**Responses of Cleveland Lawrence III**
**Co-Director of Taxpayers Against Fraud**

**The Honorable Jan Schakowsky**

1. I am concerned about doing as much as we can to protect people who put their livelihoods in jeopardy to speak out about public safety risks. And I was a proponent of the anti-retaliatory language included in MAP-21 when it passes three years ago. This whistleblower bill is directed at incentivizing whistleblowers. But in two separate places in the text, it requires that potential whistleblowers first approach someone at their company and report the defect internally. In most cases, whether they do so or not could affect whether they qualify for an award under this bill, as well as the amount of the award if they do qualify.

    a. What effect should we expect these internal reporting requirements to have on potential whistleblowers?

    **The internal reporting requirements will absolutely undermine the bill's goal of incentivizing whistleblowers to come forward and report public safety risks within the automobile industry. It cannot be disputed that quality internal compliance programs exist and can work very well to assist ethical companies that want to play by the rules. In my experience, the vast majority of employee-whistleblowers want their companies to correct misconduct without government intervention; these individuals do not necessarily want to go through the process of publicly blowing the whistle on their employers, which not only carries the risk of termination, demotion or other forms of retaliation, but also brings the stresses of being ostracized by their fellow employees and the potential of being blacklisted within their chosen field once they have been identified as a "troublemaker" within the industry. Employees are often forced to look for assistance outside their companies when they recognize that reporting misconduct internally will not result in change.**

    **The bill fails to recognize that not all internal compliance programs are the same, and that lying, cheating and stealing has become a business model for many companies. Within some corporate environments, compliance officers are actually nothing more than "compliant" officers, who are fully aware of their respective companies' misconduct – which is often directed from management. In such companies, blowing the whistle through the internal compliance program will do nothing more than place a target on the employee. Moreover, once employers identify the potential whistleblowers within their companies, they generally cut off those employees' access to additional information regarding the misconduct – often by simply firing the employees. Just as these companies see paying fines and compensating victims as a "cost of doing business," so too do they see any potential exposure from employee retaliation claims. In these situations, the effect on the companies' bottom line may be minimal (and will often be passed along to stockholders anyway), but the effect on the employees may be far worse, as it may involve protracted litigation and immediate searches for new employment. To make**

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**matters worse, these individuals will no longer be able to gather information that could assist the government in quickly resolving misconduct – and preventing public safety crises.**

**We should trust employees to understand the culture within their respective organizations, and we should allow employees the freedom to determine whether reporting misconduct up the corporate chain of command or directly to government officials will result in a faster, better resolution of the problems they've identified. By requiring employees to report internally before contacting appropriate government officials, the bill will likely <u>dis-incentivize</u> whistleblowers from coming forward.**

b. Are the exceptions to the internal reporting requirement in the bill enough to provide cover for people who feel morally obligated to speak out but are concerned about retaliation from their employer?

**The bill wisely recognizes that employees who report their employers' misconduct face the risk of retaliation. Consequently, the bill includes four exceptions to its internal reporting requirement – each of which generally arises when the employee reasonably believes that the company already knows about the misconduct.**

**As an initial matter, the bill is silent with respect to whom within the company must be aware of the misconduct for any of the exceptions to apply; certainly in every instance the employee-whistleblower will be aware of the misconduct, but the bill does not address whether the employee's knowledge (regardless of his/her position within the company) will be sufficient to place the company on notice for the purposes of triggering any of the exceptions. As a result, the bill needlessly introduces confusion into a process that should be as straightforward as possible for employees who must weigh a variety of factors before deciding whether or not to participate in a corporate internal compliance program and/or a government whistleblower program. In addition, since the exceptions are based on whether the employee's belief was "reasonable," any employee who might choose to forgo the corporate internal compliance program will still be left to wonder whether or not the Secretary of Transportation – in his/her unfettered discretion – will ultimately agree that the employee's decision was reasonable or will instead decide to withhold an award from the employee entirely.**

**The uncertainly associated with many of the bill's most important provisions does not provide the comfort and security that employees require before they will decide to risk their livelihoods to expose misconduct within their companies. Thus, the exceptions to the internal reporting requirement are insufficient to incentivize employees from coming forward.**

c. The whistleblower bill calls on the Secretary of Transportation and the rest of DOT to avoid revealing the identity of whistleblowers. But how does the internal reporting

requirement affect confidentiality and the effort to protect the identity of whistleblowers once they decide to report their employer?

**Again, the bill prudently identifies a significant issue faced by whistleblowers – namely, a desire for anonymity – but the bill fails properly to address that issue. The bill outlines several measures the Government will undertake to maintain the confidentiality of its whistleblowers, but the bill's internal reporting requirement undercuts those measures because it fails to protect whistleblowers' identities from their employers – about whom whistleblowers are primarily concerned, due to fears of reprisal and blacklisting. As a result, the bill fails to serve one of whistleblowers' most important needs, which will result in fewer whistleblowers coming forward.**

2. This whistleblower bill gives the Secretary of Transportation broad discretion in determining awards to whistleblowers. Other whistleblower bounty provisions, like Dodd Frank for example, give the government discretion as to the amount, but require that some award be given as long as certain conditions are met. In comparison, this bill would give the Secretary of Transportation complete discretion in whether to give an award at all, and merely prescribes criteria for the Secretary to consider. How will broad discretion for the Secretary in determining awards affect the likelihood that whistleblowers come forward?

**The bill's most problematic provision grants the Secretary of Transportation unfettered discretion to determine awards under the whistleblower program – including no award at all. Thus, employees who do everything the bill requires, by risking retaliation and reporting misconduct through the company's internal compliance program; later reporting the problems to the government after the company refuses to correct them; and eventually succeeding in exposing public safety concerns that result in significant monetary sanctions against the company, might still be denied awards through no fault of their own. This framework does not provide a real incentive for coming forward; instead, it offers an illusory promise. Furthermore, although the bill grants whistleblowers the right to appeal the Secretary's decisions, that provision is also ineffectual, since it recognizes the Secretary's unlimited power in this regard, and thereby offers whistleblowers no real basis on which to appeal. Once again, the bill inserts uncertainties into the process, which only discourages employees from blowing the whistle.**

**<u>Every</u> successful whistleblower program I am aware of – including the federal and state False Claims Act laws; the IRS whistleblower program; the SEC whistleblower program; and the CFTC whistleblower program – guarantees minimum awards to successful whistleblowers who follow the program's rules. Unfortunately, the bill does not, and therefore, it simply cannot succeed. Rather than grant the Secretary unfettered discretion, the bill should follow the lead of these other whistleblower programs, and authorize financial awards within a predetermined range that guarantees whistleblowers a minimum percentage of the government's recovery. Only then will whistleblowers have a real incentive to expose misconduct under the program.**

3. Overall, will this bill incentivize whistleblowers?

> **This bill will not incentivize employees to become whistleblowers, as it injects unnecessary complications and ambiguities into the process. In fact, the bill will likely discourage whistleblowing, which can only make the automobile industry less safe for all of us.**

Thank for you allowing me to testify before the Committee on this important matter. Should you have any additional questions, I would be happy to answer them.

Best regards,

/s/ Cleveland Lawrence III

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