TESTIMONY OF CLEVELAND LAWRENCE III
CO-EXECUTIVE DIRECTOR, TAXPAYERS AGAINST FRAUD
BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON COMMERCE, MANUFACTURING, AND TRADE
REGARDING
"LEGISLATIVE HEARING ON VIN DATABASE AND
AUTO WHISTLEBLOWER BILLS"
FRIDAY SEPTEMBER 25, 2015

Summary of Testimony

The proposed Motor Vehicle Whistleblower Safety Act is an admirable attempt to incentive whistleblowers to expose safety issues within the automobile industry that might result in the imposition of monetary sanctions from the U.S. Department of Transportation. However, the bill fails to recognize several important principles that are essential to an effective whistleblower program. We have a thirty-year track record of success recovering stolen taxpayer dollars through the qui tam provisions of the False Claims Act, and that success has been replicated at the state level – as there are now 30 state FCA statutes – and within multiple federal agencies, including at the IRS, SEC, and CFTC – which have created whistleblowers programs to expose the most substantial fraud schemes against those agencies. All of these programs guarantee successful whistleblowers minimum rewards for their efforts and information, and none requires employee-whistleblowers first to report the misconduct to their employers before providing the information to the government.

By ignoring these fundamental principles of effective whistleblower programs, the proposed Motor Vehicle Whistleblower Safety Act will inevitably fail to incentivize whistleblowers to come forward, due to fears of reprisal in the workplace coupled with concerns that no reward will be paid even after the government collects monetary sanctions based on their work. I encourage the Subcommittee to look to False Claims Act laws, as well as the IRS, SEC, and CFTC whistleblower programs for guidance, and I offer my resources to assist the Subcommittee in any way.

Full Testimony of Cleveland Lawrence III
Co-Executive Director, Taxpayers Against Fraud
Before the
United States House of Representatives
Committee on Energy and Commerce
Subcommittee on Commerce, Manufacturing, and Trade
Regarding
"Legislative Hearing on VIN Database and
Auto Whistleblower Bills"
Friday September 25, 2015

Good morning Mr. Chairman and members of the Subcommittee, and thank you for inviting me to testify at today's hearing on the proposed Motor Vehicle Safety Whistleblower Act. My name is Cleveland Lawrence III and I am a Co-Executive Director of Taxpayers Against Fraud ("TAF") and its sister organization, Taxpayers Against Fraud Education Fund ("TAFEF"), two national non-profit organizations dedicated to combating fraud against taxpayer dollars through the promotion and protection of False Claims Act ("FCA") laws and *qui tam* provisions – which allow whistleblowers with evidence of fraud against the government to file suit on behalf of the government in exchange for financial rewards of at least 15% and up to 30% of the government's recovery if those lawsuits are successful. My organizations also support the goals of the IRS, SEC, and CFTC whistleblowers programs, which do not have *qui tam* provisions, but still offer monetary rewards to whistleblowers in exchange for original information regarding significant tax, securities and commodities fraud. I first joined TAFEF in 2008, and became Co-Executive Director in 2013. I am an attorney by training and spent the first six years of my career as an associate at international law firm, Weil, Gotshal & Manges, LLP, where my practice included defending whistleblower claims brought under the federal False Claims Act, among a variety of other commercial litigation matters.

Having examined whistleblower claims from both sides over the past fifteen years, I can say without reservation that the federal False Claims Act[1] is the model statute for any effective whistleblower law or program. Since it was overhauled in 1986, the False Claims Act has returned more than $40 billion to the U.S. Treasury.[2] This result is due in large part to the significant role whistleblowers play in exposing fraud on the federal fisc. For example, according to the U.S. Department of Justice, federal False Claims Act cases recovered $5.69 billion for the government in fiscal year 2014, with nearly $3 billion of that total resulting from lawsuits filed by whistleblowers.[3]

The unparalleled success of the False Claims Act over a nearly 30-year period should not be – and has not been – ignored. More than half the States and the District of Columbia now have False Claims Act laws to protect their respective taxpayer dollars; and at the federal government's urging,[4] most of these state laws generally mirror their federal counterpart. Similarly, when the Tax Relief and Health Care Act of 2006[5] revamped the IRS whistleblower program in order to combat the most significant tax fraud schemes, the new program adopted several key features modeled after the False Claims Act.[6] Moreover, when the SEC and CFTC whistleblower offices were created to combat fraud on the securities and commodities

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[1] 31 U.S.C. 3729 *et seq.*

[2] *See* Civil Division, U.S. Department of Justice, *Fraud Statistics – Overview*, Nov. 20, 2014, *available at* *http://www.taf.org/DOJ-FCA-Statistics-2014.pdf* (last visited Sept. 22, 2015).

[3] *See* U.S. Department of Justice Office of Public Affairs, *Justice Department Recovers Nearly $6 Billion from False Claims Act Cases in Fiscal Year 2014*, Nov. 20, 2014, *available at* http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014 (last visited Sept. 22, 2015).

[4] The Deficit Reduction Act of 2005, Pub.L. 109-171, amended section 1909 of the Social Security Act by adding a provision that incentivizes States to enact FCA legislation that is at least as effective as the federal law in facilitating *qui tam* suits. States that enact qualifying False Claims Act laws will receive a ten percentage point increase when splitting FCA recoveries in Medicaid cases with the federal government.

[5] Pub.L. 109-182,

[6] *See* Internal Revenue Service, *History of the Whistleblower/Informant Program*, Feb. 20, 2015, *available at*, *http://www.irs.gov/uac/History-of-the-Whilstleblower-Informant-Program (last visited Sept. 22, 2015)* (discussing the program's reward structure).

marketplaces as part of 2010's Dodd-Frank Wall Street Reform and Consumer Protection Act, both Commissions looked to the False Claims Act for guidance and adopted key FCA provisions.[7]

While I applaud and fully endorse the effort to enact whistleblower legislation to make automobiles and road travel safer, I cannot support the proposed Motor Vehicle Safety Whistleblower Act in its current form, as the bill suffers from some of the most serious deficiencies that have already been recognized and corrected in the False Claims Act, IRS, SEC, and CFTC contexts. I will now discuss the bill's two primary weaknesses – either of which is significant enough to derail the program.

Lack of Guaranteed Minimum Rewards

Sections 30172 (b)(1) and (c)(1)(A) of the bill grant the Secretary of Transportation unfettered discretion over the amount to award (up to the maximum) to whistleblowers whose efforts and information resulted in the government recovering monetary sanctions from a motor vehicle manufacturer, part supplier, or dealership – including the option to award nothing at all. Such a framework will render the whistleblower program totally ineffective. Decades of experience have made clear that any whistleblower program will inevitably fail unless it provides a guaranteed minimum award for those who risk their careers to come forward; and since the Motor Vehicle Safety Whistleblower Act would only allow employees to serve as whistleblowers, every individual who blows the whistle under the program will risk his or her job to do so.

Before the False Claims Act was amended in 1986, it lacked a minimum reward structure and was a failure – and only recovered $54 million during the prior year.[8] Since the Act was

[7] *See* Pub. L. No. 111-203, §§ 748(b)(1)(a) and 922(a)(b)(1)(a) (creating reward structures similar to the FCA model).

amended to include guaranteed minimum rewards, whistleblower claims have steadily increased and annual recoveries have been in the billions in recent years.[9] Similarly, before Dodd-Frank was enacted, the SEC for two decades had operated a bounty program for whistleblowers to report insider trading violations. That program was a failure, though, as it did not guarantee minimum rewards to successful whistleblowers; only six whistleblowers received rewards under the program, and the total awarded was slightly more than $1 million.[10] Whistleblowers were simply unwilling to risk their livelihood without the assurance of some compensation for doing so. Dodd-Frank addressed this shortcoming by providing mandatory 10% minimum rewards to successful whistleblowers under the SEC whistleblower program.[11] Since the change was made, whistleblowers have flocked to the SEC with information regarding serious securities law violations. According to the SEC Whistleblower Office's 2014 Annual Report to Congress, last fiscal year alone the Office paid nine whistleblower rewards, including a $30 million payment.

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[8] U.S. Congress Hearing of the Senate Committee on the Judiciary, "The False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century," testimony of Michael Hertz, Deputy Assistant Attorney General, Department of Justice Civil Division, Feb. 27, 2008, *available at* http://www.judiciary.senate.gov/imo/media/doc/hertz_testimony_02_27_08.pdf (last visited Sept. 22, 2015).

[9] *See* DOJ Press Release, *supra*, note 2.

[10] Securities and Exchange Commission, Office of Inspector General, Office of Audits, *Assessment on the SEC's Bounty Program,* March 29, 2010, at p. 4-5, *available at* http://www.sec.gov/about/offices/oig/reports/audits/2010/474.pdf (last visited Sept. 22, 2015) (discussing the less than $200,000 in rewards paid to only five whistleblowers during the 20-year history of the bounty program); Security and Exchange Commission, Litig. Release No. 21601, *SEC Awards $1 Million for Information Provided in Insider Trading Case*, July 23, 2010, *available at* *http://www.sec.gov/litigation/litreleases/2010/lr21601.htm* (last visited September 22, 2015) (announcing the final, $1 million reward paid under the old bounty program to a sixth whistleblower – two days after Dodd-Frank was enacted).

[11] *See* Pub. L. No. 111-203 § 922(a)(b)(1)(a).

The IRS also recognized the importance of guaranteeing minimum rewards to successful whistleblowers, and changed its primary whistleblower program accordingly.[12]

Despite this universal trend toward guaranteed minimum rewards, the bill moves in the opposite direction. The concept of "incentivized integrity" works. However, a whistleblower program that does not ensure even a minimum reward to whistleblowers who produce results can offer little more than an illusory promise. Moreover, although the bill provides that whistleblowers will have the right to appeal the Secretary's award determinations, since the Secretary's determinations are wholly discretionary,[13] the appellate right is effectively rendered toothless. A whistleblower program that suffers from these deficiencies will be doomed from the start.

Internal Reporting Requirement

I cannot think of any effective law enforcement paradigm that requires notification to potential wrongdoers before prosecuting officials will initiate an investigation of alleged violation. In fact, the FCA takes exactly the opposite approach, as it specifies that whistleblowers must report the frauds they discover to the government by filing their complaints under seal, to allow the government an opportunity to investigate the fraud allegations in secret. The SEC and CFTC whistleblower programs take a slightly different approach, but still allow whistleblowers to decide whether or not to report internally before contacting appropriate government officials. Under the SEC and CFTC whistleblower programs, employees who report

[12] *See* Internal Revenue Service, *What Happens to a Claim for an Informant Award (Whistleblower)*, Feb. 20, 2015, *available at* http://www.irs.gov/uac/What-Happens-to-a-Claim-for-an-Informant-Award-(Whistleblower) *(last visited Sept. 22, 2015).*

[13] *See* Bill at section 30172 (h)(1).

internally before contacting the government will receive a "plus" factor when a reward determination is made.[14]

In my experience, whistleblowers often prefer to report internally – if a trustworthy mechanism is available. FCA laws and effective whistleblower programs have created incentives for corporate internal compliance programs to work. However, not all internal compliance programs are created equal. In addition, the most significant fraud schemes are often directed from the top. Over the years, I've witnessed countless examples of the serious consequences whistleblowers can suffer when they report internally to ineffective compliance programs that are designed to ferret out the "snitches." When whistleblowers know that their internal reports will fall on deaf ears within their companies, they may feel compelled immediately to report their concerns to the government – and they should be encouraged to do so.

I recognize that the bill permits whistleblowers to disregard the internal reporting requirement under certain circumstances: (1) when the whistleblower reasonably believes that reporting internally will result in retaliation; (2) when the whistleblower reasonably believes that the information was already reported internally; (3) when the whistleblower reasonably believes that the information was already the subject of an internal investigation by the company; or (4) when the whistleblower reasonably believes that the company already knew about the fraud.[15] However, these "exceptions" completely swallow the rule whenever a whistleblower is alleging fraud and not mistakes or mere negligence. Each exception is based on the premise that

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[14] *See e.g.* Securities and Exchange Commission Office of the Whistleblower, *Frequently Asked Questions*, at no. 6, *available at* http://www.sec.gov/about/offices/owb/owb-faq.shtml#P13_4032 (last visited Sept. 22, 2015); Commodity Futures Trading Commission Whistleblower Program, *Frequently Asked Questions*, at no. 7, *available at* http://www.cftc.gov/ConsumerProtection/WhistleblowerProgram/WhistleblowerFrequentlyAskedQuestions/index.htm#question7 (last visited Sept. 22, 2015).

[15] *See* Bill at section 30172 (c)(2)(E).

whistleblowers should be excused from the internal reporting requirement if they reasonably believe that their employer is knowingly engaging in the conduct. This "knowing" requirement is central to every fraud case, and therefore, whenever a whistleblower reasonably believes that his or her employer is engaged in fraud, then he or she will qualify for the exception to the rule. Since the exceptions will almost always swallow this rule, the rule is unnecessary. A program that forces whistleblowers to reveal themselves to their employers – thereby risking their jobs and livelihoods before a government investigation commences – cannot realize its full potential.

Correcting these two issues will substantially improve the likelihood of a robust motor vehicle safety whistleblower program. As the bill is considered further, it would be my pleasure to offer my resources to assist the Subcommittee in any way. Thank you for allowing me to testify today. I am happy to answer your questions.