

ONE HUNDRED FOURTEENTH CONGRESS  
**Congress of the United States**  
**House of Representatives**  
COMMITTEE ON ENERGY AND COMMERCE  
2125 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6115

Majority (202) 225-2927  
Minority (202) 225-3641

**MEMORANDUM**

**December 2, 2016**

**To: Subcommittee on Oversight and Investigations Democratic Members and Staff**

**Fr: Committee on Energy and Commerce Democratic Staff**

**Re: Hearing on “Volkswagen’s Emissions Cheating Settlement: Questions Concerning ZEV Program Implementation”**

On **Tuesday, December 6, 2016, at 10:00 a.m. in room 2322 of the Rayburn House Office Building**, the Subcommittee on Oversight and Investigations will hold a hearing titled “Volkswagen’s Emissions Cheating Settlement: Questions Concerning ZEV Program Implementation.” The hearing will examine the recent settlement for 2.0-liter vehicles, focusing on the requirement that Volkswagen (VW) invest \$2 billion in the Zero Emission Vehicle (ZEV) industry over a 10-year period.

**I. BACKGROUND**

The Clean Air Act (CAA) was enacted to promote public health and welfare by “[initiating] and [accelerating] a national research and development program to achieve the prevention and control of air pollution.”<sup>1</sup> The CAA regulates air emissions from stationary and mobile sources and requires the EPA to establish National Ambient Air Quality Standards, as well as hazardous pollutant emission standards for “criteria air pollutants.”<sup>2</sup> Nitrogen oxide (NO<sub>x</sub>), which forms when fuel is burned at high temperatures, is one of six major pollutants classified as “criteria air pollutants.”<sup>3</sup>

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<sup>1</sup> 42 U.S.C. § 7401(b).

<sup>2</sup> United States Environmental Protection Agency, *Summary of the Clean Air Act* (accessed Nov. 10, 2016); Congressional Research Service, *Environmental Laws: Summaries of Major Statutes Administered by the Environmental Protection Agency* (Dec. 20, 2013); 42 U.S.C. § 7401 et seq.; United States Environmental Protection Agency, *Nitrogen Oxides (NO<sub>x</sub>) Control Regulations* (accessed Nov. 10, 2016).

<sup>3</sup> *Id.*

In September 2015, VW revealed that it had equipped 11 million vehicles with software to circumvent the Environmental Protection Agency's (EPA) NOx emissions standards. The software sensed when the vehicles were undergoing emissions testing and were able to ensure that emissions control systems were operating to pass. During normal road use, however, the software would switch to a different mode.<sup>4</sup> According to the EPA, vehicles operating in "road mode" produced NOx emissions up to 40 times greater than emission standards allow.<sup>5</sup> The VW software is classified as a "defeat device" under the CAA.<sup>6</sup>

On September 18, 2015, the EPA issued a notice of violation to VW for non-compliance with the CAA and its implementing regulations.<sup>7</sup> The notice of violation alleged: (1) the defeat devices "bypass, defeat, or render inoperative elements of the vehicles emission control system that exist to comply with CAA emissions standards," and (2) VW violated the CAA by "selling, offering for sale, introducing into commerce, delivering for introduction into commerce, or importing" vehicles that do not conform to the vehicle specifications described in the certificates of conformity.<sup>8</sup> On the same day, the California Air Resources Board (CARB) initiated an enforcement investigation of VW and its alleged violations of federal and state law.<sup>9</sup>

On October 8, 2015, the Subcommittee on Oversight and Investigations held a hearing to review VW's violations of emissions standards. The hearing memo for the Subcommittee's October 2015 hearing can be found [here](#).

## II. VOLKSWAGEN CLEAN AIR ACT PARTIAL SETTLEMENT

The Department of Justice (DOJ) filed a civil complaint on behalf of EPA against VW on January 4, 2016. In March 2016, the Federal Trade Commission (FTC) also sued VW, charging that the company deceived consumers with false claims that its vehicles were low-emission,

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<sup>4</sup> Letter from Phillip A. Brooks, Director, Air Enforcement Division, Office of Civil Enforcement, United States Environmental Protection Agency, to David Geanacopoulos, Executive Vice President Public Affairs and General Counsel, Volkswagen Group of America, Inc. and Stuart Johnson, General Manager, Engineering and Environmental Office, Volkswagen Group of America (Sept. 18, 2015); Environmental Protection Agency, *Notices of Violations - Volkswagen - FAQs* (accessed Nov. 10, 2016).

<sup>5</sup> United States Environmental Protection Agency, *Notices of Violations - Volkswagen* (accessed Nov. 10, 2016).

<sup>6</sup> 42 U.S.C. § 7522(a)(3)(b).

<sup>7</sup> Environmental Protection Agency, *Notices of Violations - Volkswagen* (accessed Nov. 10, 2016).

<sup>8</sup> *Id.*

<sup>9</sup> Letter from Annette Hebert, Chief, Emissions Compliance, Automotive Regulations and Science Division, California Air Resources Board, to David Geanacopoulos, Executive Vice President of Public Affairs and General Counsel, Volkswagen Group of America, Inc. and Stuart Johnson, General Manager, Engineering and Environmental Office, Volkswagen Group of America, Inc. (Sept. 18, 2015).

environmentally friendly, in compliance with emissions standards, and would be able to maintain high resale value.<sup>10</sup>

On June 28, 2016, VW announced the terms of the proposed settlement agreement it had reached with federal regulators, private plaintiffs, and 44 states for certain 2.0 liter diesels.<sup>11</sup> The U.S. District Court for the Northern District of California approved the settlement on October 25, 2016.<sup>12</sup> Under the partial settlement, VW agreed to spend up to \$14.7 billion on the following measures to settle allegations of cheating emissions tests and deceiving customers:

- Remove from commerce in the United States or perform an approved emissions modification on at least 85 percent of the affected 2.0-liter diesel vehicles by 2019 (projected cost of \$10.033 billion);
- Meet a separate 85 percent recall rate in California;
- Fund a \$2.7 billion mitigation trust fund to pay for NOx reduction projects;
- Invest \$2 billion in charging infrastructure for zero emission vehicles (ZEVs) and the promotion of ZEVs, which generate fewer emissions than gas-powered cars and produce no tailpipe pollution.<sup>13</sup>

In November 2016, it was reported that VW, EPA, and CARB had reached an agreement on the affected 3.0-liter diesel engines. The District Court has yet to approve this deal; a hearing is scheduled for November 30, 2016.<sup>14</sup>

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<sup>10</sup> Department of Justice, *Volkswagen to Spend Up to \$14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles* ([www.justice.gov/opa/pr/volkswagen-spend-147-billion-settle-allegations-cheating-emissions-tests-and-deceiving](http://www.justice.gov/opa/pr/volkswagen-spend-147-billion-settle-allegations-cheating-emissions-tests-and-deceiving)) (accessed Nov. 10, 2016).

<sup>11</sup> Volkswagen, *Volkswagen Reaches Settlement Agreements with U.S. Federal Regulators, Private Plaintiffs and 44 U.S. States on TDI Diesel Engine Vehicles* (June 28, 2016) ([media.vw.com/release/1214/](http://media.vw.com/release/1214/)).

<sup>12</sup> Environmental Protection Agency, *Volkswagen Clean Air Act Partial Settlement* ([www.epa.gov/enforcement/volkswagen-clean-air-act-partial-settlement](http://www.epa.gov/enforcement/volkswagen-clean-air-act-partial-settlement)) (accessed Nov. 10, 2016).

<sup>13</sup> Environmental Protection Agency, *Volkswagen Clean Air Act Partial Settlement* ([www.epa.gov/enforcement/volkswagen-clean-air-act-partial-settlement](http://www.epa.gov/enforcement/volkswagen-clean-air-act-partial-settlement)) (accessed Nov. 10, 2016); Union of Concerned Scientists, *What is California's Zero Emission Vehicle (ZEV) Regulation?* ([www.ucsusa.org/clean-vehicles/california-and-western-states/what-is-zev#.WCTWGy0rKM8](http://www.ucsusa.org/clean-vehicles/california-and-western-states/what-is-zev#.WCTWGy0rKM8)) (accessed Nov. 10, 2016); Department of Justice, *Volkswagen to Spend Up to \$14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles* ([www.justice.gov/opa/pr/volkswagen-spend-147-billion-settle-allegations-cheating-emissions-tests-and-deceiving](http://www.justice.gov/opa/pr/volkswagen-spend-147-billion-settle-allegations-cheating-emissions-tests-and-deceiving)) (accessed Nov. 10, 2016).

<sup>14</sup> *VW Said to Reach U.S. Deal to Fix Most Tainted Audi Diesels*, Bloomberg Technology (Nov. 15, 2016).

### III. VW INVESTMENT IN THE ZERO EMISSION VEHICLE INDUSTRY

As part of the 2.0-liter vehicle settlement agreement, VW must make a \$2 billion investment over a 10-year period into the zero-emission vehicle industry. While some in the industry are supportive of VW's investment, others have raised concerns that VW's investment in this market could undermine competition and have other deleterious effects on those currently supplying the ZEV industry. On August 5, 2016, 28 companies filed a letter with the DOJ requesting that the federal government exercise fair market standards and ensure fair treatment of all industry participants as VW makes the \$2 billion ZEV investment.<sup>15</sup> ChargePoint Inc., the world's largest electric vehicle charging network, also submitted a filing in District Court claiming that VW's investment in ZEVs would allow VW to "drown out all other participants in the ZEV infrastructure market through enormous spending" that would be "untethered to the normal constraints and financial metrics by which all other market participants must operate."<sup>16</sup>

On November 1, 2016, Chairmen Upton and Murphy sent a letter to EPA Administrator Gina McCarthy inquiring about VW's investment in ZEVs under the partial settlement.<sup>17</sup> Their letter raised concerns about the impact that VW's investment will have on the electric vehicle infrastructure marketplace. It also asked what efforts state and federal authorities will take to prevent VW from gaining a competitive advantage in the provision of ZEV infrastructure.<sup>18</sup>

On November 18, 2016, the EPA responded to the Chairmen's letter. The EPA noted that, with respect to the ZEV aspect of the settlement, the District Court had determined the settlement to be "substantially fair."<sup>19</sup> The EPA also indicated that as the process moves forward, it would "ensure that Volkswagen provides a robust opportunity for stakeholder input" into any ZEV-related investment plans prior to the company spending any money.<sup>20</sup> Finally, regarding competition concerns, the EPA indicated that, "[I]f, in the course of making the ZEV investments, Volkswagen unlawfully undermines competition in the market, it will be subject to enforcement under antitrust or other competition laws by appropriate state and federal authorities responsible for overseeing such laws."<sup>21</sup>

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<sup>15</sup> *Electric car charging station companies issue warning over VW settlement*, Reuters (Aug. 9, 2016).

<sup>16</sup> *ChargePoint urges judge to revise VW settlement*, Automotive News (Oct. 12, 2016).

<sup>17</sup> Letter from Rep. Fred Upton, Chairman, House Committee on Energy and Commerce and Rep. Tim Murphy, Chairman, Subcommittee on Oversight and Investigations, to Gina McCarthy, Administrator, Environmental Protection Agency (Nov. 1, 2016).

<sup>18</sup> *Id.*

<sup>19</sup> Letter from Cynthia Giles, Assistant Administrator for the Office of Enforcement and Compliance Assurance, Environmental Protection Agency, to Rep. Fred Upton, Chairman, Committee on Energy and Commerce (Nov. 18, 2016).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

#### **IV. WITNESSES**

The following witnesses have been invited to testify:

**The Honorable Cynthia Giles**

Assistant Administrator

Office of Enforcement and Compliance Assurance

U.S. Environmental Protection Agency

**Ms. Janet McCabe**

Acting Assistant Administrator

Office of Air and Radiation

U.S. Environmental Protection Agency