleblower gives written consent, or if the Transportation Department receives the information through an inspection or investigation and has the authority to release the information. Even if the information must be provided to a defendant, the Transportation Department must redact the information to protect the whistleblower's identity. And, as discussed below, even if the identity of the whistleblower were to be disclosed, another federal law makes it illegal for an employer to take any adverse action against a whistleblower.

You called it an incentive program. What is the incentive?

A qualifying whistleblower who provides information that leads to a "successful resolution in a covered action" may receive between 10 to 30 percent of the collected monetary sanctions. Considering that General Motors was sanctioned \$35 million in 2014 for the ignition switch scandal, the whistleblower could have been entitled to an award of over \$10 million. The \$1.2 billion fine of Toyota for delayed recalls could have resulted in a \$360 million reward. Clearly, whistleblowers stand to gain a significant monetary reward.

How much of a reward will be up to the Secretary of Transportation, who may consider whether the whistleblower attempted to report the information internally, the significance of the original information to the resolution, how much the whistleblower assisted the Feds, and any additional relevant factors. It will be interesting to see the awards in future whistleblower cases.

Wasn't this already part of the Moving Ahead for Progress in the 21st Century Act of 2012 (MAP-21 Act)?

It's similar. The MAP-21 Act made it illegal for an auto company, supplier or dealer to discriminate against or take adverse employment action against an employee who reports or is about to report a defect, noncompliance or any violation of a motor vehicle defect reporting obligation. It allows for complaints to be filed with the Secretary of Labor, who is charged with investigating the complaint and adjudicating the dispute. The secretary can order the employee to be reinstated or award damages and attorney fees to the complainant.

The FAST Act builds on this by also awarding any whistleblower 10 to 30 percent of any resulting settlements, fines or civil penalties.

Will this increase the number of defect investigations against auto companies?

If the SEC Whistleblower Program is any indication, this will almost certainly lead to more enforcement actions eventually, but not at first. In 2012, the program's first full year, the SEC received 3,001 tips. This number has gradually increased by around 300 more tips each year since, culminating 3,923 tips during 2015.

But it wasn't just the volume of tips that has increased enforcement as much as the quality. As the program has aged, tipsters have hired attorneys to help them collect the appropriate data to report, thus increasing the likelihood of receiving an award. From all of the 14,116 tips received during the life of the program, the SEC has paid out \$54 million to just 22 whistleblowers. But, \$37 million of that was paid out in 2015 alone.

So is there anything we can do?

Yes, there is! Congress built exceptions into the MVSWP that deny a reward to otherwise qualifying whistleblowers in certain circumstances, such as criminal activity by the whistleblower, or if he deliberately caused or substantially contributed to the violation.

One of those exceptions provides auto companies with a way to ensure its employees will not qualify for a reward: By creating an internal reporting mechanism to protect employees from retaliation. Having such an internal reporting mechanism would force the whistleblower to meet another qualifying element (He must have a reasonable belief he would have been retaliated against anyway, have a reasonable belief that the information was already internally reported, investigated or otherwise made known to the company, or "if the Secretary has good cause waive this requirement.") If you already established a policy and a procedure to encourage the reporting of potential violations and to protect whistleblowers from retaliation, as major suppliers and OEMs have, you should be all set. If not, such policies and procedures should be established quickly.

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