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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION
15

16 IN RE: VOLKSWAGEN "CLEAN DIESEL") MDL No. 2672 CRB (JSC)
17 MARKETING, SALES PRACTICES, AND)
18 PRODUCTS LIABILITY LITIGATION) **UNITED STATES' NOTICE OF NON-**
19) **MATERIAL MODIFICATIONS TO THIRD**
20) **PARTIAL CONSENT DECREE**
21)
22)
23)
24)

20 This Document Relates to:
21 *United States v. Volkswagen AG et al.*,
22 Case No. 16-cv-295 (N.D. Cal.)
23)
24)

1 Pursuant to Paragraphs 105 and 106 of the Third Partial Consent Decree, which was entered by
2 the Court on April 13, 2017, Dkt. No. 3155 at 73,¹ the United States notifies the Court that the attached
3 non-material modifications to the Third Partial Consent Decree have been agreed to in writing by all the
4 Parties and do not need further approval by the Court. As required by Paragraph 106, the United States
5 is hereby filing the modifications with the Court as Attachment A to this Notice.
6

7 Dated: June 1, 2018

Respectfully submitted,

8 For the United States of America

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27 ¹ In this Notice, all page references to a Court document are to those pages in the header of the Court
28 document (e.g., "Page 73 of 83").

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ATTACHMENT A
Modifications to Third Partial Consent Decree

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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 _____)
15 IN RE: VOLKSWAGEN "CLEAN)
DIESEL" MARKETING, SALES)
16 PRACTICES, AND PRODUCTS)
LIABILITY LITIGATION)

Case No: MDL No. 2672 CRB (JSC)

17 **THIRD PARTIAL CONSENT DECREE**

18 Hon. Charles R. Breyer
19)
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Environmental Management System (“EMS”) Audit

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2 24. EMS Audit. Within 90 Days after the Effective Date, the VW Defendants shall
3 contract with and retain an independent third party to conduct an EMS audit pursuant to an
4 industry-recognized standard for product development processes for vehicles to be certified for
5 sale in the United States for each year for calendar years 2017, 2018, and 2019. Beginning with
6 the EMS audit covering calendar year 2017, the EMS audit shall include: (1) an assessment of
7 the VW Defendants’ processes to comply with U.S. environmental laws and regulations; and (2)
8 a recommendation for corrective actions.
9

10 25. Annual EMS Audit Report. Upon completion of each annual EMS audit report,
11 the VW Defendants shall provide to the Department of Justice a copy of their annual EMS audit
12 report covering calendar year 2017, 2018, and 2019. To the extent that any such report contains
13 CBI, the VW Defendants shall simultaneously submit to Department of Justice for its review a
14 summary version that can be made publicly available. Within 21 Days after a copy is provided
15 to the Department of Justice, the VW Defendants shall post a copy of the annual EMS audit
16 report (redacted of any CBI or personal information the disclosure of which is restricted by
17 applicable law; however no emissions test methods and results may be claimed as CBI) in
18 English and German on the public website required by Paragraph 51.
19
20

Implementation Timeframe

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22 26. The VW Defendants shall continue to implement the ongoing requirements of this
23 Consent Decree, other than Section VI (Injunctive Relief for the Porsche Defendants), for a
24 three-year period after the implementation of the requirements of Paragraph 16.
25

Independent Compliance Auditor

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27 27. Retention of Independent Compliance Auditor. The VW Defendants shall retain,
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1 upon approval by the United States, a person or entity to serve as the Independent Compliance
2 Auditor for the oversight of the VW Defendants' obligations under this Section V (Injunctive
3 Relief for the VW Defendants) for a three-year period after June 16, 2017 (the
4 "EffectiveRetention Date").

5
6 a. Recommendation of Candidates for the Independent Compliance

7 Auditor. Within 60 Days after the Effective Date, the VW Defendants shall
8 submit to the United States a list of three candidates for the position of the
9 Independent Compliance Auditor. The VW Defendants shall:

10 i. Submit a resume, biographical information, and any
11 relevant material concerning each of the candidate's competence and
12 qualifications to serve as Independent Compliance Auditor;

13
14 ii. Describe any past, present, or future business or financial
15 relationship that the candidate has with the VW Defendants or EPA. A
16 candidate may not be an employee or an agent of the VW Defendants, VW
17 Defendants' subsidiaries or the United States, nor may the candidate be
18 currently engaged in any work for, or in representation of, the VW
19 Defendants;
20

21 iii. Verify that, to the VW Defendants' best knowledge and
22 based on the reasonably available information, either the candidate has no
23 conflicts of interest with regard to this matter or any actual or apparent
24 conflict has been waived by the VW Defendants and the United States;
25

26 iv. Verify that the candidate has agreed not to be employed by
27 the VW Defendants, or their subsidiaries, for a minimum of two years after
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1 that their obligations under this Consent Decree are independent of the Plea
2 Agreement. Thus, if for any reason the VW Defendants do not retain a Monitor
3 under the Plea Agreement by such time as an Auditor is required to be retained by
4 Paragraph 27.b of this Consent Decree, or if the Court does not enter the Plea
5 Agreement by such time as an Auditor is required to be retained by Paragraph 27.b
6 of this Consent Decree, the VW Defendants must still retain an Auditor that
7 satisfies the requirements of Paragraph 27 of this Consent Decree.
8

9 28. Access Rights and Duties of the Independent Compliance Auditor. The VW
10 Defendants shall cooperate fully with the Auditor in any and all matters relating to the Auditor's
11 duties as set forth in this Paragraph.
12

13 a. Audit Plan. The Independent Compliance Auditor shall carry out
14 its duties based on: (1) review of relevant documents and procedures; (2) on-site
15 observation of selected systems and procedures at the VW Defendants' sites,
16 including internal controls, record-keeping, and internal audit procedures; (3)
17 meetings with and interviews of relevant employees, managers, and directors; and
18 (4) analyses, studies, and testing of the VW Defendants' compliance management
19 system. Within 30 Days after retention, the Independent Compliance Auditor
20 shall develop and submit to the Department of Justice for comment a draft audit
21 plan that will establish a checklist of relevant compliance requirements,
22 procedures for the exchange of any documents and information that the
23 Independent Compliance Auditor needs to perform its duties, and any other terms
24 that the Independent Compliance Auditor may deem necessary to effectuate its
25 duties. By ~~June 30~~February 28 of each subsequent year, the Independent
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1 Compliance Auditor shall develop and submit to the Department of Justice for
2 comment a draft audit plan for its annual audit activities. The Independent
3 Compliance Auditor shall take the Department of Justice's comments into
4 consideration in developing each of the final audit plans.

5
6 b. Information and Access Rights Accorded to Independent
7 Compliance Auditor, and Independent Compliance Auditor Notice to DOJ of Non-
8 Compliance. The VW Defendants shall cooperate fully with the Independent
9 Compliance Auditor and shall provide the Independent Compliance Auditor with
10 any information and documents that the Auditor requests or may reasonably need
11 to fulfill the duties listed in this Paragraph 28. The VW Defendants shall
12 designate an Environmental Compliance Officer to liaise directly with the
13 Independent Compliance Auditor regarding issues of information and access
14 rights. The VW Defendants shall facilitate the Independent Compliance Auditor's
15 access to the VW Defendants' documents, databases, and facilities where
16 certification or compliance testing of the VW Defendants' vehicles occur. The
17 VW Defendants shall use best efforts to make their employees or contractors
18 available to answer questions or provide information that the Independent
19 Compliance Auditor may need in the fulfillment of its duties. In the event that the
20 VW Defendants seek to withhold from the Auditor access to information,
21 documents, records, facilities, or current or former employees or contractors of the
22 VW Defendants that may be subject to a claim of attorney-client privilege or to the
23 attorney work product doctrine, or where the VW Defendants reasonably believe
24 production or providing access would otherwise be inconsistent with applicable
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1 law, the VW Defendants shall work cooperatively with the Auditor to resolve the
 2 matter to the satisfaction of the Auditor consistent with applicable law. If the
 3 Independent Compliance Auditor believes the VW Defendants have violated the
 4 requirements of this Paragraph 28, the Independent Compliance Auditor shall
 5 promptly notify the Department of Justice, including a description of the alleged
 6 violations and supporting documentation as necessary.
 7

8 c. Annual Reports. The Independent Compliance Auditor shall
 9 review documents and take such reasonable measures as may be necessary to
 10 verify the VW Defendants' compliance with Section V (Injunctive Relief for the
 11 VW Defendants). For three years after the ~~Retention~~Effective Date, the
 12 Independent Compliance Auditor shall audit the VW Defendants' compliance with
 13 their obligations under Section V (Injunctive Relief for the VW Defendants) of
 14 this Consent Decree, and shall provide ~~an~~ draft annual report to the Department of
 15 Justice as follows:- ~~The first~~ draft annual report is due on May 18, 2018
 16 (covering the time period from April 13, 2017 through April 13, 2018);~~one year~~
 17 after the Effective Date, the second draft annual report is due on May 17, 2019
 18 (covering the time period from April 14, 2018 through April 13, 2019);~~two years~~
 19 after the Effective Date, and the third draft annual report is due on March 31, 2020
 20 (covering the time period from April 14, 2019 through April 13, 2020, provided
 21 that the Independent Compliance Auditor will notify the VW Defendants by April
 22 15, 2020 of any additional or different findings or recommendations that it
 23 identifies between providing its third draft annual report on March 31, 2020 and
 24 April 13, 2020 that it intends to include in the final audit report)~~three years after~~
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1 ~~the Effective Date.~~ The Independent Compliance Auditor shall concurrently
2 provide a ~~draft~~ copy of its draft annual report to ~~the Department of Justice and~~ the
3 VW Defendants. Within 30 Days after receipt of ~~the each~~ draft annual report, the
4 VW Defendants shall provide their comments, if any, to the Independent
5 Compliance Auditor. The Independent Compliance Auditor may consider and
6 reflect the VW Defendants' comments in its final annual report to the extent that
7 the Independent Compliance Auditor deems appropriate in the exercise of its
8 independent judgment. In the annual report, the Independent Compliance Auditor
9 shall include, as applicable, findings that identify any noncompliance by the VW
10 Defendants with the requirements of Section V (Injunctive Relief for the VW
11 Defendants), and shall recommend, as applicable, actions for the VW Defendants
12 to take to achieve compliance. The Independent Compliance Auditor shall also
13 monitor the VW Defendants' implementation of any action plan submitted
14 pursuant to Paragraph 29, and shall indicate in the second and third annual reports
15 the status of any corrective action. The Independent Compliance Auditor shall
16 provide final annual reports to the Department of Justice and the VW Defendants
17 as follows: the first final annual report is due on August 17, 2018; the second final
18 annual report is due on August 16, 2019; and the third final annual report is due on
19 June 16, 2020. The Independent Compliance Auditor may exercise discretion to
20 report events occurring outside of each of the designated time periods related to
21 each annual report provided that the events occur prior to the submission of the
22 third final annual report on June 16, 2020. To the extent the Independent
23 Compliance Auditor makes material changes to the findings or recommendations
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1 after providing the VW Defendants a draft report, the Independent Compliance
2 Auditor will provide the VW Defendants' advanced notice and a reasonable
3 opportunity to comment on the additions or changes before it issues each final
4 annual report. All final annual reports from the Independent Compliance Auditor
5 (redacted of any CBI or personal information the disclosure of which is restricted
6 by applicable law; however no emissions test methods and results may be claimed
7 as CBI) shall be posted by the VW Defendants on the public website required by
8 Paragraph 51 in both English and German within 21 Days after issuance.
9

10 d. Compensation of the Independent Compliance Auditor. The VW
11 Defendants shall be responsible for compensating the Independent Compliance
12 Auditor for the performance of its duties in accordance with the terms agreed upon
13 by the VW Defendants and the selected Independent Compliance Auditor. Such
14 terms of agreement shall clarify that the Independent Compliance Auditor is not an
15 employee or an agent of the VW Defendants, and the Independent Compliance
16 Auditor's work is not subject to the VW Defendants' assertion of attorney-client
17 or work product privileges. Upon the Department of Justice's request, any
18 agreements between the VW Defendants and the Independent Compliance Auditor
19 shall be made available for the Department of Justice's review.
20

21 29. VW Defendants' Response to Independent Compliance Auditor's Report.
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23 a. Action Plan. Within 60 Days after receiving any final annual
24 report anfrom the Independent Compliance Auditor's final report containing a
25 finding of noncompliance, the VW Defendants shall submit to the Department of
26 Justice a response to the Independent Compliance Auditor's findings and
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1 recommendations for corrective action. The VW Defendants' response shall
2 include, as applicable, an action plan to implement corrective measures as
3 expeditiously as practicable, or an explanation of why corrective measures are not
4 being implemented. After the VW Defendants have completed implementation of
5 the corrective measures, if any, the VW Defendants shall provide a report to the
6 Department of Justice with a certification, in accordance with Paragraph 52 of the
7 Consent Decree, that the work has been completed.
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9 b. Annual Meeting. Within 90 Days after receiving each final annual
10 report from the Independent Compliance Auditor's final report, the VW
11 Defendants shall meet with the Department of Justice to discuss the Independent
12 Compliance Auditor's final annual report and any suggestions, comments, or
13 improvements that the VW Defendants may wish to discuss with the Department
14 of Justice.
15

16 VI. INJUNCTIVE RELIEF FOR THE PORSCHE DEFENDANTS

17 30. Segregation of Duties between Product Development and Certification

18 Testing/Monitoring. Within 90 Days after the Effective Date, the Porsche Defendants shall
19 implement measures to ensure that employees involved in certification testing and monitoring
20 are organizationally separate from those involved in product development. Consistent with the
21 Porsche Remediation Plan, the Porsche Defendants shall, as set forth in Paragraph 31 below,
22 improve policies, procedures, practices, or processes for the development of vehicles that include
23 emission control systems designed to comply with U.S. laws and regulations related to emissions
24 standards and certifications, and to ensure that emissions certification testing of such vehicles is
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1 46. Any stipulated penalties applicable to the original Submission, as provided in
2 Section IX (Stipulated Penalties), shall accrue during the 30-Day period or other specified period
3 pursuant to Paragraph 43. Such stipulated penalties shall not be payable unless the resubmission
4 of the Submission is untimely or is disapproved in whole or in part; provided that, if the original
5 Submission was so deficient as to constitute a material breach of the VW Defendants' or the
6 Porsche Defendants', as applicable, obligations under this Decree in making that Submission, the
7 stipulated penalties applicable to the original Submission shall be due and payable
8 notwithstanding any subsequent resubmission.
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10 **VIII. REPORTING AND CERTIFICATION REQUIREMENTS**

11 47. Timing of Reports. The VW Defendants shall submit an annual report
12 incorporating information required by Paragraphs 19, 21, 22, and 23, and 28. The first annual
13 report is due on May 18, 2018 (covering the time period from April 13, 2017 through April 13,
14 2018); the second annual report is due on May 17, 2019 (covering the time period from April 14,
15 2018 through April 13, 2019); and the third annual report is due on May 18, 2020 (covering the
16 time period from April 14, 2019 through April 13, 2020)-one year after the Effective Date; the
17 second annual report is due two years after the Effective Date, and the third annual report is due
18 three years after the Effective Date. The reports required by Paragraphs 15, 18, 25, and 49.b
19 shall be due as set forth in those Paragraphs.
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22 48. Defendants may assert that information submitted under this Consent Decree is
23 protected as CBI as set out in 40 C.F.R. Part 2.
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25 49. Reporting of Violations.

26 a. If the VW Defendants or the Porsche Defendants reasonably
27 believe they have violated, or that they may violate, any requirement of this
28