

Air Pollution

VW Reaches ‘Agreement in Principle’ on Diesel Emissions That Includes Buyback

Volkswagen AG will offer to buy back hundreds of thousands of U.S.-owned diesel vehicles and provide “substantial compensation” to consumers as part of an agreement over the company’s use of illegal technology in diesel vehicles, a federal judge announced (*In re Volkswagen “Clean Diesel” Mktg., Sales Practices and Prod. Liab.*, N.D. Cal., MDL No. 2672, hearing 4/21/16).

The agreement in principle, announced during an April 21 status conference in the U.S. District Court for the Northern District of California, will offer a combination of “payment of substantial compensation to the consumer class members in connection with the car buyback, car modification and cancellation” of vehicle leases, Senior Judge Charles Breyer said. While full details of the agreement are not expected to be announced until June, Breyer said the structure of the deal “will compensate fully all customers” and remediate the environmental impacts in a settlement that is “good for customers and good for the environment.”

“It is also my understanding that the agreement will give consumers several options, including the option to have Volkswagen buy back their vehicle; and, subject to governmental approval after further testing, the option to have the consumer’s vehicle modified in accordance with the agreement; and for those consumers who have leased their car, to cancel the lease and return the car to Volkswagen,” Breyer said.

The agreement also would “fully address” excess nitrogen oxides emissions from the diesel vehicles by establishing an environmental remediation fund and by requiring Volkswagen to fund programs to promote green vehicle technology, Breyer said.

Volkswagen AG, in an April 21 statement, confirmed that it has reached an agreement in principle to resolve civil allegations brought by the U.S. Justice Department, Environmental Protection Agency and California Air Resources Board over the automaker’s use of illegal defeat devices, which allowed the diesel vehicles to pass emissions tests despite emitting more nitrogen oxides pollution than allowed.

Volkswagen’s use of the emissions-cheating software in 11 million vehicles worldwide, announced in September, exposed the automaker to billions in maximum

civil penalties from U.S. authorities, hundreds of consumer lawsuits, individual state claims, and litigation in other countries (182 DEN A-5, 9/21/15) (183 DEN A-5, 9/22/15) (183 DEN A-1, 9/22/15) (184 DEN A-3, 9/23/15).

Consent Decree Due in June. Wyn Hornbuckle, a Justice Department spokesman, told Bloomberg BNA in an April 21 e-mail that the agreement only covers what to do about the two-liter diesel vehicles sold by Volkswagen in the U.S. and the environmental consequences resulting from excess emissions from those vehicles. The defeat device allegations covered about 480,000 two-liter diesels sold by Volkswagen in the U.S., including various model years of the Passat, Jetta and Golf.

Volkswagen still must resolve allegations that about 90,000 three-liter diesel vehicles contained undisclosed auxiliary emissions control devices. Additionally, the Justice Department has yet to announce a decision on whether it will file criminal charges against the automaker, which could potentially include charges related to conspiracy, obstruction of justice and making false statements to government officials (04 DEN A-2, 1/7/16).

“The Department’s other investigations into VW’s conduct remain active and ongoing,” Hornbuckle said.

The German automaker also confirmed it has reached an agreement on the “basic features” of a settlement with class action plaintiffs, including consumers who purchased or leased affected diesel vehicles.

Breyer set a June 21 deadline for the federal government to file its proposed consent decrees and for the plaintiffs’ steering committee to file an approval motion for its settlement.

Breyer, who had given Volkswagen until April 21 to present a proposed plan to address the diesel vehicles that remain on the road, acknowledged that he had set aggressive deadlines. The parties met those deadlines thanks to lengthy negotiations that were overseen by former Federal Bureau of Investigation Director Robert Mueller, who is serving as settlement master in the litigation, Breyer said.

“Without the cooperation of the Department of Justice, the plaintiffs’ steering committee, EPA, CARB and in particular the Federal Trade Commission and Volkswagen, none of this would have occurred today,” Breyer said.

Mueller, who is now a partner at Wilmer Cutler Pickering Hale and Dorr LLP, declined to comment after the hearing.

Quick Resolution Reached. Robert J. Giuffra Jr., an attorney with Sullivan & Cromwell LLP in New York representing Volkswagen, thanked Breyer and Mueller for helping get quick resolution.

“We’re not aware of an MDL [multi-district litigation] that has moved that quickly,” Giuffra said. “That reflects that Volkswagen is committed to win back the trust of its regulators, consumers and all Americans.”

Michael Weinstein, chair of the White Collar Defense Practice at Cole Schotz PC, told Bloomberg BNA that Volkswagen had “great incentive” to quickly resolve the diesel emissions claims and provide investors with some certainty about how much the automaker will need to spend to get past the scandal. While full details of the agreement are not yet available, Weinstein said Volkswagen is probably “paying a premium” to settle quickly in order to obtain closure.

“They needed some finality: this is a significant step in that direction,” Weinstein said. “I think Volkswagen is going to want to resolve as much as possible with this settlement. They are highly motivated to understand and cap their exposure.”

Gag Order Issued. Breyer imposed a confidentiality order and said consumers and the public will be able to review and comment on the details in due course.

“There’s nothing for the consumer or their counsel to do until they actually receive the formal notice,” Breyer said.

Elizabeth Cabraser, a partner at Lief Cabraser Heimann & Bernstein LLP who is serving as lead attorney for the class action plaintiffs, told reporters following the status conference the parties are under a “zone of confidentiality” and can provide few details outside filings that will be posted on the court’s website.

Aggressive deadlines, “feasible or not, we’ve meet them before and we will meet them again,” said Cabraser.

Thomas Young, an attorney representing Hillsborough County, Fla., in a lawsuit against Volkswagen, told Bloomberg BNA that while the confirmation that Volkswagen will offer to buy back vehicles is a “big win” for consumers, there are likely still many details to be worked out before a final settlement is reached. Those details likely include how the vehicles will be valued for the purposes of a buyback and how much of a premium consumers will receive as compensation.

“Obviously the devil is in the details there,” Young said. “Judge Breyer did make very clear that the public will have plenty of opportunity to scrutinize whatever the details are.”

The cost of buying back all the affected vehicles could total \$9.4 billion, according to Bloomberg Intelligence analyst Brandon Barnes (57 DEN A-5, 3/24/16).

Advocates Wait for More Details. Various environmental and public health organizations, along with consumer advocates and some lawmakers, have pushed for any Volkswagen settlement to include a buy-back offer for consumers who do not want to keep their cars.

John Olivieri, 21st Century transportation campaign director at the U.S. PIRG, said in an April 21 statement that the agreed-upon framework of the Volkswagen deal “appears to include all of the elements” that the deal should. Any settlement must make consumers whole and address the environmental damage caused by Volkswagen’s decision to use illegal software, Olivieri said.

Frank O’Donnell, president of the nonprofit Clean Air Watch, told Bloomberg BNA that while Breyer’s mention of a buyback program and environmental remediation fund are “a good sign,” advocates will need to wait for a final agreement to judge whether the settlement is a good one for the public and the environment. For example, O’Donnell said there are no details on what the buyback program will look like, what the environmental compensation programs will be and how many non-compliant cars will remain on the road.

“At least they’re talking about an environmental compensation package,” O’Donnell said. “So that’s a good sign. It’s not being ignored.”

Some Claims Remain. Weinstein said that while the proposed agreements announced by Breyer would resolve “a lot” of Volkswagen’s issues, the automaker is “still not out of the woods” on the diesel emissions scandal.

The next step for Volkswagen likely will be to address any potential criminal liability, as well as claims filed under state consumer protection law, Weinstein said.

Young said that while the court’s focus was on taking care of the consumers first, the agreements do not cover claims by several states and localities. The issue of civil penalties and fines against Volkswagen also must still be formally resolved, Young said.

“Those could be additional billions [of dollars for Volkswagen to pay] quite easily,” he said.

New York Attorney General Eric Schneiderman (D) said in a statement that the agreement announced by Breyer “does not in any way” resolve state consumer protection and environmental penalty claims.

In addition to those claims, Volkswagen also needs to resolve issues with Volkswagen dealers who were negatively affected by the emissions scandal, Young said. Most Volkswagen dealers have held off on filing lawsuits in the hope that they can come to an “amicable solution” with the automaker, according to Young.

Volkswagen also is represented by Jeffrey Chase of Herzfeld & Ruben PC, while Volkswagen subsidiary Porsche Cars North America Inc. is represented by Cari Dawson of Alston & Bird LLP. Joshua Van Eaton, deputy assistant U.S. attorney in the Justice Department’s Environment and Natural Resources Division, represents the EPA.

BY JOYCE E. CUTLER AND PATRICK AMBROSIO

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