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Volkswagen has admitted that up to 11 million diesel vehicles around the world have engines fitted with defeat devices that allowed them to pass emissions tests despite spewing more pollution than permitted. The revelations were announced Sept. 18 by the Environmental Protection Agency and have prompted investigations by the EPA and the Department of Justice. Just nine days before the scandal came to light, the DOJ unveiled a new policy that holds executives accountable for the misconduct of their organizations, prompted by the lack of prosecutions after the financial collapse of Wall Street. The new policy was announced in a memorandum known as the Yates Memo. Whether the DOJ will pursue criminal charges against Volkswagen or its leaders for these so-called defeat devices remains to be seen, but the government's commitment to the principles of the new policy could be put to the test. Michael C. Gross, Carolyn H. Kendall and Aaron S. Mapes of Post & Schell, P.C.'s Philadelphia office examine the Yates Memo, the emissions scandal, federal investigations and the higher standards the new policy sets for the prosecution of corporate crime.

Will Volkswagen Executives Be the Yates Memo's First Casualties?

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In response to public criticism over its lack of prosecutions of Wall Street executives in connection with the financial crisis, the Department of Justice (“DOJ”) instituted a new policy aimed at holding executives accountable for their companies’ misconduct. This policy was announced in a memorandum issued on Sept. 9, 2015, by Deputy Attorney General Sally Quillian Yates (the “Yates Memo”).¹ The emerging Volkswagen “defeat device” emissions scandal appears to be the highest profile case of alleged wrongdoing by a major corporation since the Yates Memo was issued. Consequently, one of the first major tests of the government’s commitment to the principles articulated in the Yates Memo, issued primarily in response to critiques regarding the handling of financial industry cases, interestingly could occur in the context of environmental law.

Whether the DOJ ultimately will (or should) pursue criminal charges against Volkswagen or any of its top executives of course remains an open question. The progress of the Volkswagen investigation will serve as an interesting litmus test of the Yates Memo and how aggressively the DOJ will seek to apply it. As we discuss, Volkswagen is already sending signals which suggest that it is positioning the defense case in such a way that it may be difficult for the government to attain the stated goals of the Yates Memo: the successful prosecution of top executives.

The Yates Memo

The Yates Memo was released on Sept. 9, 2015.² The next day, Deputy Attorney General Yates elaborated on its purpose — prosecuting high-level corporate executives.³ She stressed that the DOJ is committed “to holding lawbreakers accountable regardless of whether they commit their crimes on the street corner or in the boardroom” and that the DOJ would not “allow the flesh-and-blood people responsible for misconduct to walk away, while leaving only the company’s employees and shareholders to pay the price.”⁴ Although it always has been DOJ policy to hold individuals accountable for corporate misconduct,⁵ in practice such enforcement actions have been rare in the context of

large, publicly held corporations.⁶ Typically, the government has pursued only the company and resolved the case through a non- or deferred prosecution agreement imposing substantial corporate financial penalties but no jail time for executives.⁷ One of the most publicly criticized instances of this approach was the December 2012 deferred prosecution agreement of bank HSBC, in which no individuals were prosecuted and the bank was not charged, but in which HSBC paid almost \$2 billion in penalties to resolve allegations that it knowingly transferred billions of dollars for nations like Iran and allowed drug cartels to move money illegally through its subsidiaries.⁸ Likewise, a well-known federal judge strongly criticized the DOJ’s Sept. 17, 2015, deferred prosecution agreement with U.S. auto manufacturer General Motors involving its alleged failure to disclose safety defects as “a shocking example of potentially culpable individuals not being criminally charged.”⁹

Moreover — and likely relevant to the unfolding Volkswagen emissions scandal — when the government has charged individuals, the focus generally has been on mid- and lower-level employees, whose liability is easier to discern, while the more sophisticated residents of the C-suite escape unscathed. Recognizing the challenges inherent in prosecuting corporate executives, Deputy Attorney General Yates stated that “regardless of how challenging it may be to make a case against individuals in a corporate fraud case, it’s our responsibility at the Department of Justice to overcome these challenges and do everything we can to develop the evidence and bring these cases.”¹⁰

The Yates Memo purports to change this pattern of historical practice by strongly encouraging — stopping just short of requiring — the prosecution of individuals in cases of corporate misconduct. The Yates Memo instructs DOJ attorneys to not resolve matters with a corporation absent a clear plan to resolve related cases against individuals.¹¹ DOJ lawyers also are required to

plea or some other disposition of the charges against the corporation”).

⁶ See, e.g., FCPA Professor, *The Yates Memo* (Sept. 11, 2015), available at <http://www.fcpaprofessor.com/the-yates-memo> (noting that from 2008-2014, 75% of corporate enforcement actions in the Foreign Corrupt Practices Act context did not include charges against individuals).

⁷ See, e.g., *Deferred Prosecution Agreement – JPMorgan Chase Bank, N.A.* (Jan. 6, 2015), available at [http://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/JPMC%20DPA%20Packet%20Fully%20Executed%20w%20Exhibits\).pdf](http://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/JPMC%20DPA%20Packet%20Fully%20Executed%20w%20Exhibits).pdf); *Deferred Prosecution Agreement – General Motors Co.* (Sept. 17, 2015), available at <http://www.justice.gov/usao-sdny/pr/general-motors-company-deferred-prosecution-documents>.

⁸ See, e.g., Lynn Parramore, *HSBC: Too Big to Jail*, SALON (Dec. 13, 2012), available at http://www.salon.com/2012/12/13/hsbc_too_big_to_jail/.

⁹ *United States v. Saena Tech Corp.*, 2015 BL 346454, D.D.C., No. 1:14-cr-00066, 10/21/15, available at <http://src.bna.com/bMN>. The agreement concerned allegations that GM failed to disclose safety defects in its vehicles.

¹⁰ Deputy Attorney General Sally Quillian Yates, *Remarks at New York University School of Law announcing new policy on Individual Liability in Matters of Corporate Wrongdoing* (Sept. 10, 2015), available at <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school>.

¹¹ Deputy Attorney General Sally Quillian Yates, *Memorandum Re: Individual Accountability for Corporate Wrongdoing*

¹ Deputy Attorney General Sally Quillian Yates, *Memorandum Re: Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), available at http://www.postschell.com/site/rte_uploads/files/yates%20Memo.pdf.

² *Id.*

³ Deputy Attorney General Sally Quillian Yates, *Remarks at New York University School of Law announcing new policy on Individual Liability in Matters of Corporate Wrongdoing* (Sept. 10, 2015), available at <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school>.

⁴ *Id.*

⁵ See, e.g., Deputy Attorney General Mark Filip, *Memorandum Re: Principles of Federal Prosecution of Business Organizations* (Aug. 28, 2008), available at <http://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf> (providing that “[p]rosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation” and instructing that “[o]nly rarely should provable individual culpability not be pursued, particularly if it relates to high-level corporate officers, even in the face of an offer of a corporate guilty

obtain a declination from the U.S. attorney or her designee in order to *not* prosecute an individual in connection with a case of corporate misconduct.¹² Further, companies under investigation are enlisted to facilitate prosecutions and civil enforcement actions against their own executives and directors and those that refuse face potentially severe penalties. Under the Yates Memo, a corporation must identify individuals responsible for the company's wrongdoing (*i.e.*, its employees, executives, or directors) and provide the government with "all relevant facts" relating to them to even become eligible for any cooperation credit, such as a non-prosecution agreement or a reduction in charges.¹³ In short, the Yates Memo makes individual prosecutions the default for cases of corporate malfeasance and forces companies to choose between mitigating their own liability and providing inculpatory evidence about their own employees and executives to prosecutors tasked specifically with pursuing and obtaining convictions of individuals.

Although the Yates Memo has attempted to set a strong tone regarding executive liability for corporate crime, the government's ability and willingness to execute on this new policy remains to be seen. The Volkswagen emissions scandal, in which the company already appears to have admitted widespread and serious regulatory violations,¹⁴ will be a major test for the DOJ – particularly because no one, including the DOJ, has yet suggested that executives should be prosecuted simply because of their seniority, regardless of the actual evidence.

The Volkswagen Emissions Scandal

On Sept. 3, 2015, less than a week before the Yates Memo was issued, Volkswagen announced that eight of its diesel vehicles from certain model years were outfitted with devices specifically designed to circumvent federal emissions standards.¹⁵ These so-called "defeat devices" artificially reduce the concentrations of nitrogen oxide emitted during emissions testing in vehicles that during routine operation emit concentrations of nitrogen oxide that far exceed permissible legal limits.¹⁶

(Sept. 9, 2015), available at <http://www.postschell.com/site/reports/uploads/files/yates%20Memo.pdf>.

¹² *Id.*

¹³ *Id.*

¹⁴ See, e.g., EPA, EPA, *California Notify Volkswagen of Clean Air Act Violations / Carmaker allegedly used software that circumvents emissions testing for certain air pollutants* (Sept. 18, 2015), available at <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/dfc8e33b5ab162b985257ec40057813b!OpenDocument>; Volkswagen, Volkswagen Diesel Information FAQ 1, available at <https://www.vwdieselinfo.com/faqs/> (stating that "regrettably, VW did not comply with th[e] regulations" prohibiting the use of defeat devices under federal law).

¹⁵ *How VW's Scandal Unfolded*, N.Y. TIMES (Oct. 22, 2015), available at http://www.nytimes.com/interactive/2015/10/23/business/international/vw-scandal-timeline.html?_r=0#/#time389_11287. Volkswagen now has announced that certain models for model years 2009-2016 contain defeat devices. Volkswagen, *Volkswagen Diesel Information*, available at <https://www.vwdieselinfo.com>.

¹⁶ EPA, EPA, *California Notify Volkswagen of Clean Air Act Violations / Carmaker allegedly used software that circumvents emissions testing for certain air pollutants* (Sept. 18,

According to estimates by researchers at West Virginia University, two Volkswagen models equipped with defeat devices released compliant concentrations of nitrogen oxide during emissions testing but emitted nitrogen oxide concentrations of up to 38 times the allowable federal limit during ordinary operation.¹⁷ Nitrogen oxide is a significant environmental and public health concern due to its smog creating characteristics.¹⁸

Since its initial announcement, Volkswagen has disclosed that additional Volkswagen models, as well as other of its owned brands (Audi and Porsche) with diesel engines, also contain defeat devices.¹⁹ The Environmental Protection Agency ("EPA") estimates the number of affected vehicles in the United States at approximately 567,000.²⁰ Given the apparent wide-spread use of the defeat devices and Volkswagen's ongoing internal investigation, further revelations about the extent of the scandal continue to emerge.

Federal Investigations and Enforcement

Both the EPA and the DOJ have launched investigations into Volkswagen's use of defeat devices and representations made to the federal government in connection with emissions testing. To date, the EPA has issued two administrative Notices of Violation to Volkswagen alleging violations of the Clean Air Act (the "Act").²¹ Specifically, the EPA has alleged that Volkswagen sold over 550,000 diesel passenger vehicles in the United States outfitted with defeat devices in violation of Sections 203(a)(1) and 203(a)(3)(B) of the Act. Section 203(a)(1) provides that new vehicles cannot be sold in the U.S. without a valid certificate of Clean Air Act conformity issued by the EPA and in effect at the time of the sale.²² According to the EPA, Volkswagen's failure to disclose the defeat devices' existence during the application process invalidated previously granted certificates of conformity for vehicles that contained defeat

2015), available at <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/dfc8e33b5ab162b985257ec40057813b!OpenDocument>. See also 40 C.F.R. § 86 Subpart A at § 86.004-2, which defines "defeat device" as "an auxiliary emission control device (AECD) that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use" aside from limited exceptions not applicable to the Volkswagen scenario.

¹⁷ Sonari Grinton, *How A Little Lab In West Virginia Caught Volkswagen's Big Cheat*, National Public Radio (Sept. 25, 2015), available at <http://www.npr.org/2015/09/24/443053672/how-a-little-lab-in-west-virginia-caught-volkswagens-big-cheat>. West Virginia University researchers studied Volkswagen's 2011 Jetta and 2012 Passat. *Id.*

¹⁸ See EPA, *Ground-Level Ozone Standards Designations*, available at <http://www3.epa.gov/ozonedesignations/faq.htm>.

¹⁹ *Id.*

²⁰ Jay Ramey, *EPA Adds 75,000 3.0-liter diesel VW, Audi, and Porsche Models to Investigation*, AUTOWEEK (Nov. 20, 2015), available at <http://autoweek.com/article/vw-diesel-scandal/epa-30-liter-diesel-vw-audi-and-porsche-models-also-have-defeat-devices>.

²¹ EPA, *Volkswagen Light Duty Diesel Vehicle Violations for Model Years 2009-2016*

Share (Nov. 25, 2015), available at <http://www.epa.gov/vw>.

²² 42 U.S.C. § 7522(a)(1).

devices.²³ Section 203(a)(3)(B) of the Act prohibits the sale or installation of “any part or component intended for use with, or as part of, any motor vehicle or motor vehicle engine, where the principal effect of the part or component is to bypass, defeat, or render inoperative” devices or parts designed to ensure compliance with Clean Air Act standards.²⁴

The Clean Air Act regulates air emissions from, among other things, mobile sources such as vehicles, and authorizes the United States to seek both civil and criminal penalties for violations of its provisions. Civil liability for violations of certain sections, including Sections 203(a)(1) and (a)(3)(B), under the Act is strict and arises simply by virtue of the existence of a Clean Air Act violation.²⁵ The Act’s key civil enforcement provision for vehicles, Section 205,²⁶ authorizes the EPA to assess civil penalties of up to \$37,500 per vehicle for violations of Section 203(a)(1) and up to \$3,750 per vehicle for violations of Sections 203(a)(3)(B).²⁷ In determining the appropriate amount of civil penalty, the EPA is required to consider the gravity of the violation, the economic benefit or savings to the violator derived from the violation, the size of the violator’s business, and the violator’s history of compliance (or non-compliance) with the Act, as well as any action taken to remedy the violation and the effect of the penalty on the violator’s ability to continue in business.²⁸ The EPA also is required to consider “any other matter that justice requires.”²⁹ Assuming that the EPA pursues a penalty of \$37,500 per vehicle equipped with a defeat device, Volkswagen could face nearly \$21 billion in potential civil penalties.³⁰

Moreover, it has been publicly reported that the DOJ is conducting a criminal investigation of Volkswagen and its use of defeat devices.³¹ The Clean Air Act’s primary criminal enforcement mechanism, Section 113,³² provides multiple alternative provisions regarding criminal liability. Although the Clean Air Act’s first

criminal provision³³ explicitly does not apply to violations of Section 203, i.e., the EPA’s allegations in the two Notices of Violation, the Act’s second criminal provision makes it a crime for “any person” to knowingly falsify, tamper with, render inaccurate, or fail to install any “monitoring device or method required to be maintained or followed under” the Act.³⁴ This broad language contains no exceptions and could be construed to cover Volkswagen’s sale of cars with defeat devices.

Regardless of the nuances of the Clean Air Act’s criminal provisions, the DOJ is empowered to pursue other more traditional statutes regarding criminal liability under Title 18, the general federal criminal code. Possible charges could include: mail and wire fraud in connection with deceiving consumers and regulators, conspiracy to defraud, and false statements and certifications made to government regulators, including statements made to the Internal Revenue Service in connection with diesel-vehicle purchasers’ advanced lean-burn technology motor vehicle credit.

Given the investigation’s early stages, it cannot be known whether the DOJ will charge any Volkswagen executives.³⁵ In arguable contrast to its track record regarding U.S. executives, the Department has proven willing to pursue individual executives of *foreign* companies that commit crimes with a connection to the U.S. The most recent high-profile example of this willingness is the sweeping prosecution of numerous officials from across the globe involved in the Federation Internationale de Football Association, or FIFA. Even prior to the FIFA-related prosecutions, the DOJ investigated individual bankers and executives from Swiss banks that facilitated U.S. taxpayers’ tax evasion, particularly since the DOJ’s Swiss Bank Program was launched in 2013. As a condition of a bank’s receipt of a non-prosecution agreement under the Program, a bank must provide information about its own “cross-border activities,” including potentially incupatory information about its bankers’ and executives’ activities.³⁶ To date, the DOJ has used such information to indict more than 20 Swiss bankers.³⁷ Despite this willingness to indict Swiss bankers, the DOJ has not yet been able to secure any convictions. The primary obstacle appears to be limits to the U.S.’s ability to extradite. In addition to

²³ Notice of Violation, United States Environmental Protection Agency (Sept. 18, 2015), available at <http://yosemite.epa.gov/opa/admpress.nsf/a883dc3da7094f97852572a00065d7d8/dfc8e33b5ab162b985257ec40057813b!OpenDocument>.

²⁴ 42 U.S.C. § 7522(a)(3)(B).

²⁵ 42 U.S.C. § 7524(a).

²⁶ 42 U.S.C. § 7542.

²⁷ 40 C.F.R. § 19.4.

²⁸ 42 U.S.C. § 7524(c)(2). See also Memorandum from Granta Y. Nakayama, Assistant Administrator, U.S. Environmental Protection Agency, to Mobile Source Enforcement Personnel, Clean Air Act Mobile Source Civil Penalty Policy (Jan. 6, 2009) available at http://www.epa.gov/sites/production/files/documents/vehicleengine-penalty-policy_0.pdf.

²⁹ *Id.*

³⁰ For a similar estimate, see Amy Harder and Aruna Viswanatha, *Volkswagen May Not Face Environmental Criminal Charges*, WALL ST. J. (Sept. 29, 2015), available at <http://www.wsj.com/articles/volkswagen-may-not-face-environmental-criminal-charges-1443567204>, (calculating approximately \$18 billion prior to EPA increasing its estimate of affected vehicles).

³¹ Del Quentin Wilber and Greg Farrell, *Volkswagen Said Focus of U.S. Criminal Probe on Emissions*, Bloomberg.com (Sept. 21, 2015), available at <http://www.bloomberg.com/news/articles/2015-09-21/volkswagen-said-to-be-target-of-u-s-criminal-probe-on-emissions>.

³² 42 U.S.C. § 7413(c).

³³ 42 U.S.C. § 7413(c)(1) (listing statutory violations that represent felonies if violated knowingly, and not listing any motor vehicle emissions standards requirements set forth at 42 U.S.C. § 7521 to § 7554).

³⁴ 42 U.S.C. § 7413(c)(2)(C).

³⁵ See Ronald Levine and Michael Gross, *Keeping Government Environmental Investigations Civil*, Business Crimes Bulletin, July 1, 2015 available at http://www.postschell.com/site/files/post_schell_environmental_investigations_business_crimes_bulletin_july_2015.pdf (“Individuals are not exempt from prosecution. As a matter of policy, “[p]rosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation.” U.S. Attorney’s Manual (USAM) at § 5-11.114. Of course, federal Sentencing Guidelines contain specific provisions related to environmental crimes, with base offense levels allowing for incarceration. See, e.g., U.S.S.G. § § 2Q1.1-2Q1.3 (eff. Nov. 1, 2014).”)

³⁶ DOJ, *Swiss Bank Program*, available at <http://www.justice.gov/tax/swiss-bank-program>.

³⁷ Jesse Drucker, *America’s Most-Wanted Swiss Bankers Aren’t Hard to Find*, Bloomberg.com, available at <http://www.bloomberg.com/news/articles/2015-04-16/america-s-most-wanted-swiss-bankers-aren-t-hard-to-find>.

the delay inherent in the extradition process, extradition likely is unavailable in many cases because tax evasion is not illegal under Swiss law.³⁸ Although the treaty-process delays would be present in a potential extradition of Volkswagen executives from Germany,³⁹ Volkswagen executives may be more readily eligible for extradition. Indeed, it has been reported that German prosecutors also are investigating Volkswagen executives in connection with the defeat device issue.⁴⁰

However, the DOJ may face other problems in securing convictions once executives are brought to trial. For example, the DOJ to date has tried only one high level Swiss banker — former UBS AG global wealth-management head Raoul Weil — and was unable to convict him of the charged tax conspiracy.⁴¹ After a three-week trial, during which the defense called no witnesses, the jury quickly returned an acquittal.⁴² From media reports, it appears that the government failed to convince the jury that Mr. Weil had the requisite knowledge and intent.⁴³ However, the government's lack of successful executive prosecutions does not appear to have reduced the DOJ's commitment to pursuing these prosecutions. The Volkswagen emissions scandal may represent the DOJ's next major opportunity to reverse its track record.

Public Stance of the Company to Date: Pointing to “a Handful” of Non-Executives

Volkswagen may elect to provide the DOJ with information about culpable individuals. However, the question remains whether the company will disclose inculpatory information about executives or only employees like engineers and managers. The company has begun an internal investigation through outside counsel, and will face significant pressure to turn over to the DOJ facts regarding potential bad acts by individuals in order to mitigate its burgeoning liability, particularly because the company will be ineligible under the Yates Memo for a non- or deferred-prosecution agreement or other cooperation credit unless it provides information about individual wrongdoing. Based on a recent company statement, it appears that Volkswagen currently is limiting its perception of responsibility to “a handful” of non-executive employees, including engineers who allegedly installed the defeat devices and some senior

managers.⁴⁴ This evolving scenario echoes in part the individual prosecutions resulting from another high-profile environment case: the 2010 Deepwater Horizon oil spill in the Gulf of Mexico by British Petroleum, which focused primarily on two well site supervisors who were present on the oil rig that exploded; the single executive who was prosecuted was charged not for contributing to the cause of the explosion itself, but rather for allegedly lying to Congress about subsequent efforts to contain the spill. Notably, he was acquitted at trial.⁴⁵

Volkswagen also launched a corporate “amnesty program” limited to mid- and lower-level employees in early November. The amnesty program, which provided protection from being fired, was designed to encourage employees with knowledge to provide information to the company's investigators and to elicit inculpatory information about participants' own roles in the emissions scandal (although presumably such information will be turned over by Volkswagen to the DOJ). Participation was limited to employees covered by collective bargaining agreements; executives could not participate.⁴⁶ Volkswagen indicated when the amnesty program terminated on Nov. 30, approximately 50 employees participated.⁴⁷

Although the amnesty program and the overall internal investigation appear to be producing information relating to the scandal — the company's recent statement that “only a handful of employees, including senior managers, were actively involved in the diesel fraud” came after the amnesty program was complete. Further, it is unclear whether the amnesty program has yielded information about those not “actively” involved in the scandal, and what steps, if any, the company is taking to identify those higher-placed individuals. This group could include executives who may have been aware of and condoned or failed to stop the use of defeat devices or who were “willfully blind” to evidence of the devices' use. Proving the requisite criminal intent of executives in corporate wrongdoing cases can be difficult, as noted *supra*, given the separation between front-line employees and the C-suite. However, prosecutors frequently attempt to solve this problem by establishing intent through the doctrine of willful blindness, which, very generally, provides that when a criminal statute requires proof that a defendant acted knowingly or willfully, “defendants cannot escape the reach of these statutes by deliberately shielding them-

³⁸ See, e.g., *id.*

³⁹ Extradition Treaty with the Federal Republic of Germany, U.S. – Germany (Jan. 19, 1979), available at <http://www.mcnabbassociates.com/Germany%20International%20Extradition%20Treaty%20with%20the%20United%20States.pdf>.

⁴⁰ See, e.g., Kelly Phillips Erb, Germany Investigating Volkswagen Employees For Emissions Scandal Related Tax Evasion, *Forbes.com* (Dec. 1, 2015), available at <http://www.forbes.com/sites/kellyphillipserb/2015/12/01/germany-investigating-volkswagen-employees-for-emissions-scandal-related-tax-evasion/>.

⁴¹ Susannah Nesmith and David Voreacos, *Ex-UBS Executive Weil Acquitted of U.S. Tax Conspiracy*, *Bloomberg.com* (Nov. 4, 2014), available at <http://www.bloomberg.com/news/articles/2014-11-03/ex-ubs-executive-weil-acquitted-of-u-s-tax-conspiracy>.

⁴² Andrew Grossman, *Acquittal Deals U.S. a Blow in Tax-Cheat Crackdown*, *WALL ST. J.* (Nov. 3, 2014), available at <http://www.wsj.com/articles/former-ubs-executive-acquitted-on-tax-conspiracy-charge-1415057280>.

⁴³ See, e.g., *id.*

⁴⁴ William Boston, Hendrik Varnholt, and Sarah Sloat, *Volkswagen Blames ‘Chain of Mistakes’ for Emissions Scandal*, *WALL ST. J.* (Dec. 10, 2015), available at <http://www.wsj.com/articles/vw-shares-up-ahead-of-emissions-findings-1449740759?tesla=y>.

⁴⁵ Kenzi Abou-Sabe, *Former BP Exec Acquitted on Charges of Lying to Investigators After Oil Spill*, *PBS News Hour*, available at <http://www.pbs.org/newshour/rundown/bp-exec-acquitted-charges>.

⁴⁶ Christoph Rauwald, *VW’s Open Door to Whistleblowers Closes at the End of the Month*, *Bloomberg.com* (Nov. 12, 2015), available at <http://www.bloomberg.com/news/articles/2015-11-12/vw-s-open-door-to-whistleblowers-closes-at-the-end-of-the-month>.

⁴⁷ AFP, *‘Around 50’ VW Workers Testify in Emissions Scandal Probe*, *The Telegraph* (Dec. 1, 2015), available at <http://www.telegraph.co.uk/finance/newsbysector/industry/12027312/Around-50-VW-workers-testify-in-emissions-scandal-probe.html>.

selves from clear evidence of critical facts that are strongly suggested by the circumstances.”⁴⁸ The willful blindness doctrine has been employed and analyzed in the realm of environmental prosecutions.⁴⁹ This doctrine always represents a potentially powerful weapon in the DOJ’s arsenal, and it may become particularly relevant in the Volkswagen investigation given the breadth of the alleged Clean Air Act violations.

Conclusion

By issuing the Yates Memo, the DOJ has thrown down the gauntlet and held itself out in the public eye to a higher standard in regards to its effective pursuit of corporate crime. Nonetheless, the DOJ remains bound by the constraints of litigation realities and the ethical duty to not prosecute an individual or a corporation, regardless of the evidence, *simply* because of their status in order to “send a message.” The evolving Volkswagen emissions scandal – with its cocktail mix of apparently widespread violations occurring in the context of a complicated regulatory regime that traditionally has proven difficult for successful prosecutions – could provide a fascinating and thorny test for the DOJ. The public scrutiny will be intense, and the potential outcomes could produce criticisms for yet again backing down on meaningful executive prosecutions, or for pursuing

⁴⁸ *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 131 S. Ct. 2060, 179 L. Ed. 2d 1167, 98 U.S.P.Q.2d 1665, 79 U.S.L.W. 4400, 2011 BL 142067 (2011)

⁴⁹ See e.g., *United States v. Atl. States Cast Iron Pipe Co.*, 2007 BL 70923, D.N.J., No. 3:03-cr-00852, 8/2/07 (“[T]here is ample support for such an instruction in environmental felony cases.”)

misplaced prosecutions to save face in the light of public promises.

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