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The first stage of bringing VW to justice?

By Davina Pujari and Christopher Jensen

The Volkswagen emission control device case seems to have all the essential ingredients of a criminal prosecution — deception, public outrage, and actual environmental harm. But, on Jan. 4th, the U.S. Department of Justice filed civil charges against the company for violations of the federal Clean Air Act.

Is DOJ's decision to pursue a civil case against Volkswagen for tampering with diesel engine emission controls a sign that the company might avoid criminal charges? Or is it just the "first stage in bringing Volkswagen to justice" (as the U.S. attorney for the Eastern District of Michigan said about the filing of the civil complaint)?

Without question, DOJ left the door open for future criminal charges when it announced the civil case against Volkswagen, explicitly noting that its criminal investigation is ongoing. A number of scenarios in which criminal charges still could be filed are possible. That is true even if the government pursues a purely civil resolution against Volkswagen itself. A settlement of the civil case is almost certain, given the company's admissions. The price of such a settlement will be high for Volkswagen, but well below the \$48 billion in maximum civil penalties available under the Clean Air Act.

Perhaps DOJ is pursuing a civil resolution with the company while it explores filing criminal charges against individual Volkswagen executives? Last September — about a week before the Environmental Protection Agency issued its first notice of violation to Volkswagen — Deputy Attorney General Sally Quillian Yates issued a memorandum addressing DOJ's past failure to pursue criminal charges against individuals who participate in corporate wrongdoing. The memo notes that filing criminal charges against individual executives is "one of the most effective ways to combat corporate misconduct" and outlines policies intended to encourage the prosecution of such individuals. The memo announces several important policy shifts for DOJ, stating that "[a]bsent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals." The memorandum also emphasizes that "a company must completely disclose ... all relevant facts about individual misconduct" before it receives cooperation credit for DOJ.

The Yates memo suggests that Volkswagen executives are still at risk of criminal prosecution,



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A 2014 Volkswagen Touareg TDI, a diesel model, is driven with a portable emissions testing system during a road test by the EPA's National Vehicle and Fuel Emissions Laboratory in Ann Arbor, Mich., Nov. 4, 2015.

even if the company itself has been charged civilly. One individual who appears to be a subject of the DOJ criminal investigation is Wolfgang Hatz, the former head of research and development at Porsche. After being promoted in 2007 to lead Volkswagen's engine development, Hatz was filmed complaining that the California Air Resources Board's diesel engine emissions control standards were "impossible" and "not realistic." Ulrich Hackenberg, Audi's chief engineer, has also been identified as a subject of the investigation. These or other Volkswagen executives could yet be charged criminally under the Clean Air Act, for making false statements regarding Volkswagen's Clean Air Act compliance.

Federal prosecutors may also look beyond the Clean Air Act to file criminal charges against Volkswagen executives. For example, the crime of wire fraud (18 U.S.C. Section 1343) applies to any scheme to defraud using interstate wire communications in furtherance of the scheme. To the extent that senior Volkswagen executives knew that the defeat devices were being installed in millions of vehicles around the world, a wire fraud claim against them could be an attractive option for federal prosecutors.

Nor should the possibility of criminal charges being filed against the company be discounted entirely, particularly given the recent disclosure of additional violations for defeat devices installed on 3.0-L engines. (EPA has issued two separate notices of violation against Volkswagen — one in September 2015 regarding "defeat device" software in 2.0-L diesel engine cars, and the other, based on newly discovered evidence, in November 2015, covering 3.0-L diesel engines.) All told, Volkswagen installed defeat devices on approximately 600,000 cars in the United States, for the sole purpose of cheating on emission limits for nitrogen

oxides (NOx) (a component of smog).

The obstacle to a criminal case could be a loophole in the Clean Air Act that relates to violations of the Act's Title II mobile source provisions — which apply to Volkswagen and other auto manufacturers.

The loophole is two-fold: First, the general enforcement provisions in Section 113(a)(3) authorize EPA to refer violations of other sections of the act to DOJ for criminal prosecution, but do not explicitly include Title II violations. Second, Title II violations are expressly exempted from the general criminal penalties provisions in Section 113(c)(1).

At the same time, the Clean Air Act authorizes criminal penalties for making materially false statements or omissions in connection with documentation of compliance (see Section 113(c)(2)), and the act does not exclude mobile source violations from this provision.

The awkward result is that it appears Volkswagen may be criminally charged for making false statements regarding its compliance with NOx emission limits, but EPA has no authority to refer the case to DOJ for criminal prosecution — which is the ordinary process for initiating a federal prosecution of environmental crimes.

Faced with these inconsistencies in the Clean Air Act, a civil case against the company while the criminal investigation continues is a reasonable strategy — but a purely civil resolution would call into question DOJ's resolve to "get tough" on — and prosecute individual executives for — corporate crimes. On the other hand, it wouldn't be the first time DOJ's resolve in this regard has been questioned.

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