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SENATE
Report

114-13

Calendar No. 36

MOTOR VEHICLE SAFETY WHISTLEBLOWER ACT
R E P O R T
of the
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
on
S. 304

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April 13, 2015- Ordered to be printed

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	ONE HUNDRED FOURTEENTH CONGRESS
	FIRST SESSION
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Mr. THUNE, from the Committee on Commerce, Science, and Transportation, submitted the following

R E P O R T

[To accompany S. 304]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 304) to improve motor vehicle safety by encouraging the sharing of certain information, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill (as amended) do pass.

PURPOSE OF THE BILL

The purpose of S. 304, the Motor Vehicle Safety Whistleblower Act, is to incentivize a motor vehicle manufacturer, part supplier, or dealership employee or contractor to voluntarily provide the Secretary of Transportation (Secretary) information relating to any motor vehicle defect, noncompliance, or any violation of any notification or reporting requirement that is likely to cause unreasonable risk of death or serious physical injury. S. 304 would authorize the Secretary to pay discretionary awards to whistleblowers who contribute original information that leads to recoveries of monetary sanctions exceeding $1 million.

BACKGROUND AND NEEDS

The Department of Transportation's (DOT) National Highway Traffic Safety Administration (NHTSA) is the Federal agency responsible for highway traffic safety and motor vehicle safety standards. The Highway Safety Act of 1970 (84 Stat. 1739) established NHTSA as a successor to the National Highway Safety Bureau to carry out a congressional mandate to reduce the number of deaths, injuries, and economic losses resulting from motor vehicle crashes on the Nation's highways. 1

[Footnote] While traffic fatalities and injuries have declined over the last few decades in part due to various safety features such as seat belts, air bags, and vehicle stability control systems, in 2013, more than 32,000 Americans lost their lives in motor vehicle crashes and an additional 2.3 million people were injured in motor vehicle crashes. 2

[Footnote]

[*Footnote 1:* As established by the National Traffic and Motor Vehicle Safety Act of 1966 (80 Stat. 718).]

[*Footnote 2:* U.S. Department of Transportation, National Highway Traffic Safety Administration, 2013 Motor Vehicle Crashes: Overview: DOT HS 812 101, December 2014, at http://www-nrd.nhtsa.dot.gov/Pubs/812101.pdf.]

According to NHTSA, more than 63.9 million vehicles were recalled in the United States in 2014, which is nearly three times the number recalled in 2013. 3

[Footnote] In addition, in 2014 NHTSA collected more than $126 million in civil penalties from companies, an amount exceeding the total amount collected by the agency in its entire 43-year history. 4

[Footnote] Some high-profile recalls led to the record-number of recalls in 2014, including those related to the General Motors (GM) ignition switch defect and the Takata air bag defects, both of which resulted in numerous serious injuries and deaths. NHTSA's Office of Defects Investigation (ODI) is charged with collecting and analyzing safety-related data and identifying potential defects. In 2014, Congress and the public questioned ODI's effectiveness in light of GM's delay in reporting the ignition switch defect, as well as the delays in investigating the Takata air bag defects.

[*Footnote 3:* Christopher Jensen, `A Record Year of Recalls: Nearly 64 Million Vehicles,' New York Times, February 12, 2015, at http://www.nytimes.com/2015/02/13/business/auto-safety-recalls-set-record-of-nearly-64-million-vehicles-in-2014.html.]

[*Footnote 4:* U.S. Department of Transportation, National Highway Traffic Safety Administration, `U.S. Department of Transportation Fines Honda $70 Million for Failing to Comply with Laws That Safeguard the Public,' press release, January 8, 2015, at

http://www.nhtsa.gov/About+NHTSA/Press+Releases/2015/DOT-fines-Honda-$70-million.]

In 2012, the Moving Ahead for Progress in the 21st Century Act (MAP-21; 126 Stat. 405) put in place whistleblower protections for employees of motor vehicle manufacturers, part suppliers, and dealerships, protecting employees from discrimination or being discharged for, among other things, providing information to the employer or to DOT relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of chapter 301 of title 49, United States Code. S. 304 is intended to enhance the whistleblower protections in MAP-21 by incentivizing employees and contractors in the automotive industry to provide information about defects, instances of noncompliance, and motor vehicle safety reporting violations as early as possible to help improve automobile safety.

SUMMARY OF PROVISIONS

S. 304, the Motor Vehicle Safety Whistleblower Act, as amended in Committee, would:

g authorize the Secretary to pay an award to one or more whistleblowers of not more than 30 percent in total of collected monetary penalties resulting from the DOT or Department of Justice (DOJ) administrative or judicial action(s) brought under chapter 301 of title 49, United States Code, that total more than $1 million, if original information from a whistleblower led to the action;

g apply to employees and contractors of motor vehicle manufacturers, part suppliers, and dealerships who voluntarily provide to the Secretary original information not known to the Secretary relating to any motor vehicle defect, noncompliance, or any violation of any notification or reporting requirement that is likely to cause unreasonable risk of death or serious physical injury;

g provide for considerations relevant to the determination of whether, to whom, and in what amount to provide an award, as well as circumstances when the Secretary may deny an award;

g protect the confidentiality of the whistleblowers, when appropriate; and

g direct the Secretary to issue regulations on the requirements of the Act.

LEGISLATIVE HISTORY

Chairman Thune originally introduced this bill in the 113th Congress on November 20, 2014, as S. 2949, with Senator Nelson as the lead cosponsor. That same day, the Committee held a hearing to examine the Takata air bag recalls, where the purpose and need for the bill were also discussed. On December 3, 2014, the Committee held a transportation safety nominations hearing to examine the nomination of Dr. Mark Rosekind to be Administrator of NHTSA, at which Senators and Dr. Rosekind discussed

challenges facing the agency and the record number of automobile recalls. Previously in 2014, the Committee's Subcommittee on Consumer Protection, Product Safety, and Insurance, then led by Senators McCaskill and Heller, held two hearings to examine the GM ignition switch recalls (on April 2, 2014, and July 17, 2014) and one hearing on general NHTSA oversight on September 16, 2014.

In the 114th Congress, on January 29, 2015, Chairman Thune reintroduced S. 304, the Motor Vehicle Safety Whistleblower Act, which was referred to the Committee on Commerce, Science, and Transportation. The bill is cosponsored by Ranking Member Nelson and Senators Heller, McCaskill, Klobuchar, Ayotte, Moran, and Blumenthal.

On February 26, 2015, in an open Executive Session, the Committee considered the bill, which was modified by a substitute amendment. The Committee, by voice vote, ordered S. 304 to be reported favorably, as amended.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

S. 304--Motor Vehicle Safety Whistleblower Act

Summary: S. 304 would award a portion of penalties levied on certain companies that manufacture motor vehicles or parts to individuals who provide information that leads to the imposition of those penalties (those individuals are known as whistleblowers). Based on information from the National Highway Traffic Safety Administration (NHTSA), CBO estimates that in any one year, the effect of enacting S. 304 would likely be small, but that over the 2015-2025 period, enacting S. 304 would increase direct spending by $3 million. Because enacting the legislation would affect direct spending, pay-as-you-go procedures apply. Enacting the legislation would not affect revenues.

S. 304 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: CBO estimates that enacting S. 304 would increase direct spending by less than $500,000 each year and by $3 million over the 2015-2025 period. The costs of this legislation fall within budget function 400 (transportation).

Basis of estimate: S. 304 would authorize the Secretary of Transportation at his discretion, to award to a whistleblower up to 30 percent of any civil penalty that exceeds $1 million and is collected from a company that manufactures motor vehicles or parts with serious defects or that violates certain safety laws. Information from NHTSA indicates that, since 2010, the average penalty levied for violations of vehicle safety laws

was about $10 million. Information from whistleblowers has rarely been used to impose those penalties according to NHTSA.

Based on information from NHTSA about its historical use of information from whistleblowers, CBO expects that over the 2016-2025 period, one penalty will be imposed by NHTSA because of information provided by a whistleblower. Assuming a whistleblower is awarded 30 percent of an average sized penalty this provision would increase direct spending by $3 million over the 2015-2025 period. Because CBO cannot predict the timing for when any whistleblower awards would be made, CBO estimates there is a small chance that such spending would occur in each of the next 10 years.

Pay-As-You-Go considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. The net changes in outlays that are subject to those pay-as-you-go procedures are shown in the following table.

CBO ESTIMATE OF PAY-AS-YOU-GO EFFECTS FOR S. 304, AS ORDERED REPORTED BY THE SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION ON FEBRUARY 26, 2015

	By fiscal year, in millions of dollars--										
	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2015-2020	2015-2025
NET INCREASE IN THE DEFICIT													
Statutory Pay-As-You-Go Impact	0	0	0	0	0	0	0	0	0	0	1	3	

Intergovernmental and private-sector impact: S. 304 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimate prepared by: Federal costs: Sarah Puro; Impact on state, local, and tribal governments: Melissa Merrell; Impact on the private sector: Amy Petz.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported:

NUMBER OF PERSONS COVERED

S. 304, as reported, would not impose any new regulatory requirements on businesses. However, the bill would require the Secretary to promulgate rules on the requirements of the Act. Thus, whistleblowers who voluntarily provide information to the Secretary would be subject to the requirements of the Act and the rules in order to be eligible for an award.

ECONOMIC IMPACT

Enactment of this legislation is not expected to have an adverse impact on the Nation's economy.

PRIVACY

S. 304 is not expected to have an adverse impact on the personal privacy of individuals, as whistleblowers would voluntarily provide information to the Secretary and provisions to protect a whistleblower's identity would continue to apply.

PAPERWORK

S. 304 would not measurably increase paperwork requirements for most private individuals or businesses.

CONGRESSIONALLY DIRECTED SPENDING

In compliance with paragraph 4(b) of rule XLIV of the Standing Rules of the Senate, the Committee provides that no provisions contained in the bill, as reported, meet the definition of congressionally directed spending items under the rule.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title.

This section would provide that the legislation may be cited as the `Motor Vehicle Safety Whistleblower Act.'

Section 2. Motor vehicle safety whistleblower incentives and protections.

This section would add a new section 30172 at the end of chapter 301 of title 49, United States Code, entitled 'Whistleblower Incentives and Protections.'

Section 30172(a) would define the terms `covered action,' `monetary sanctions,' `original information,' `part supplier,' 'successful resolution,' and `whistleblower.' Of particular importance, `covered action' means any administrative or judicial action, including any related administrative or judicial action, brought by the Secretary or the Attorney General under chapter 301 that, in the aggregate, results in monetary sanctions exceeding $1 million.

In addition, `whistleblower' would mean any employee or contractor of a motor vehicle manufacturer, part supplier, or dealership who voluntarily provides to the Secretary original information relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of chapter 301 that is likely to cause unreasonable risk of death or serious physical injury.

Section 30172(b) would authorize the Secretary, if the original information led to the successful resolution of a covered action, to pay an award or awards to one or more whistleblowers in an aggregate amount of not more than 30 percent, in total, of collected monetary sanctions exceeding $1 million. The section would make clear that any award would be paid from the monetary sanctions collected, and any monetary sanctions so collected would be available for such payment. The intent of this provision is to provide spending authority to allow the Secretary to pay such discretionary awards with funds collected from penalties resulting from a covered action for a violation under chapter 301.

The Congressional Budget Office has estimated that the authorization under this section to pay an award to a whistleblower of not more than 30 percent of the collected monetary sanctions would technically increase direct spending. However, the Committee also believes that such authorization may result in the Secretary receiving more information that could potentially result in additional covered actions and also additional financial penalties than would otherwise have been possible. This would ultimately provide net additonal funds to the Treasury in addition to promoting increased vehicle safety. The Committee notes, however, that the mere receipt of original information by the Secretary is not a presumption that the manufacturer, part supplier, or dealership has committed a violation, and this authorization is not intended to change the appropriateness of a penalty for a violation, as otherwise directed under law.

Section 30172(c) would outline the criteria for the Secretary to consider in determining an award, making clear that the determination of whether, to whom, or in what amount to make an award would be in the sole discretion of the Secretary. In determining whether to make an award, the Secretary would be required to take into consideration whether a whistleblower reported or attempted to report the information internally, as appropriate under the circumstances; the significance of the original information to the enforcement action; the degree of assistance provided by the whistleblower or the legal representative of the whistleblower; and additional factors the Secretary considers relevant.

Section 30172(c) would also direct when an award should not be made, including denying an award to any whistleblower who is convicted of a criminal action related to the covered action; to any whistleblower who, acting without direction from the manufacturer, part supplier, or dealership, or agent thereof, deliberately causes or substantially contributes to the alleged violation; to any whistleblower who submitted information to the Secretary that is based on facts submitted previously by another whistleblower; to any whistleblower who submits information in the incorrect form; or to any whistleblower who fails to report or attempt to report the information internally, unless the whistleblower reasonably believed such report would have resulted in retaliation, notwithstanding section 30171(a) of title 49, United States Code, or if the

whistleblower reasonably believed the information was already internally reported, subject to an internal inquiry or investigation, or otherwise known to the manufacturer, part supplier, or dealership.

The Committee intends for whistleblower(s) to report or attempt to report information internally, if appropriate, in order to ensure that safety issues are handled as quickly as possible and to ensure the manufacturer is notified of a possible problem and allow the manufacturer the opportunity to determine whether a safety issue exists, including whether a defect or instance of noncompliance exists, and issue a recall. However, the Committee understands that there are circumstances where this may not be appropriate and the provision provides stated exceptions.

Section 30172(d) would provide that a whistleblower may be represented by counsel.

Section 30172(e) would provide that no contract with the Secretary is necessary for any whistleblower to receive an award.

Section 30172(f) would direct the protection of the confidentiality of the whistleblower. Except for outlined exemptions, the Secretary and any officer or employee of the DOT would be prohibited from disclosing any information, including information provided by the whistleblower, which could reasonably be expected to reveal the identity of the whistleblower, except in accordance with the Privacy Act provisions under section 552a of title 5 United States Code. This would not apply if it is required to be disclosed in connection with a public proceeding. Information could also be disclosed if the whistleblower provides written consent to the disclosure of the information or if the Secretary also received the information through other channels and has authority to release such information under other law. However, the Secretary would be required to take reasonable measures not to reveal the identity of the whistleblower when disclosing information. In addition, the information may be shared with the DOJ or other Federal agencies as long as the other entities also keep the information confidential. The section would also ensure that nothing limits the ability of the Attorney General to present such evidence to a grand jury or to share such evidence with potential witnesses or defendants.

Section 30172(g) would provide that a whistleblower who knowingly or willfully makes any false, fictitious, or fraudulent statements would not be entitled to an award and would be subject to prosecution for making false statements under section 1001 of title 18, United States Code. The Committee stresses the importance of focusing agency resources on resolving safety issues and avoiding frivolous submissions, making it necessary to ensure that information provided to the Secretary is truthful.

Section 30172(h) would direct that any determination made, including whether, to whom, or in what amount to make an award, would be at the sole discretion of the Secretary. However, any determination may be appealed by a whistleblower to the appropriate court of appeals.

Section 30172(i) would direct the Secretary to issue regulations on the requirements of this section, consistent with this section, no later than 18 months after the date of enactment of this Act.

This section of the bill would direct that original information submitted to the Secretary be treated as original information if submitted prior to the effective date of the regulations but after the date of enactment of this Act. In addition, a whistleblower may receive an award regardless of whether the violation occurred prior to the date of enactment of this Act. A whistleblower could also receive an award even if the Secretary has not promulgated the regulations. Nevertheless, since this section limits the application of the Act to information submitted after the date of enactment, the Secretary may not issue an award under this Act for information previously submitted or for penalties already assessed prior to the date of enactment.

This section would make a conforming amendment to the table of contents of subchapter IV of chapter 301 of title 49, United States Code.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 49. TRANSPORTATION

SUBTITLE VI. MOTOR VEHICLE AND DRIVER PROGRAMS

PART A. GENERAL

CHAPTER 301. MOTOR VEHICLE SAFETY

SUBCHAPTER IV. ENFORCEMENT AND ADMINISTRATIVE

Sec. 30172. Whistleblower incentives and protections

(a) Definitions- In this section:

(1) COVERED ACTION- The term `covered action' means any administrative or judicial action, including any related administrative or judicial action, brought by the Secretary or the Attorney General under

this chapter that in the aggregate results in monetary sanctions exceeding $1,000,000.

(2) MONETARY SANCTIONS- The term `monetary sanctions' means monies, including penalties and interest, ordered or agreed to be paid.

(3) ORIGINAL INFORMATION- The term `original information' means information that--

(A) is derived from the independent knowledge or analysis of an individual;

(B) is not known to the Secretary from any other source, unless the individual is the original source of the information; and

(C) is not exclusively derived from an allegation made in a judicial or an administrative action, in a governmental report, a hearing, an audit, or an investigation, or from the news media, unless the individual is a source of the information.

(4) PART SUPPLIER- The term `part supplier' means a manufacturer of motor vehicle equipment.

(5) SUCCESSFUL RESOLUTION- The term `successful resolution' includes any settlement or adjudication of a covered action.

(6) WHISTLEBLOWER- The term `whistleblower' means any employee or contractor of a motor vehicle manufacturer, part supplier, or dealership who voluntarily provides to the Secretary original information relating to any motor vehicle defect, noncompliance, or any violation or alleged violation of any notification or reporting requirement of this chapter which is likely to cause unreasonable risk of death or serious physical injury.

(b) Awards-

(1) IN GENERAL- If the original information that a whistleblower provided to the Secretary led to the successful resolution of a covered action, the Secretary, subject to subsection (c), may pay an award or awards to 1 or more whistleblowers in an aggregate amount of not more than 30 percent, in total, of collected monetary sanctions.

(2) PAYMENT OF AWARDS- Any amount payable under paragraph (1) shall be paid from the monetary sanctions collected, and any monetary sanctions so collected shall be available for such payment.

(c) Determination of Awards; Denial of Awards-

(1) DETERMINATION OF AWARDS-

(A) DISCRETION- The determination of whether, to whom, or in what amount to make an award shall be in the discretion of the Secretary.

(B) CRITERIA- In determining an award made under subsection (b), the Secretary shall take into consideration--

(i) if appropriate, whether a whistleblower reported or attempted to report the information internally to an applicable motor vehicle manufacturer, part supplier, or dealership;

(ii) the significance of the original information provided by the whistleblower to the successful resolution of the covered action;

(iii) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in the covered action; and

(iv) such additional factors as the Secretary considers relevant.

(2) DENIAL OF AWARDS- No award under subsection (b) shall be made--

(A) to any whistleblower who is convicted of a criminal violation related to the covered action for which the whistleblower otherwise could receive an award under this section;

(B) to any whistleblower who, acting without direction from an applicable motor vehicle manufacturer, part supplier, or dealership, or agent thereof, deliberately causes or substantially contributes to the alleged violation of a requirement of this chapter;

(C) to any whistleblower who submits information to the Secretary that is based on the facts underlying the covered action submitted previously by another whistleblower;

(D) to any whistleblower who fails to provide the original information to the Secretary in such form as the Secretary may require by regulation; or

(E) to any whistleblower who fails to report or attempt to report the information internally to an applicable motor vehicle manufacturer, parts supplier, or dealership, unless--

(i) the whistleblower reasonably believed that such an internal report would have resulted in retaliation, notwithstanding section 30171(a); or

(ii) the whistleblower reasonably believed that the information--

(I) was already internally reported;

(II) was already subject to or part of an internal inquiry or investigation; or

(III) was otherwise already known to the motor vehicle manufacturer, part supplier, or dealership.

(d) Representation- A whistleblower may be represented by counsel.

(e) No Contract Necessary- No contract with the Secretary is necessary for any whistleblower to receive an award under subsection (b).

(f) Protection of Whistleblowers; Confidentiality-

(1) IN GENERAL- Notwithstanding section 30167, and except as provided in paragraphs (4) and (5) of this subsection, the Secretary, and any officer or employee of the Department of Transportation, shall not disclose any information, including information provided by a whistleblower to the Secretary, which could reasonably be expected to reveal the identity of a

whistleblower, except in accordance with the provisions of section 552a of title 5, unless--

(A) required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Secretary or any entity described in paragraph (5);

(B) the whistleblower provides prior written consent for the information to be disclosed; or

(C) the Secretary, or other officer or employee of the Department of Transportation, receives the information through another source, such as during an inspection or investigation under section 30166, and has authority under other law to release the information.

(2) REDACTION- The Secretary, and any officer or employee of the Department of Transportation, shall take reasonable measures to not reveal the identity of the whistleblower when disclosing any information under paragraph (1).

(3) SECTION 552(b)(3)(B)- For purposes of section 552 of title 5, paragraph (1) of this subsection shall be considered a statute described in subsection (b)(3)(B) of that section.

(4) EFFECT- Nothing in this subsection is intended to limit the ability of the Attorney General to present such evidence to a grand jury or to share such evidence with potential witnesses or defendants in the course of an ongoing criminal investigation.

(5) AVAILABILITY TO GOVERNMENT AGENCIES-

(A) IN GENERAL- Without the loss of its status as confidential in the hands of the Secretary, all information referred to in paragraph (1) may, in the discretion of the Secretary, when determined by the Secretary to be necessary or appropriate to accomplish the purposes of this chapter and in accordance with subparagraph (B), be made available to the following:

(i) The Department of Justice.

(ii) An appropriate department or agency of the Federal Government, acting within the scope of its jurisdiction.

(B) MAINTENANCE OF INFORMATION- Each entity described in subparagraph (A) shall maintain information described in that subparagraph as confidential, in accordance with the requirements in paragraph (1).

(g) Provision of False Information- A whistleblower who knowingly and willfully makes any false, fictitious, or fraudulent statement or representation, or who makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall not be entitled to an award under this section and shall be subject to prosecution under section 1001 of title 18.

(h) Appeals-

(1) IN GENERAL- Any determination made under this section, including whether, to whom, or in what amount to make an award, shall be in the discretion of the Secretary.

(2) APPEALS- Any determination made by the Secretary under this section may be appealed by a whistleblower to the appropriate court of appeals of the United States not later than 30 days after the determination is issued by the Secretary.

(3) REVIEW- The court shall review the determination made by the Secretary in accordance with section 706 of title 5.

(i) Regulations- Not later than 18 months after the date of enactment of the Motor Vehicle Safety Whistleblower Act, the Secretary shall promulgate regulations on the requirements of this section, consistent with this section.