17. FIRM PLEAS AND SETTLEMENTS

Much of the discussion in this chapter will be occasion for review of concepts discussed at the outset of the materials, and returned to throughout, involving corporate liability and the purposes of imposing various kinds of sanctions on firms. (Now might be an opportune time to review the materials in Chapter 1, particularly the Justice Department's corporate prosecution guidelines.) In addition to showing the forms of corporate settlements and their common features, this chapter provides a close look at the facts involved in examples of major settlements—as a way of prompting assessment of how federal prosecutors use their powers to extract penalties and terms from corporations in criminal matters.

A. Forms of Corporate Dispositions

A corporate criminal prosecution (or investigative matter) will be disposed of under current practice in one of the following ways:

1. The government may choose to **decline prosecution** after completing an investigation.

2. The government and the company may enter into a **non-prosecution agreement (NPA)**, a contractual settlement that involves no filed criminal charges.

3. The government and the company may enter into a **deferred prosecution agreement (DPA)**, a contractual settlement that includes the filing of criminal charges, the prosecution of which is deferred for some period and then prosecutors move to dismiss them if the company complies with the agreement.

4. The government and the company may enter into a **plea agreement**, a contractual settlement in which charges are filed, the company enters a guilty plea, and a court imposes a **sentence** on the company. (Sentencing of corporations is addressed in Chapter 18.)

5. The government may file charges against a company and the company may choose to contest the charges at **trial**. A jury's acquittal will end the matter, while a conviction will be followed by a court imposing a **sentence** on the company.

To generalize, all of these events—with the exception of a (1) declination or (5) an acquittal at trial—will result in some combination of sanctions imposed on a corporation by the terms of a contractual agreement or by a judge's sentence. As the Justice Department prosecution guidelines and the examples that will follow in this chapter make clear, there is a great deal of variation from case to case in how sanctions are structured. The corporate sanction menu available to prosecutors and courts includes, at least most commonly, these items:

1. Monetary fines and penalties.

2. Restitution to victims, directly or indirectly (as through funding of projects).

3. Remediation of harm (this is particularly common in environmental and consumer products cases).

4. Suspension or debarment from an industry or line of business.

5. Internal corporate reforms, particularly in the areas of management structure and compliance systems.

6. Imposition of an outside monitor to oversee the corporation's compliance with a settlement and to report to the prosecutor or court on the corporation's progress with mandated reforms.

7. Obligations to cooperate by assisting the government in investigation of individuals and further wrongdoing.

8. Admission of wrongdoing, in the form of a guilty plea or agreement to a statement of facts.

9. Waiver of legal rights, including rights to challenge admission of wrongdoing in the event that the corporation is deemed in violation of a settlement and then prosecuted for the original violations.

10. Agreement that the prosecutor retains sole power to determine whether the corporation has violated the terms of a settlement.

B. Settlement Examples

No corporate counsel can now be in a position to competently advise a company regarding resolution of a criminal matter, and negotiate with federal prosecutors, without having extensive familiarity with what might be called the "common law" of Justice Department settlements, reflected in how these agreements and their terms have developed over time and across a wide variety of corporate cases. Abundant examples of corporate criminal settlements in many different forms can be found at the Corporate Prosecution Registry and the Foreign Corrupt Practices Clearinghouse.[8]

This chapter provides two major examples as a basis for discussion. As you read these detailed settlement agreements, pay closest attention to three things: (1) the nature and seriousness of the underlying conduct, (2) the penalties imposed on the corporation and the prosecutors' explanation of the suitability of those penalties in the case, and (3) the terms that restrict the corporation's legal rights and freedom of action in various ways. Meanwhile, consider why the corporate managers and their lawyers in these cases decided to accept the terms of these agreements.

United States v. Volkswagen AG, No. 16-CR-20394 (E.D. Mich. 2017)

Rule 11 Plea Agreement

The United States of America, by and through the Department of Justice, Criminal Division, Fraud Section, the United States Attorney's Office for the Eastern District of Michigan, and the Department of Justice, Environment and Natural Resources Division, Environmental Crimes Section and with the approval of the Deputy Attorney General (collectively hereafter, "the Offices"), and the Defendant, Volkswagen AG (the

[8] CORPORATE PROSECUTION REGISTRY, http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/index.html; FOREIGN CORRUPT PRACTICES CLEARINGHOUSE, http://fcpa.stanford.edu/.

"Defendant"), by and through its undersigned attorneys, and through its authorized representative, pursuant to authority granted by the Defendant's Management Board, with the consent of the Supervisory Board, hereby submit and enter into this plea agreement (the "Agreement"), pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. The terms and conditions of this Agreement are as follows:

1. Guilty Plea

A. Waiver of Indictment and Venue

Pursuant to Fed. R. Crim. P. 7, the Defendant agrees to knowingly waive its right to grand jury indictment and its right to challenge venue in the United States District Court for the Eastern District of Michigan, and to plead guilty to Counts One through Three of the Third Superseding Information.

B. Counts of Conviction

The Third Superseding Information charges three counts: (1) Count One - conspiracy in violation of 18 U.S.C. § 371, (2) Count Two - obstruction of justice in violation of 18 U.S.C. § 1512(c), and (3) Count Three – introducing imported merchandise into the United States by means of false statements in violation of 18 U.S.C. § 542. The Defendant further agrees to persist in that plea through sentencing and, as set forth below, to cooperate fully with the Offices in their investigation into the conduct described in this Agreement and other conduct related to the introduction into the United States of diesel vehicles with defeat devices as defined under U.S. law.

C. Elements of Offense

<u>The elements of Count One (conspiracy) are as follows</u>:

(1) The elements for conspiracy to defraud the United States by obstructing the lawful function of the federal government are as follows:

(a) That two or more persons conspired, or agreed, to defraud the United States or one of its agencies or departments, in this case, the Environmental Protection Agency (EPA), by dishonest means;

(b) That the defendant knowingly and voluntarily joined the conspiracy; and

(c) That a member of the conspiracy did one of the overt acts described in the indictment for the purpose of advancing or helping the conspiracy.

(2) The elements for conspiracy to violate the wire fraud statute and Clean Air Act are as follows:

(a) That two or more persons conspired, or agreed, to commit a crime, in this case, a violation of the wire fraud statute (18 U.S.C. § 1343) and the Clean Air Act (42 U.S.C..§ 7413(c)(2)(A)) as described below;

(b) That the defendant knowingly and voluntarily joined the conspiracy; and

(c) That a member of the conspiracy did one of the overt acts described in the indictment for the purpose of advancing or helping the conspiracy.

Object of the Conspiracy – Wire Fraud – 18 U.S.C. § 1343

(a) The defendant knowingly participated in, devised, or intended to devise a scheme to defraud in order to obtain money or property;

(b) The scheme included a material misrepresentation or concealment of a material fact;

(c) The defendant had the intent to defraud; and

(d) The defendant used (or caused another to use) wire, radio or television communications in interstate or foreign commerce in furtherance of the scheme.

Object of the Conspiracy – Clean Air Act – 42 U.S.C. § 7413(c)(2)(A)

(a) The defendant knowingly made (or caused to be made) a false material statement, representation, certification, or omission of material information;

(b) The statement, representation or certification that was made (or omitted), or caused to be made or omitted was in a notice, application, record report, plan or other document required to be filed or maintained under the Clean Air Act; and

(c) The statement representation, certification, or omission of information, was material.

The elements of Count Two (obstruction of justice) are as follows:

(1) That the defendant altered, destroyed, mutilated, or concealed a record, document or other object;

(2) That the defendant acted knowingly;

(3) That the defendant acted corruptly; and

(4) That the defendant acted with the intent to impair the record, document or object's integrity or availability for use in an official proceeding.

The elements of Count Three (entry of goods by false statement) are as follows:

(1) That merchandise was imported;

(2) That the defendant entered or introduced merchandise into the commerce of the United States;

(3) That the defendant did so by means of a false statement, which it knew was false; and

(4) That the false statement was material to the entry of the merchandise.

D. Statutory Maximum Penalties

The statutory maximum sentence that the Court can impose for a violation of Title 18, United States Code, Section 371 is a fine of $500,000 or twice the gross pecuniary gain or gross pecuniary loss resulting from the offense, whichever is greatest, Title 18, United States Code, Section 3571(c), (d); five years' probation, Title 18, United States Code, Section 3561(c)(1); and a mandatory special assessment of $400, Title 18, United States Code, Section 3013(a)(2)(B). The statutory maximum sentence that the Court can impose for a violation of Title 18, United States Code, Section 1512(c) (Count Two) is a fine of $500,000; five years' probation, Title 18, United States Code, Section 3561(c)(1); and a mandatory special assessment of $400, Title 18, United States Code, Section 3013(a)(2)(B). The statutory maximum sentence that the Court can impose for a violation of Title 18, United States Code, Section 542 (Count Three) is a fine of $500,000 or twice the gross pecuniary gain or gross pecuniary loss resulting from the offense, whichever is greatest, Title 18, United States Code, Section 3571(c), (d); five years' probation, Title 18, United States Code, Section 3561(c)(1); and a mandatory special assessment of $400, Title 18, United States Code, Section 3013(a)(2)(B).

E. Factual Basis for Guilty Plea

The Defendant is pleading guilty because it is guilty of the charges contained in the Third Superseding Information. The Defendant admits, agrees, and stipulates that the factual allegations set forth in Exhibit 2 (the Statement of Facts) are true and correct, that it is responsible under the laws of the United States for the acts of its employees described in Exhibit 2, and that the facts set forth in Exhibit 2 accurately reflect the Defendant's criminal conduct and provide a factual basis for the guilty plea. The Defendant agrees that it will neither contest the admissibility of, nor contradict, the Statement of Facts contained in Exhibit 2 in any proceeding.

2. Sentencing Guidelines

A. Standard of Proof

The Court will find sentencing factors by a preponderance of the evidence.

B. Guideline Range

There are no disputes with respect to the sentencing guidelines that require resolution by the court. While the Defendant does not adopt, agree or accept the United States Sentencing Guidelines (U.S.S.G.) analysis contained herein, for purposes of avoiding the need for a contested sentencing proceeding and achieving a just and fair result, and because the Defendant agrees that the overall fine proposed herein achieves such a result, the Defendant does not contest the factual or legal basis of the Office's U.S.S.G. analysis contained in this Paragraph for the purposes of this proceeding and stipulates that the proposed fine constitutes a reasonable sentence under the factors listed in Title 18, United States Code, Section 3553(a). Pursuant to *United States v. Booker,* 543 U.S. 220 (2005), the Court must determine an advisory sentencing guideline range pursuant to the United States Sentencing Guidelines (U.S.S.G.). The Court will then determine a reasonable sentence within the statutory range after considering the advisory sentencing guideline range and the factors listed in Title 18, United States Code, Section 3553(a). The Defendant also understands that if the Court accepts this Agreement, the Court is bound by the sentencing provisions in Paragraph 3. The Offices submit that a faithful application of the U.S.S.G. to determine the applicable fine range yields the following analysis:

a. The 2016 U.S.S.G. are applicable to this matter.

b. Offense Level. Based upon U.S.S.G. § 2B1.1, the total offense level is 41, calculated as follows:

(a)(1)	Base Offense Level	7
(b)(1)(P)	Amount of Loss > $550 million	+30
(b)(2)(A)(i)	More than 10 Victims	+2
(b)(10)(B)	Substantial Part of Scheme Committed from Outside the United States	+2
TOTAL		41

c. Base Fine. Based upon U.S.S.G. § 8C2.4(a), the base fine is $8,543,169,187 (the pecuniary loss from the offense caused by the Defendant).

d. Culpability Score. Based upon U.S.S.G. § 8C2.5, the culpability score is 11, calculated as follows:

(a)	Base Culpability Score	5
(b)(1)	The unit of the organization within which the offense was committed had 5,000 or more employees and an individual within high-level personnel of the unit participated in, condoned, or was willfully ignorant of the offense	+5
(e)	Obstruction of justice	+3
(g)(3)	The organization fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct	-2
TOTAL		11

Calculation of Fine Range

Base Fine $8,543,169,187[9]

[9] The base fine consists of the loss amount as calculated under USSG § 2B1.1 and accompanying Application Notes, discounted to reflect a 50% reduction for the litigation risk that both parties would bear were there a contested sentencing proceeding. *See, e.g., United States v. Giovenco,* 773 F.3d 866 (7th Cir. 2014); *United States v. Prosperi,* 686 F.3d 32 (1st Cir. 2012).

Multipliers	2 (min) / 4 (max)
Fine Range	$17,086,338, 374 (min) / $34,172,676,746 (max)

3. Sentence

Pursuant to Fed. R. Crim. P. 11(c)(1)(C), the United States and the Defendant agree that the appropriate disposition of this case is as set forth in this Section and agree to recommend jointly that the Court at a hearing to be scheduled at an agreed upon time impose it.

A. Relevant Considerations

The Offices enter into this Agreement based on the individual facts and circumstances presented by this case and the Defendant. Among the factors considered were the following:

1. the Defendant did not voluntarily disclose to the Offices the conduct described in Exhibit 2 (the Statement of Facts);

2. the Defendant cooperated with the Offices' investigation by, among other things, (i) gathering substantial amounts of evidence and performing forensic data collections in multiple jurisdictions; (ii) producing documents, including translations, to the Offices in ways that did not implicate foreign data privacy laws; (iii) collecting, analyzing, organizing, and producing voluminous evidence and information; (iv) interviewing hundreds of witnesses in the United States and overseas; (v) providing non-privileged facts relating to individuals and companies involved in the criminal conduct; and (vi) facilitating and encouraging cooperation and voluntary disclosure of information and documents by current and former company personnel;

3. the Defendant has already agreed to compensate members of the class in *ln re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,* No. 3:15-md-2672 (N.D. Cal.), which consists of victims of the underlying criminal conduct that is the subject of this Agreement, and to pay into a NOx remediation trust, in an aggregate amount of approximately $11 billion (based on net present value);

4. despite obstruction of justice committed by certain of the Defendant's employees, principally in the form of document destruction, the Defendant, including through its outside counsel, self-disclosed this conduct to the Offices, remediated the conduct by recovering large portions of the deleted documents through a variety of forensic means, and conducted a thorough investigation of the conduct, the findings of which it reported to the Offices;

5. the Defendant engaged in remedial measures, including creation of a management board position to supervise the Defendant's legal and compliance functions, reorganization of the whistleblower system, improvements to its risk assessment systems, specific reforms to its engine-related practices, including a program to audit these reforms, termination [sic] the employment of six individuals who participated in, or failed to supervise employees who participated in, the misconduct described in the Statement of

Facts, suspending an additional eight individuals who participated in the misconduct described in the Statement of Facts for varying periods, and disciplining an additional three employees who participated in the misconduct described in the Statement of Facts; however, the Defendant's remediation remains incomplete;

6. the Defendant has committed to continue to enhance its compliance program and internal controls;
7. the Defendant has agreed, as part of its continuing cooperation obligations, and to ensure that the Defendant and its wholly-owned subsidiary Volkswagen Group of America ("VW GOA") implements an effective compliance program, to the appointment of an independent monitor (the "Monitor") for a period of up to three years, who will have authority with respect to the Defendant and VW GOA;
8. the nature and seriousness of the offenses;
9. the Defendant has no prior criminal history;
10. the Defendant has agreed to continue to cooperate with the Offices in any ongoing investigation of the conduct of the Defendant and its officers, directors, employees agents, business partners, and consultants relating to the violations to which the Defendant is pleading guilty; and
11. the Defendant has agreed to pay an additional $1,500,000,000 to the United States to resolve claims for civil penalties arising from the underlying conduct that is the subject of this Agreement;
12. accordingly, after considering (1) through (11) above, (a) the Defendant received an aggregate discount of approximately 20% off of the bottom of the otherwise applicable U.S. Sentencing Guidelines fine range, reflecting its cooperation in the investigation, and (b) after application of the foregoing discount, the Defendant in addition received a credit of $11 billion, representing the net present value of the Defendant's settlements with consumers and payments to the NOx remediation trust in settlement of civil litigation.

B. Fine

The Defendant shall pay to the United States a criminal fine of $2,800,000,000, payable in full within ten days of the entry of judgment following the sentencing hearing in this matter. The Defendant shall not seek or accept directly or indirectly reimbursement or indemnification from any source with regard to the penalty amount that the Defendant pays pursuant to this Agreement. The Defendant further agrees that it shall not claim assert, or apply for, either directly or indirectly, any tax deduction, tax credit, or any other offset with regard to any U.S. federal, state, or local tax or taxable income for any fine or forfeiture paid pursuant to this Agreement.

C. Probation

The parties agree that a term of organizational probation for a period of three years should be imposed on the Defendant pursuant to 18 U.S.C. §§ 3551(c)(1) and 3561(c)(1). The parties further agree, pursuant to

U.S.S.G. 8D1.4, that the term of probation shall include as conditions the obligations set forth in Paragraphs 5 and 6 below as well as the payment of the fine set forth in this Paragraph, but shall not include the obligations set forth in Paragraph 7 below.

D. Special Assessment

The Defendant shall pay to the Clerk of the Court for the United States District Court for the Eastern District of Michigan within ten days of the time of sentencing the mandatory special assessment of $1,200 ($400 per count).

E. Restitution

No order of restitution is appropriate in this case pursuant to 18 U.S.C. § 3663A(c)(3) as the number of identifiable victims is so large as to make restitution impracticable and/or determining complex issues of fact related to the cause or amount of victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process. Moreover, as noted in Paragraph 2(A) above the Defendant has already agreed to compensate members of the class in *In re Volkswagen "Clean Diesel" Marketing, Sales Practice, and Products Liability Litigation,* which consists of individuals who purchased affected vehicles described in Exhibit 2.

4. Other Charges

In exchange for the guilty plea of the Defendant and the complete fulfillment of all of its obligations under this Agreement, the Offices agree that they will not file additional criminal charges against the Defendant or any of its direct or indirect affiliates or subsidiaries related to: (1) any conduct described in the Third Superseding Information or Exhibit 2; (2) any conduct related to the emissions, or compliance with U.S. emissions standards, of the Subject Vehicles or the Porsche Vehicles as described and defined in the Third Superseding Information and Exhibit 2; and (3) any conduct disclosed by, or on behalf of, the Defendant or otherwise known to the Offices or the BPA as of the date of this Agreement. The Offices, however, may use any information related to the conduct described in the Statement of Facts against the Defendant: (a) in a prosecution for perjury or obstruction of justice apart from the charge in the Third Superseding Information and identified in the Statement of Facts; (b) in a prosecution for making a false statement; (c) in a prosecution or other proceeding relating to any crime of violence; or (d) in a prosecution or other proceeding relating to a violation of any provision of Title 26 of the United States Code. This Paragraph does not provide any protection against prosecution for any other conduct, including but not limited to crimes committed in the future by the Defendant or by any of its affiliates subsidiaries, officers, directors, employees, agents or consultants, whether or not disclosed by the Defendant pursuant to the terms of this Agreement. In addition, this Agreement does not provide any protection against prosecution of any joint ventures of which the Defendant is a part, or any individuals, regardless of their affiliation with the Defendant. The Defendant agrees that nothing in this Agreement is intended to release the Defendant from any and all of the Defendant's excise and income tax liabilities and reporting obligations for any and all income not properly reported and/or legally or illegally obtained or derived.

5. The Defendant's Obligations

A. Except as otherwise provided in Paragraph 6 below in connection with the Defendant's cooperation obligations, the Defendant's obligations under the Agreement shall last and be effective for a period beginning on the date on which the Third Superseding Information is filed and ending three years from the later of the date on which the Third Superseding Information is filed or the date on which the Monitor is retained by the Defendant, as described in Paragraph 15 below (the "Term"). The Defendant agrees, however, that, in the event the Offices determine, in their sole discretion, that the Defendant has failed specifically to perform or to fulfill each of the Defendant's obligations under this Agreement, an extension or extensions of the Term may be imposed by the Offices, in their sole discretion, for up to a total additional time period of one year, without prejudice to the Offices' right to proceed as provided in Paragraph 9 below. Any extension of the Term extend all terms of this Agreement, including the terms of the Monitorship in Exhibit 3, for an equivalent period. Conversely, in the event the Offices find, in their sole discretion, that there exists a change in circumstances sufficient to eliminate the need for the Monitorship in Exhibit 3 and that the other provisions of this Agreement have been satisfied, the Term may be terminated early, except for the Defendant's cooperation obligations described in Paragraph 6 below.

B. The Defendant agrees to abide by all terms and obligations of this Agreement as described herein, including, but not limited to, the following:

1. to plead guilty as set forth in this Agreement;

2. to abide by all sentencing stipulations contained in this Agreement;

3. to appear, through its duly appointed representatives, as ordered for all court appearances, and obey any other ongoing court order in this matter, consistent with all applicable U.S. and foreign laws, procedures, and regulations;

4. to commit no further crimes;

5. to be truthful at all times with the Court and the Offices;

6. to pay the applicable fine and special assessments; . . .

15. Independent Compliance Monitor

A. Promptly after the Offices' selection pursuant to Paragraph 15(B) below, the Defendant agrees to retain the Monitor for the term specified in Paragraph 15(C). The Monitor's duties and authority, and the obligations of the Defendant with respect to the Monitor and the Offices, are set forth in Exhibit 3, which is incorporated by reference into this Agreement. The same Monitor shall serve as the Independent Auditor appointed pursuant to Paragraph 27(b) of the Third Partial Consent Decree in *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,* MDL No. 2672 CRB (JSC) (N.D. Cal.). No later than the date of execution of this Agreement, and after consultation with the Offices, the Defendant will propose to the Offices a pool of three qualified candidates to serve as the Monitor. If the Offices determine, in their sole discretion, that any of the candidates are not, in fact, qualified to serve as the Monitor, or if the Offices, in their sole discretion, are not satisfied with the candidates proposed, the Offices reserve the right to seek additional nominations from the Defendant, The parties will endeavor to complete the monitor selection process within sixty (60) days of the execution of this Agreement. The Monitor candidates or their team members shall have, at a minimum, the following qualifications:

1. demonstrated expertise with respect to federal anti-fraud and environmental laws, including experience counseling on these issues;
2. experience designing and/or reviewing corporate ethics and compliance programs, including anti-fraud policies, procedures and internal controls;
3. knowledge of automotive or similar industries;
4. the ability to access and deploy resources as necessary to discharge the Monitor's duties as described in the Agreement;
5. sufficient independence from the Defendant to ensure effective and impartial performance of the Monitor's duties as described in the Agreement; and
6. the qualifications set out in Paragraph 27(a) of the Third Partial Consent Decree in *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,* MDL No. 2672 CRB (JSC) (N.D. Cal.).

B. The Offices retain the right, in their sole discretion, to choose the Monitor from among the candidates proposed by the Defendant, though the Defendant may express its preference(s) among the candidates. In the event the Offices reject all proposed Monitors, the Defendant shall propose an additional three candidates within twenty (20) business days after receiving notice of the rejection. This process shall continue until a Monitor acceptable to both parties is chosen. The Offices and the Defendant will use their best efforts to complete the selection process within sixty (60) calendar days of the execution of this Agreement. If, during the term of the monitorship, the Monitor becomes unable to perform his or her obligations as set out herein and in Exhibit 3, or if the Offices in their sole discretion determine that the Monitor cannot fulfill such obligations to the satisfaction of the Offices, the Offices shall notify the Defendant of the release of the Monitor, and the Defendant shall within thirty (30) calendar days of such notice recommend a pool of three qualified Monitor candidates from which the Offices will choose a replacement.

C. The Monitor's term shall be three years from the date on which the Monitor is retained by the Defendant, subject to extension or early termination as described in Paragraph 5. The Monitor's powers, duties, and responsibilities, as well as additional circumstances that may support an extension of the Monitor's term, are set forth in Exhibit 3. The Defendant agrees that it will not employ or be affiliated with the Monitor or the Monitor's firm for a period of not less than two years from the date on which the Monitor's term expires. Nor will the Defendant discuss with the Monitor or the Monitor's firm the possibility of further employment or affiliation during the Monitor's term.

16. Complete Agreement

This document states the full extent of the Agreement between the parties. There are no other promises or agreements, express or implied. Any modification of this Agreement shall be valid only if set forth in writing in a supplemental or revised plea agreement signed by all parties. . . .

EXHIBIT 2: STATEMENT OF FACTS

The following Statement of Facts is incorporated by reference as part of the Plea Agreement (the "Agreement") between the United States Department of Justice (the "Department") and Volkswagen AG ("VW AG"). VW AG hereby agrees and stipulates that the following information is true and accurate. VW AG admits, accepts, and acknowledges that under U.S. law it is responsible for the acts of its employees set forth in this Statement of Facts, which acts VW AG acknowledges were within the scope of the employees' employment and, at least in part, for the benefit of VW AG. All references to legal terms and emissions standards, to the extent contained herein, should be understood to refer exclusively to applicable U.S. laws and regulations, and such legal terms contained in this Statement of Facts are not intended to apply to, or affect, VW AG's rights or obligations under the laws or regulations of any jurisdiction outside the United States. This Statement of Facts does not contain all of the facts known to the Department or VW AG; the Department's investigation into individuals is ongoing. The following facts took place during the time frame specified in the Third Superseding Information and establish beyond a reasonable doubt the charges set forth in the criminal Information attached to this Agreement:

<u>Relevant Entities and Individuals</u>

1. VW AG was a motor vehicle manufacturer based in Wolfsburg, Germany. Under U.S. law, VW AG acts through its employees, and conduct undertaken by VW AG, as described herein, reflects conduct undertaken by employees. Pursuant to applicable German stock corporation law, VW AG was led by a Management Board that was supervised by a Supervisory Board. Solely for purposes of this Statement of Facts, unless otherwise indicated, references in this Statement of Facts to "supervisors" are to senior employees below the level of the VW AG Management Board.

2. Audi AG ("Audi") was a motor vehicle manufacturer based in lngolstadt, Germany and a subsidiary approximately 99.55% owned by VW AG. Under U.S. law, Audi AG acts through its employees, and conduct undertaken by Audi AG, as described herein, reflects conduct undertaken by employees.

3. Volkswagen Group of America, Inc. ("VW GOA") was a wholly owned subsidiary of VW AG based in Herndon, Virginia. Under U.S. law, VW GOA acts through its employees, and conduct undertaken by VW GOA, as described herein, reflects conduct undertaken by employees.

4. VW AG, Audi AG, and VW GOA are collectively referred to herein as "VW."

5. "VW Brand" was an operational unit within VW AG that developed vehicles to be sold under the "Volkswagen" brand name.

6. Company A was an automotive engineering company based in Berlin, Germany, which specialized in software, electronics, and technology support for vehicle manufacturers. VW AG owned fifty percent of Company A's shares and was Company A's largest customer.

7. "Supervisor A," an individual whose identity is known to the United States and VW AG, was the supervisor in charge of Engine Development for all of VW AG from in or about October 2012 to in or about September 2015. From July 2013 to September 2015, Supervisor A also served as the supervisor in charge of Development for VW Brand, where he supervised a group of approximately 10,000 VW AG employees. From in or about October 2011, when he joined VW, until in or about July 2013, Supervisor A served as the supervisor in charge of the VW Brand Engine Development department.

8. "Supervisor B," an individual whose identity is known to the United States and VW AG, was a supervisor in charge of the VW Brand Engine Development department from in or about May 2005 to in or about April 2007.

9. "Supervisor C," an individual whose identity is known to the United States and VW AG, was a supervisor in charge of the VW Brand Engine Development department from in or about May 2007 to in or about March 2011.

10. "Supervisor D," an individual whose identity is known to the United States and VW AG, was a supervisor in charge of the VW Brand Engine Development department from in or about October 2013 to the present.

11. "Supervisor E," an individual whose identity is known to the United States and VW AG, was a supervisor with responsibility for VW AG's Quality Management and Product Safety department who reported to the supervisor in charge of Quality Management from in or about 2007 to in or about October 2014.

12. "Supervisor F," an individual whose identity is known to the United States and VW AG, was a supervisor within the VW Brand Engine Development department from in or about 2003 until in or about December 2012.

13. "Attorney A," an individual whose identity is known to the United States and VW AG, was a German-qualified in-house attorney for VW AG who was the in-house attorney principally responsible for providing legal advice in connection with VW AG's response to U.S. emissions issues from in or about May 2015 to in or about September 2015.

U.S. NOx Emissions Standards

14. The purpose of the Clean Air Act and its implementing regulations was to protect human health and the environment by, among other things, reducing emissions of pollutants from new motor vehicles, including

nitrogen oxides ("NOx").

15. The Clean Air Act required the U.S. Environmental Protection Agency ("EPA") to promulgate emissions standards for new motor vehicles. The EPA established standards and test procedures for light-duty motor vehicles sold in the United States, including emission standards for NOx.

16. The Clean Air Act prohibited manufacturers of new motor vehicles from selling, offering for sale, introducing or delivering for introduction into U.S. commerce, or importing (or causing the foregoing with respect to) any new motor vehicle unless the vehicle complied with U.S. emissions standards, including NOx emissions standards, and was issued an EPA certificate of conformity.

17. To obtain a certificate of conformity, a manufacturer was required to submit an application to the EPA for each model year and for each test group of vehicles that it intended to sell in the United States. The application was required to be in writing, to be signed by an authorized representative of the manufacturer, and to include, among other things, the results of testing done pursuant to the published Federal Test Procedures that measure NOx emissions, and a description of the engine, emissions control system, and fuel system components, including a detailed description of each Auxiliary Emission Control Device ("AECD") to be installed on the vehicle.

18. An AECD was defined under U.S. law as any element of design which senses temperature, vehicle speed, engine RPM, transmission gear, manifold vacuum, or any other parameter for the purpose of activating, modulating, delaying, or deactivating the operation of any part of the emission control system. The manufacturer was also required to include a justification for each AECD. If the EPA, in reviewing the application for a certificate of conformity, determined that the AECD "reduced the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use," and that (1) it was not substantially included in the Federal Test Procedure, (2) the need for the AECD was not justified for protection of the vehicle against damage or accident, or (3) it went beyond the requirements of engine starting, the AECD was considered a "defeat device." Whenever the term "defeat device" is used in this Statement of Facts, it refers to a defeat device as defined by U.S. law.

19. The EPA would not certify motor vehicles equipped with defeat devices. Manufacturers could not sell motor vehicles in the United States without a certificate of conformity from the EPA.

20. The California Air Resources Board ("CARB") (together with the EPA, "U.S. regulators") issued its own certificates, called executive orders, for the sale of motor vehicles in the State of California. To obtain such a certificate, the manufacturer was required to satisfy the standards set forth by the State of California, which were equal to or more stringent than those of the EPA.

21. As part of the application for a certification process, manufacturers often worked in parallel with the EPA and CARB. To obtain a certificate of conformity from the EPA, manufacturers were required to demonstrate that the light-duty vehicles were equipped with an on-board diagnostic ("OBD") system capable of monitoring all emissions-related systems or components. Manufacturers could demonstrate compliance with California OBD standards in order to meet federal requirements. CARB reviewed applications from

manufacturers, including VW, to determine whether their OBD systems were in compliance with California OBD standards, and CARB's conclusion would be included in the application the manufacturer submitted to the EPA.

22. In 1998, the United States established new federal emissions standards that would be implemented in separate steps, or Tiers. Tier II emissions standards including for NOx emissions, were significantly stricter than Tier I. For light-duty vehicles, the regulations required manufacturers to begin to phase in compliance with the new, stricter Tier II NOx emissions standards in 2004 and required manufacturers to fully comply with the stricter standards for model year 2007. These strict U.S. NOx emissions standards were applicable specifically to vehicles in the United States.

<u>VW Diesel Vehicles Sold in the United States</u>

23. In the United States, VW sold, offered for sale, introduced into commerce, delivered for introduction into commerce, imported, or caused the foregoing actions (collectively "sold in the United States") the following vehicles containing 2.0 liter diesel engines ("2.0 Liter Subject Vehicles"):

a. Model Year ("MY") 2009-2015 VW Jetta;

b. MY 2009-2014 VW Jetta Sportwagen;

c. MY 2010-2015 VW Golf;

d. MY 2015 VW Golf Sportwagen;

e. MY 2010-2013, 2015 Audi A3;

f. MY 2013-2015 VW Beetle and VW Beetle Convertible; and

g. MY2012-2015 VW Passat.

24. VW sold in the United States the following vehicles containing 3.0 liter diesel engines ("3.0 Liter Subject Vehicles"):

a. MY 2009-2016 VW Touareg;

b. MY 2009-2015 Audi Q7;

c. MY 2014-2016 Audi A6 Quattro;

d. MY 2014-2016 Audi A7 Quattro;

e. MY 2014-2016 Audi A8L; and

f. MY 2014 2016 Audi Q5.

25. VW GOA's Engineering and Environmental Office ("EEO") was located in Auburn Hills, Michigan, in the Eastern District of Michigan. Among other things, EEO prepared and submitted applications (the "Applications") for a certificate of conformity and an executive order (collectively, "Certificates") to the EPA and CARB to obtain authorization to sell each of the 2.0 Liter Subject Vehicles and 3.0 Liter Subject Vehicles in the United States (collectively, the "Subject Vehicles"). VW GOA's Test Center California performed testing related to the Subject Vehicles.

26.. VW AG developed the engines for the 2.0 Liter Subject Vehicles. Audi AG developed the engines for the 3.0 Liter Subject Vehicles and the MY 2013-2016 Porsche Cayenne diesel vehicles sold in the United States (the “Porsche Vehicles”).

27. The Applications to the EPA were accompanied by the following signed statement by a VW representative:

> The Volkswagen Group states that any element of design, system, or emission control device installed on or incorporated in the Volkswagen Group's new motor vehicles or new motor vehicle engines for the purpose of complying with standards prescribed under section 202 of the Clean Air Act, will not, to the best of the Volkswagen Group's information and belief, cause the emission into the ambient air of pollutants in the operation of its motor vehicles or motor vehicle engines which cause or contribute to an unreasonable risk to public health or welfare except as specifically permitted by the standards prescribed under section 202 of the Clean Air Act. The Volkswagen Group further states that any element of design, system, or emission control device installed or incorporated in the Volkswagen Group's new motor vehicles or new motor vehicle engines, for the purpose of complying with standards prescribed under section 202 of the Clean Air Act, will not, to the best of the Volkswagen Group's information and belief, cause or contribute to an unreasonable risk to public safety. All vehicles have been tested in accordance with good engineering practice to ascertain that such test vehicles meet the requirement of this section for the useful life of the vehicle.

28. Based on the representations made by VW employees in the Applications for the Subject Vehicles, EPA and CARE issued Certificates for these vehicles, allowing the Subject Vehicles to be sold in the United States.

29. Upon importing the Subject Vehicles into the United States, VW disclosed to U.S. Customs and Border Protection ("CBP") that the vehicles were covered by valid Certificates by affixing an emissions label to the vehicles' engines. These labels stated that the vehicles conformed to EPA and CARB emissions regulations. VW affixed these labels to each of the Subject Vehicles that it imported into the United States.

30. VW represented to its U.S. customers, U.S. dealers, U.S. regulators and others in the United States that the Subject Vehicles met the new and stricter U.S. emissions standards identified in paragraph 22 above. Further, VW designed a specific marketing campaign to market these vehicles to U.S. customers as "clean diesel" vehicles.

VW AG's Criminal Conduct

31. From approximately May 2006 to approximately November 2015, VW AG, through Supervisors A-F and other VW employees, agreed to deceive U.S. regulators and U.S. customers about whether the Subject Vehicles and the Porsche Vehicles complied with U.S. emissions standards. During their involvement with design, marketing and/or sale of the Subject Vehicles and the Porsche Vehicles in the United States, Supervisors A-F and other VW employees: (a) knew that the Subject Vehicles and the Porsche Vehicles did not meet U.S. emissions standards; (b) knew that VW was using software to cheat the U.S. testing process by making it appear as if the Subject Vehicles and the Porsche Vehicles met U.S. emissions standards when, in fact, they did not; and (c) attempted to and did conceal these facts from U.S. regulators and U.S. customers.

32. In at least in or about 2006, VW AG employees working under the supervision of Supervisors B, C, and F were designing the new EA 189 2.0 liter diesel engine (later known as the Generation 1 or "Gen 1") for use in the United States that would be the cornerstone of a new project to sell passenger diesel vehicles in the United States. Selling diesel vehicles in the U.S. market was an important strategic goal of VW AG. This project became known within VW as the "US '07" project.

33. Supervisors B, C, and F, and others, however, realized that VW could not design a diesel engine that would both meet the stricter U.S. NOx emissions standards that would become effective in 2007 and attract sufficient customer demand in the U.S. market. Instead of bringing to market a diesel vehicle that could legitimately meet the new, more restrictive U.S. NOx emissions standards, VW AG employees acting at the direction of Supervisors B, C, and F and others, including Company A employees, designed, created, and implemented a software function to detect, evade and defeat U.S. emissions standards.

34. While, employees acting at their direction designed and implemented the defeat device software, Supervisors B, C, and F, and others knew that U.S. regulators would measure VW's diesel vehicles' emissions through standard U.S. tests with specific, published drive cycles. VW AG employees acting at the direction of Supervisors B, C, and F, and others designed the VW defeat device to recognize whether the vehicle was undergoing standard U.S. emissions testing on a dynamometer (or "dyno") or whether the vehicle was being driven on the road under normal driving conditions. The defeat device accomplished this by recognizing the standard drive cycles used by U.S. regulators. If the vehicle's software detected that it was being tested, the vehicle performed in one mode, which satisfied U.S. NOx emissions standards. If the defeat device detected that the vehicle was not being tested, it operated in a different mode, in which the effectiveness of the vehicle's emissions control systems was reduced substantially, causing the vehicle to emit substantially higher NOx, sometimes 35 times higher than U.S. standards.

35. In designing the defeat device, VW engineers, borrowed the original concept of the dual-mode, emissions cycle-beating software from Audi. On or about May 17 2006, a VW engineer, in describing the Audi software, sent an email to employees in the VW Brand Engine Development department that described aspects of the software and cautioned against using it in its current form because it was "pure" cycle-beating, i.e., as a mechanism to detect, evade and defeat U.S. emissions cycles or tests. The VW AG engineer wrote (in German), "within the clearance structure of the pre-fuel injection the acoustic function is nearly always

activated within our current US '07-data set. This function is pure [cycle-beating] and can like this absolutely not be used for US '07."

36. Throughout in or around 2006, Supervisor F authorized VW AG engineers to use the defeat device in the development of the US '07 project, despite concerns expressed by certain VW AG employees about the propriety of designing and activating the defeat device software. In or about the fall of 2006, lower level VW AG engineers, with the support of their supervisors raised objections to the propriety of the defeat device, and elevated the issue to Supervisor B. During a meeting that occurred in or about November 2006, VW AG employees briefed Supervisor B on the purpose and design of the defeat device. During the meeting, Supervisor B decided that VW should continue with production of the US '07 project with the defeat device, and instructed those in attendance, in sum and substance not to get caught.

37. Throughout 2007, various technical problems arose with the US '07 project that led to internal discussions and disagreements among members of the VW AG team that was primarily responsible for ensuring vehicles met U.S. emissions standards. Those disagreements over the direction of the project were expressly articulated during a contentious meeting on or about October 5, 2007, over which Supervisor C presided. As a result of the meeting, Supervisor C authorized Supervisor F and his team to proceed with the US '07 project despite knowing that only the use of the defeat device software would enable VW diesel vehicles to pass U.S. emissions tests.

38. Starting with the first model year 2009 of VW's new engine for the 2.0 Liter Subject Vehicles through model year 2016, Supervisors A-D and F, and others, then caused the defeat device software to be installed in the 2.0 Liter Subject Vehicles marketed and sold in the United States.

39. Starting in or around 2006, Audi AG engineers designed a 3.0 liter diesel for the U.S. market. The 3.0 liter engine was more powerful than the 2.0 liter engine, and was included in larger and higher-end model vehicles. The 3.0 liter engine was ultimately placed in various Volkswagen, Audi and Porsche diesel vehicles sold in the United States for model years 2009 through 2016. In order to pass U.S. emissions tests, Audi engineers designed and installed software designed to detect, evade and defeat U.S. emissions standards, which constituted a defeat device under U.S. law.

40. Specifically, Audi AG engineers calibrated a defeat device for the 3.0 Liter Subject Vehicles and the Porsche Vehicles that varied injection levels of a solution consisting of urea and water ("AdBlue") into the exhaust gas system based on whether the vehicle was being tested or not, with less NOx reduction occurring during regular driving conditions. In this way, the vehicle consumed less AdBlue, and avoided a corresponding increase in the vehicle's AdBlue tank size, which would have decreased the vehicle's trunk size, and made the vehicle less marketable in the United States. In addition, the vehicle could drive further between service intervals, which was also perceived as important to the vehicle's marketability in the United States.

41. VW employees met with the EPA and CARB to seek the certifications required to sell the Subject Vehicles to U.S. customers. During these meetings, some of which Supervisor F attended personally, VW employees misrepresented, and caused to be misrepresented, to the EPA and CARB staff that the Subject

Vehicles complied with U.S. NOx emissions standards, when they knew the vehicles did not. During these meetings, VW employees described, and caused to be described, VW's diesel technology and emissions control systems to the EPA and CARB staff in detail but omitted the fact that the engine could not meet U.S. emissions standards without using the defeat device software.

42. Also as part of the certification process for each new model year, Supervisors A-F and others certified, and/or caused to be certified, to the EPA and CARB that the Subject Vehicles met U.S. emissions standards and complied with standards prescribed by the Clean Air Act. Supervisors A-F, and others, knew that if they had told the truth and disclosed the existence of the defeat device, VW would not have obtained the requisite certificates for the Subject Vehicles and could not have sold any of them in the United States.

43. In order to import the Subject Vehicles into the United States, VW was required to disclose to CBP whether the vehicles were covered by valid certificates for the United States. VW did so by affixing a label to the vehicles' engines. VW employees caused to be stated on the labels that the vehicles complied with applicable EPA and CARB emissions regulations and limitations, knowing that if they had disclosed that the Subject Vehicles did not meet U.S. emissions regulations and limitations, VW would not have been able to import the vehicles into the United States. Certain VW employees knew that the labels for the Porsche Vehicles stated that those vehicles complied with EPA and CARB emissions regulations and limitations, when in fact, the VW employees knew they did not.

44. Supervisors A and C and others marketed, and caused to be marketed the Subject Vehicles to the U.S. public as "clean diesel" and environmentally friendly, when they knew the Subject Vehicles were intentionally designed to detect, evade and defeat U.S. emissions standards.

45. For example, on or about November 18, 2007, Supervisor C sent an email to Supervisor F and others attaching three photos of himself with California's then-Governor, which were taken during an event at which Supervisor C promoted the 2.0 Liter Subject Vehicles in the United States as "green diesel."

46. Following the launch of the Gen 1 2.0 Liter Subject Vehicles in the United States, Supervisors C and F, and others, worked on a second generation of the vehicle (the "Gen 2"), which also contained software designed to detect, evade and defeat U.S. emissions tests. The Gen 2 2.0 Liter Subject Vehicles were launched in the United States in or around 2011.

47. In or around 2012, hardware failures developed in certain of the 2.0 Liter Subject Vehicles that were being used by customers on the road in the United States. VW AG engineers hypothesized that vehicles equipped with the defeat device stayed in "dyno" mode (i.e., testing mode) even when driven on the road outside of test conditions. Since the 2.0 Liter Subject Vehicles were not designed to be driven for longer periods of time in “Dyno” mode, VW AG engineers suspected that the increased stress on the exhaust system from being driven too long in “Dyno” mode could be the root cause of the hardware failures.

48. In or around July 2012, engineers from the VW Brand Engine Development department met, in separate meetings, with Supervisors A and E to explain that they suspected that the root cause of the hardware failures in the 2.0 Liter Subject Vehicles was the increased stress on the exhaust system from being driven

too long in "Dyno" mode as a result of the use of software designed to detect, evade and defeat U.S. emissions tests. To illustrate the software's function the engineers used a document. Although they understood the purpose and significance of the software, Supervisors A and E each encouraged the further concealment of the software. Specifically, Supervisors A and E each instructed the engineers who presented the issue to them to destroy the document they had used to illustrate the operation of the defeat device software.

49. VW AG engineers, having informed the supervisor in charge of the VW AG Engine Development department and within the VW AG Quality Management and Product Safety department of the existence and purpose of the defeat device in the 2.0 Liter Subject Vehicles, then sought ways to improve its operation in existing 2.0 Liter Subject Vehicles to avoid the hardware failures. To solve the hardware failures, VW AG engineers decided to start the 2.0 Liter Subject Vehicles in the "street mode" and, when the defeat device recognized that the vehicle was being tested for compliance with U.S. emissions standards, switch to the "Dyno mode." To increase the likelihood that the vehicle in fact realized that it was being tested on the dynamometer for compliance with U.S. emissions standards, the VW AG engineers activated a "steering wheel angle recognition" feature. The steering wheel angle recognition interacted with the software by enabling the vehicle to detect whether it was being tested on a dynamometer (where the steering wheel is not turned), or being driven on the road.

50. Certain VW AG employees again expressed concern, specifically about the expansion of the defeat device through the steering wheel angle detection, and sought approval for the function from more senior supervisors within the VW AG Engine Development department. In particular, VW AG engineers asked Supervisor A for a decision on whether or not to use the proposed function in the 2.0 Liter Subject Vehicles. In or about April 2013, Supervisor A authorized activation of the software underlying the steering wheel angle recognition function, VW employees then installed the new software function in new 2.0 Liter Subject Vehicles being sold in the United States, and later installed it in existing 2.0 Liter Subject Vehicles through software updates during maintenance.

51. VW employees falsely told, and caused others to tell, U.S. regulators, U.S. customers and others in the United States that the software update in or around 2014 was intended to improve the 2.0 Liter Subject Vehicles when, in fact, VW employees knew that the update also used the steering wheel angle of the vehicle as a basis to more easily detect when the vehicle was undergoing emissions tests, thereby improving the defeat device's precision in order to reduce the stress on the emissions control systems.

52. In or around March 2014, certain VW employees learned of the results of a study undertaken by West Virginia University's Center for Alternative Fuels, Engines and Emissions and commissioned by the International Council on Clean Transportation (the "ICCT study"). The ICCT study identified substantial discrepancies in the NOx emissions from certain 2.0 Liter Subject Vehicles when tested on the road compared to when these vehicles were undergoing EPA and CARB standard drive cycle tests on a dynamometer. The results of the study showed that two of the three vehicles tested on the road, both 2.0 Liter Subject Vehicles, emitted NOx at values of up to approximately 40 times the permissible limit applicable during testing in the United States.

53. Following the ICCT study, CARB, in coordination with the EPA, attempted to work with VW to determine the cause for the higher NOx emissions in the 2.0 Liter Subject Vehicles when being driven on the road as opposed to on the dynamometer undergoing standard emissions test cycles. To do this, CARB, in coordination with the EPA, repeatedly asked VW questions that became increasingly more specific and detailed, as well as conducted additional testing themselves.

54. In response to learning about the results of the ICCT study, engineers in the VW Brand Engine Development department formed an ad hoc task force to formulate responses to questions that arose from the U.S. regulators. VW AG supervisors, including Supervisors A, D, and E, and others, determined not to disclose to U.S. regulators that the tested vehicle models operated with a defeat device. Instead, Supervisors A, D, and E, and others decided to pursue a strategy of concealing the defeat device in responding to questions from U.S. regulators, while appearing to cooperate.

55. Throughout 2014 and the first half of 2015, Supervisors A, D, and E, and others, continued to offer, and/or cause to be offered, software and hardware "fixes" and explanations to U.S. regulators for the 2.0 Liter Subject Vehicles' higher NOx measurements on the road without revealing the underlying reason—the existence of software designed to detect, evade and defeat U.S. emissions tests.

56. On or about April 28, 2014, members of the VW task force presented the findings of the ICCT study to Supervisor E, whose supervisory responsibility included addressing safety and quality problems in vehicles in production. Included in the presentation was an explanation of the potential financial consequences VW could face if the defeat device was discovered by U.S. regulators, including but not limited to applicable fines per vehicle, which were substantial.

57. On or about May 21, 2014, a VW AG employee sent an email to his supervisor, Supervisor D, and others, describing an "early round meeting" with Supervisor A at which emissions issues in North America for the Gen 2 2.0 Liter Subject Vehicles were discussed, and questions were raised about the risk of what could happen and the available options for VW. Supervisor D responded by email that he was in "direct touch" with the supervisor in charge of Quality Management at VW AG and instructed the VW AG employee to “please treat confidentially” the issue.

58. On or about October 1, 2014, VW AG employees presented to CARB regarding the ICCT study results and discrepancies identified in NOx emissions between dynamo meter testing and road driving. In response to questions, the VW AG employees did not reveal that the existence of the defeat device was the explanation for the discrepancies in NOx emissions, and, in fact gave CARB various false reasons for the discrepancies in NOx emissions including driving patterns and technical issues.

59. When U.S. regulators threatened not to certify VW model year 2016 vehicles for sale in the United States, VW AG supervisors requested a briefing on the situation in the United States. On or about July 27, 2015, VW AG employees presented to VW AG supervisors. Supervisors A and D were present, among others.

60. On or about August 5, 2015, in a meeting in Traverse City, Michigan, two VW employees met with a CARB official to discuss again the discrepancies in emissions of the 2.0 Liter Subject Vehicles. The VW

employees did not reveal the existence of the defeat device.

61. On or about August 18, 2015, Supervisors A and D, and others, approved a script to be followed by VW AG employees during an upcoming meeting with CARB in California on or about August 19, 2015. The script provided for continued concealment of the defeat device from CARB in the 2.0 Liter Subject Vehicles, with the goal of obtaining approval to sell the Gen 3 model year 2016 2.0 Liter Subject Vehicles in the United States.

62. On or about August 19, 2015, in a meeting with CARB in El Monte, California, a VW employee explained, for the first time to U.S. regulators and in direct contravention of instructions from supervisors at VW AG, that certain of the 2.0 Liter Subject Vehicles used different emissions treatment depending on whether the vehicles were on the dynamometer or the road, thereby signaling that VW had evaded U.S. emissions tests.

63. On or about September 3, 2015, in a meeting in El Monte, California with CARB and EPA, Supervisor D, while creating the false impression that he had been unaware of the defeat device previously, admitted that VW bad installed a defeat device in the 2.0 Liter Subject Vehicles.

64. On or about September 18, 2015, the EPA issued a public Notice of Violation to VW stating that the EPA had determined that VW had violated the Clean Air Act by manufacturing and installing defeat devices in the 2.0 Liter Subject Vehicles.

65. On or about January 27, 2015, CARB informed VW AG that CARB would not approve certification of the Model Year 2016 3.0 Liter Subject Vehicles until Audi AG confirmed that the 3.0 Liter Subject Vehicles did not possess the same emissions issues as had been identified by the ICCT study and as were being addressed by VW with the 2.0 Liter Subject Vehicles.

66. On or about March 24, 2015, in response to CARB's questions, Audi AG employees made a presentation to CARB, during which Audi AG employees did not disclose that the Audi 2.0 and 3.0 Liter Subject Vehicles and the Porsche Vehicles in fact contained a defeat device, which caused emissions discrepancies in those vehicles. The Audi AG employees informed CARB that the 3.0 Liter Subject Vehicles did not possess the same emissions issues as the 2.0 Liter Subject Vehicles when, in fact; the 3.0 Liter Subject Vehicles possessed at least one defeat device that interfered with the emissions systems to reduce NOx emissions on the dyno but not on the road. On or about March 25, 2015, CARB, based on the misstatements and omissions made by the Audi AG representatives, issued an executive order approving the sale of Model Year 2016 3.0 Liter Subject Vehicles.

67. On or about November 2, 2015, EPA issued a Notice of Violation to VW AG, Audi AG and Porsche AG, citing violations of the Clean Air Act related to EPA's discovery that the 3.0 Liter Subject Vehicles and the Porsche Vehicles contained a defeat device that resulted in excess NOx emissions when the vehicles were driven on the road.

68. On or about November 2, 2015, VW AG issued a statement that "no software has been installed in the 3-liter V6 diesel power units to alter emissions characteristics in a forbidden manner."

69. On or about November 19, 2015, Audi AG representatives met with EPA and admitted that the 3.0 Liter Subject Vehicles contained at least three undisclosed AECDs. Upon questioning from EPA, Audi AG representatives conceded that one of these three undisclosed AECDs met the criteria of a defeat device under U.S. law.

70. On or about May 16, 2016, Audi AG representatives met with CARB and admitted that there were additional elements within two of its undisclosed AECDs, which impacted the dosing strategy in the 3.0 Liter Subject Vehicles and the Porsche Vehicles.

71. On or about July 19, 2016, in a presentation to CARE, Audi AG representatives conceded that elements of two of its undisclosed AECDs met the definition of a defeat device.

72. Supervisors A-F and others caused defeat device software to be installed on all of the approximately 585,000 Subject Vehicles and the Porsche Vehicles sold in the United States from 2009 through 2015.

73. As VW employees prepared to admit to U.S. regulators that VW used a “defeat device” in the 2.0 Liter Subject Vehicles, counsel for VW GOA prepared a litigation hold notice to ensure that VW GOA preserved documents relevant to diesel emissions issues. At the same time, VW GOA was in contact with VW AG to discuss VW AG preserving documents relevant to diesel emissions issues, Attorney A made statements that several employees understood as suggesting the destruction of these materials. In anticipation of this hold taking effect at VW AG certain VW AG employees destroyed documents and files related to U.S. emissions issues that they believed would be covered by the hold. Certain VW AG employees also requested that their counterparts at Company A destroy sensitive documents relating to U.S. emissions issues. Certain Audi AG employees also destroyed documents related to U.S. emissions issues. The VW AG and Audi AG employees who participated in this deletion activity did so to protect both VW and themselves from the legal consequences of their actions.

74. Between the August 19, 2015 and September 3, 2015 meetings with U.S. regulators, certain VW AG employees discussed issues with Attorney A and others.

75. On or about August 26, 2015 VW GOA's legal team sent the text of a litigation hold notice to Attorney A in VW AG's Wolfsburg office that would require recipients to preserve and retain records in their control. The subject of the e-mail was "Legal Hold Notice - Emissions Certification of MY2009-2016 2.0L TDI Volkswagen and Audi vehicles." The VW GOA legal team stated that VW GOA would be issuing the litigation hold notice to certain VW GOA employees the following day. On or about August 28, 2015 Attorney A received notice that VW GOA was issuing that litigation hold notice that day. Attorney A indicated to his staff on August 31 that the hold would be sent out at VW AG on September l. Among those at VW AG being asked to retain and preserve documents were Supervisors A and D and a number of other VW AG employees.

76. On or about August 27, 2015, Attorney A met with several VW AG engineers to discuss the technology behind the defeat device. Attorney A indicated that a hold was imminent, and that these engineers should check their documents, which multiple participants understood to mean that they should delete documents prior to the hold being issued.

77. On or about August 31, 2015, a meeting was held to prepare for the September 3 presentation to CARE and EPA where VW's use of the defeat device in the United States was to be formally revealed. During the meeting, within hearing of several participants, Attorney A discussed the forthcoming hold and again told the engineers that the hold was imminent and recommended that they check what documents they had. This comment led multiple individuals, including supervisors in the VW Brand Engine Development department at VW AG, to delete documents related to U.S. emissions issues.

78. On or about September 1, 2015, the hold at VW AG was issued. On or about September 1, 2015, several employees in the VW Brand Engine Development department at VW AG discussed the fact that their counterparts at Company A would also possess documents related to U.S. emissions issues. At least two VW AG employees contacted Company A employees and asked them to delete documents relating to U.S. emissions issues.

79. On or about September 3, 2015, Supervisor A approached Supervisor D's assistant, and requested that Supervisor D's assistant search in Supervisor D's office for a hard drive on which documents were stored containing emails of VW AG supervisors, including Supervisor A. Supervisor D' s assistant recovered the hard drive and gave it to Supervisor A. Supervisor A later asked his assistant to throw away the hard drive.

80. On or about September 15, 2015, a supervisor within the VW Brand Engine Development department convened a meeting with approximately 30-40 employees, during which Attorney A informed the VW AG employees present about the current situation regarding disclosure of the defeat device in the United States. During this meeting, a VW AG employee asked Attorney A what the employees should do with new documents that were created, because they could be harmful to VW AG. Attorney A indicated that new data should be kept on USB drives and only the final versions saved on VW AG's system, and then, only if “necessary.”

81. Even employees who did not attend these meetings, or meet with Attorney A personally, became aware that there had been a recommendation from a VW AG attorney to delete documents related to U.S. emissions issues. Within VW AG and Audi AG thousands of documents were deleted by approximately 40 VW AG and Audi AG employees.

82. After it began an internal investigation, VW AG was subsequently able to recover many of the deleted documents.

Problem 17-1	
(a)	Was VW fined an appropriate amount in its plea agreement? How would you develop an answer to that question?
(b)	Most recent corporate resolutions take the form of NPAs and DPAs. Why did the VW case end with a guilty plea? Does the form of the VW resolution matter, assuming all penalties and requirements remain the same?
(c)	What might explain the conduct at VW that led to this prosecution? Does the plea agreement promise to reduce future instances of that conduct, at VW and/or other companies in the industry?

On April 21, 2012, *The New York Times* published a dramatic expose,[10] apparently based on information from a company whistleblower, about a "vast" bribery scheme in Walmart's Mexico operations, and an organized scheme by corporate management to cover up the findings of an internal investigation into the Mexico misconduct. The Walmart bribery case instantly became one of the most closely watched FCPA matters of the past decade, while a major investigation ensued. Over *seven years* later, the Justice Department and Walmart announced their agreement to settle the matter in the following non-prosecution agreement (coupled with an SEC settlement and a guilty plea by Walmart's Brazil subsidiary).

U.S. Department of Justice
Criminal Division

June 20, 2019

Karen P. Hewitt
Jones Day
4655 Executive Drive
Suite 1500
San Diego, California 92121

Re: Walmart Inc.

Dear Ms. Hewitt:

The United States Department of Justice, Criminal Division, Fraud Section and the United States Attorney's Office for the Eastern District of Virginia (the "Fraud Section and the Office"), and Walmart Inc. (the "Company") pursuant to authority granted by the Company's Board of Directors, enter into this Non-Prosecution Agreement (the "Agreement"). On the understandings specified below, the Fraud Section and the Office will not criminally prosecute the Company for any crimes (except for criminal tax violations, as to which the Fraud Section and the Office do not make any agreement) relating to any of the conduct described

[10] David Barstow, *Wal-Mart Hushed Up a Vast Mexican Bribery Case*, N.Y. TIMES (Apr. 21, 2012), https://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html.

in the Statement of Facts attached hereto as Attachment A (the "Statement of Facts"). The Company, pursuant to authority granted by the Company's Board of Directors, also agrees to certain terms and obligations of the Agreement as described below.

The Fraud Section and the Office enter into this Agreement based on the individual facts and circumstances presented by this case and the Company, including:

(a) the Company did not receive voluntary disclosure credit because it did not timely and voluntarily disclose to the Fraud Section and the Office the Mexico conduct described in the Statement of Facts, and because, although the Company disclosed the conduct related to Brazil, China, and India prior to the Fraud Section or the Office learning of that conduct, such disclosure was after the Fraud Section and the Office had already begun investigating the Company relating to the Mexico conduct;

(b) the Company received full credit for its cooperation with the Fraud Section and the Office's investigation into conduct in Brazil, China, and India and partial cooperation credit for its investigation into conduct in Mexico; its cooperation included: conducting a thorough internal investigation; proactively identifying issues and facts that would likely be of interest to the Fraud Section and the Office, and providing updates to the Fraud Section and the Office; making regular factual presentations to the Fraud Section and the Office and sharing information that would not have been otherwise available to the Fraud Section and the Office; voluntarily making foreign-based employees available for interviews in the United States; producing documents, including translations, to the Fraud Section and the Office from foreign countries in ways that did not implicate foreign data privacy laws; obtaining cooperation of former employees and third parties, including their consent to interviews; providing counsel to employees and former employees to facilitate their cooperation; collecting, analyzing, and organizing voluminous evidence and information for the Fraud Section and the Office; and identifying, investigating, and disclosing conduct to the Fraud Section and the Office that was outside the scope of the Company's initial disclosures; the Company received partial cooperation credit for the conduct in Mexico because, in the view of the Fraud Section and the Office, Walmart did not timely provide documents and information to the Fraud Section and the Office in response to certain requests and did not deconflict with the Fraud Section and the Office's request to interview one witness before the Company interviewed that witness;

(c) by the completion of the investigation, the Company provided to the Fraud Section and the Office all relevant facts known to it, including information about the individuals involved in the conduct described in the attached Statement of Facts and conduct disclosed to the Fraud Section and the Office prior to the Agreement;

(d) the Company has engaged in significant remedial measures, including enhancing its anti-corruption compliance program and internal accounting controls related to anti-corruption, including: (1) hiring a Global Chief Ethics & Compliance Officer ("CECO") who holds an Executive Vice President position, an International Chief Ethics & Compliance Officer ("International CECO"), and a dedicated Global Anti-Corruption Officer, with separate reporting lines to the Audit Committee of the Board of Directors; (2) adding dedicated regional and market Chief Ethics & Compliance Officers, foreign market anti-corruption directors and anti-corruption compliance personnel at the Company's home office and in the Company's foreign markets, with separate reporting lines to the Audit Committee of the Board of Directors; (3) conducting, across each of the Company's markets, enhanced monthly and quarterly anti-corruption monitoring by dedicated Company Financial Controls and Continuous Improvement Teams (who monitor at the store-level), with results tracked in a centralized, real-time automated monitoring system; (4) enhancing annual anti-corruption risk assessments across all international markets; (5) enhancing on-site global anti-corruption audits to test adherence to enhanced anti-corruption related internal accounting controls and procedures; (6) enhancing anti-corruption related internal accounting controls on the selection and use of third parties, including building a custom third party automated portal to evaluate, manage and identify third party intermediaries and conducting third party audits and risk-based anti-corruption training of third parties; (7) enhancing global anti-corruption training and awareness program, including enhanced onboarding and annual in-person and computer-based anti-corruption training for directors, senior management, and employees most likely to interact directly or indirectly with government officials; (8) implementing an automated global license management system for obtaining and renewing licenses and permits and a global donation management system, which enhances controls relating to charitable donations; and (9) terminating business relationships with third parties involved in the conduct at issue;

(e) the Company has enhanced and has committed to continuing to enhance its compliance program and internal accounting controls related to anti-corruption, including ensuring that its compliance program satisfies the minimum elements set forth in Attachment B to this Agreement (the "Corporate Compliance Program");

(f) although the Company has engaged in significant remedial measures, the Fraud Section and the Office have determined that an independent compliance monitor is necessary to ensure that the Company's compliance program is operating effectively and adequately tested to ensure that it meets the minimum elements set forth in the Corporate Compliance Program;

(g) the nature and seriousness of the offense conduct;

(h) the Company has no prior criminal history related to corruption; and

(i) the Company has agreed to continue to cooperate with the Fraud Section and the Office in any ongoing investigation of the conduct of the Company's officers, directors, employees, agents, business partners, distributors, and consultants relating to violations of the Foreign Corrupt Practices Act (the "FCPA");

> Accordingly, after considering (a) through (i) above, the Fraud Section and the Office believe that an appropriate resolution of this case is this Agreement with the Company, a guilty plea by WMT Brasilia S.a.r.l., the imposition of an independent compliance monitor for a term of two years, and an aggregate discount of 25% off of the bottom of the otherwise-applicable U.S. Sentencing Guidelines fine range for the portion of the penalty applicable to conduct in Brazil, China, and India, and 20% off of the bottom of the otherwise applicable U.S. Sentencing Guidelines fine range for the portion of the penalty applicable to conduct in Mexico.

The Company admits, accepts, and acknowledges that it is responsible under United States law for the acts of its officers, directors, employees, and agents as set forth in the attached Statement of Facts. The Company also admits, accepts, and acknowledges that the facts described in the attached Statement of Facts are true and accurate and that certain employees who had responsibility for implementing and maintaining internal accounting controls related to anti-corruption with respect to Walmart's subsidiaries in Brazil, China, India, and Mexico had knowledge that the anti-corruption related internal accounting controls in those subsidiaries were not adequate and willfully failed to implement and maintain them. The Company expressly agrees that it shall not, through current or future attorneys, officers, directors, employees, agents, or any other person authorized to speak for the Company, make any public statement, in litigation or otherwise, contradicting the acceptance of responsibility by the Company set forth above or the facts described in the attached Statement of Facts. The Company agrees that if it, or any of its current or future direct or indirect subsidiaries or affiliates, issues a press release or holds any press conference in connection with this Agreement, the Company shall first consult the Fraud Section and the Office to determine: (a) whether the text of the release or proposed statements at the press conference are true and accurate with respect to matters between the Fraud Section, the Office, and the Company; and (b) whether the Fraud Section and the Office have any objection to the release. If the Fraud Section and the Office determine that a public statement by any such person contradicts in whole or in part a statement contained in the Statement of Facts, the Fraud Section and the Office shall so notify the Company, and the Company may avoid a breach of this Agreement by publicly repudiating such statement(s) within five business days after notification.

The Company shall be permitted to raise defenses and to assert affirmative claims in other proceedings relating to the matters set forth in the Statement of Facts provided that such defenses and claims do not contradict, in whole or in part, a statement contained in the Statement of Facts. This Paragraph does not apply to any statement made by any former officer, director, employee, or agent of the Company in the course of any criminal, regulatory, or civil case initiated against such individual, unless such individual is speaking on behalf of the Company.

The Company's obligations under this Agreement shall have a term of three years from the later of the date on which the Agreement is executed or the date on which the independent compliance monitor (the "Monitor") is retained by the Company, as described below (the "Term"). The Company agrees, however, that, in the event the Fraud Section and the Office determine, in their sole discretion, that the Company has knowingly violated any provision of this Agreement or has failed to completely perform or fulfill each of the Company's obligations under this Agreement, an extension or extensions of the Term may be imposed by the Fraud Section and the Office, in their sole discretion, for up to a total additional time period of one year, without prejudice to the Fraud Section and the Office's right to proceed as provided in the breach provisions of this Agreement below. Any extension of the Agreement extends all terms of this Agreement for an equivalent period, except the term of the monitorship, which has a term of two years and is addressed in Attachment C. Conversely, in the event the Fraud Section and the Office find, in their sole discretion, that there exists a change in circumstances sufficient to eliminate the need for the monitorship in Attachment C, and that the other provisions of this Agreement have been satisfied, the Agreement may be terminated early.

The Company shall cooperate fully with the Fraud Section and the Office in any and all matters relating to the conduct described in this Agreement and the attached Statement of Facts and Attachment C, subject to applicable law and regulations, until the later of the date upon which all investigations and prosecutions arising out of such conduct are concluded, or the Term. At the request of the Fraud Section and the Office, the Company shall also cooperate fully with other domestic or foreign law enforcement and regulatory authorities and agencies, as well as the Multilateral Development Banks ("MDBs"), in any investigation of the Company, or its affiliates, or any of its present or former officers, directors, employees, agents, and consultants, or any other party, in any and all matters relating to the conduct described in this Agreement and the attached Statement of Facts and Attachment C. The Company agrees that its cooperation shall include, but not be limited to, the following:

a. Upon request of the Fraud Section and the Office, and subject to applicable law and regulation, the Company shall truthfully disclose all factual information related to the conduct described in the Statement of Facts that is not protected by a valid claim of attorney-client privilege or attorney work product doctrine. This includes conduct of the Company's affiliates and present and former directors, officers, employees, agents, and consultants. This obligation of truthful disclosure includes, but is not limited to, the obligation of the Company to provide to the Fraud Section and the Office, upon request, any non-privileged document, record, or other tangible evidence about which the Fraud Section and the Office may inquire of the Company related to the conduct described in the Statement of Facts.

b. Upon request of the Fraud Section and the Office, the Company shall designate knowledgeable employees, agents, or attorneys to provide to the Fraud Section and the Office the information and materials described above on behalf of the Company. It is further understood that the Company must at all times provide complete, truthful, and accurate information.

c. The Company shall use its best efforts to make available for interviews or testimony, as requested by the Fraud Section and the Office, present or former officers, directors, employees, agents, and consultants of the Company. This obligation includes, but is not limited to, sworn testimony before a federal grand jury or in federal trials, as well as interviews with domestic or foreign law enforcement and regulatory authorities. Cooperation shall include identification of witnesses who, to the knowledge of the Company, may have material information regarding the matters under investigation.

d. With respect to any information, testimony, documents, records, or other tangible evidence provided to the Fraud Section and the Office pursuant to this Agreement, the Company consents to any and all disclosures, subject to applicable law and regulations, to other governmental authorities, including United States authorities and those of a foreign government, as well as MDBs, of such materials as the Fraud Section and the Office in their sole discretion shall deem appropriate.

In addition, during the Term, should the Company learn of any evidence or allegation of conduct that may constitute a violation of the FCPA anti-bribery or accounting provisions had the conduct occurred within the jurisdiction of the United States, the Company shall promptly report such evidence or allegation to the Fraud Section and the Office. Thirty days prior to the end of the Term, the Company, by the Chief Executive Officer of the Company and the Chief Financial Officer of the Company, will certify to the Fraud Section and the Office that the Company has met its disclosure obligations pursuant to this Agreement. Each certification will be deemed a material statement and representation by the Company to the executive branch of the United States for purposes of 18 U.S.C. § 1001.

The Company represents that it has implemented and will continue to implement a compliance and ethics program designed to prevent and detect violations of the FCPA and other applicable anti-corruption laws throughout its operations, including those of its affiliates, agents, and majority owned or controlled joint ventures, and those of its contractors and subcontractors whose responsibilities include interacting with foreign officials or other activities carrying a high risk of corruption, including, but not limited to, the minimum elements set forth in the Corporate Compliance Program.

The Company agreed to retain a Monitor prior to the date on which the Agreement is executed for the purposes of preparing a written work plan as described in Attachment C. The term of the monitorship is two years from the date on which the Agreement is executed, subject to a possible one-year extension as described in Attachment C. The Monitor's duties and authority, and the obligations of the Company with respect to the Monitor and the Fraud Section and the Office, are set forth in Attachment C, which is incorporated by reference into this Agreement. The Company proposed to the Fraud Section and the Office a pool of three qualified candidates to serve as the Monitor. The Monitor candidates or their team members had, at a minimum, the following qualifications:

a. demonstrated expertise with respect to the FCPA and other applicable anti-corruption laws, including experience counseling on FCPA issues;

b. experience designing and/or reviewing corporate compliance policies, procedures and internal accounting controls, including FCPA and anti-corruption policies, procedures and internal accounting controls;

c. the ability to access and deploy resources as necessary to discharge the Monitor's duties as described in the Agreement; and

d. sufficient independence from the Company to ensure effective and impartial performance of the Monitor's duties as described in the Agreement.

The Fraud Section and the Office retained the right, in their sole discretion, to choose the Monitor from among the candidates proposed by the Company, though the Company was entitled to express its preference(s) among the candidates. If the Monitor resigns or is otherwise unable to fulfill his or her obligations as set out herein and in Attachment C, the Company shall within twenty business days recommend a pool of three qualified Monitor candidates from which the Fraud Section and the Office will choose a replacement.

The Monitor's powers, duties, and responsibilities, as well as additional circumstances that may support an extension of the Monitor's term, are set forth in Attachment C. The Company agrees that it will not employ or be affiliated with the Monitor or the Monitor's firm for a period of not less than two years from the date on which the Monitor's term expires. Nor will the Company discuss with the Monitor or the Monitor's firm the possibility of further employment or affiliation during the Monitor's term.

The Company agrees to pay a total monetary penalty in the amount of $137,955,249 (the "Total Monetary Penalty"). The Total Monetary Penalty reflects a discount of 25% off of the bottom of the U.S. Sentencing Guidelines fine range for the portion of the penalty applicable to conduct in Brazil, China, and India, and 20% off of the bottom of the U.S. Sentencing Guidelines fine range for the portion of the penalty applicable to conduct in Mexico. The Company will pay the Total Monetary Penalty to the United States Treasury within ten business days of the sentencing hearing by the Court of WMT Brasilia S.a.r.l. in connection with its guilty plea and plea agreement entered into simultaneously herewith, except that the parties agree that any criminal penalties that might be imposed by the Court on WMT Brasilia S.a.r.l. in connection with its guilty plea and plea agreement will be deducted from the Total Monetary Penalty.

The Total Monetary Penalty is in addition to the $144,691,172 disgorgement of profits plus prejudgment interest by the Company in connection with its resolution with the U.S. Securities and Exchange Commission in a related matter. The Company acknowledges that no tax deduction may be sought in connection with the payment of any part of the Total Monetary Penalty. The Company shall not seek or accept directly or indirectly reimbursement or indemnification from any source of the penalty or disgorgement amounts that the Company pays pursuant to this Agreement or any other agreement entered into with an enforcement authority or regulator concerning the facts set forth in the attached Statement of Facts.

The Fraud Section and the Office agree, except as provided herein, that they will not bring any criminal or civil case (except for criminal tax violations, as to which the Fraud Section and the Office do not make any agreement) against the Company, or any of its present or former subsidiaries and joint ventures, relating to any of the conduct described in the attached Statement of Facts, except for the plea agreement with WMT Brasilia S.a.r.l. entered into on June 20, 2019. The Fraud Section and the Office, however, may use any information related to the conduct described in the attached Statement of Facts against the Company: (a) in a prosecution for perjury or obstruction of justice; (b) in a prosecution for making a false statement; (c) in a prosecution or other proceeding relating to any crime of violence; or (d) in a prosecution or other proceeding relating to a violation of any provision of Title 26 of the United States Code. This Agreement does not provide any protection against prosecution for any future conduct by the Company or any of its present or former parents or subsidiaries. In addition, this Agreement does not provide any protection against prosecution of any individuals, regardless of their affiliation with the Company.

If, during the Term, the Company: (a) commits any felony under U.S. federal law; (b) provides in connection with this Agreement deliberately false, incomplete, or misleading information, including in connection with its disclosure of information about individual culpability; (c) fails to cooperate as set forth in this Agreement; (d) fails to maintain a compliance program as set forth in this Agreement and Attachment B; (e) commits any acts that, had they occurred within the jurisdictional reach of the FCPA, would be a violation of the FCPA; or (f) otherwise fails to completely perform or fulfill each of the Company's obligations under the Agreement, regardless of whether the Fraud Section and the Office become aware of such a breach after the Term is complete, the Company, or its subsidiaries, shall thereafter be subject to prosecution for any federal criminal violation of which the Fraud Section and the Office have knowledge, including, but not limited to, the conduct described in the attached Statement of Facts, which may be pursued by the Fraud Section and the Office in the U.S. District Court for the Eastern District of Virginia or any other appropriate venue. Determination of whether the Company has breached the Agreement and whether to pursue prosecution of the Company shall be in the Fraud Section and the Office's sole discretion. Any such prosecution may be premised on information provided by the Company or its personnel. Any such prosecution relating to the conduct described in the attached Statement of Facts or relating to conduct known to the Fraud Section and the Office prior to the date on which this Agreement was signed that is not time-barred by the applicable statute of limitations on the date of the signing of this Agreement must be commenced against the Company, or its affiliates and subsidiaries, notwithstanding the expiration of the statute of limitations by the expiration of the Term plus one year. Thus, by signing this Agreement, the Company agrees that the statute of limitations with respect to any such prosecution that is not time-barred on the date of the signing of this Agreement shall be tolled for the Term plus one year. In addition, the Company agrees that the statute of limitations as to any violation of U.S. federal law that occurs during the Term will be tolled from the date upon which the violation occurs until the earlier of the date upon which the Fraud Section and the Office are made aware of the violation or the duration of the Term plus five years, and that this period shall be excluded from any calculation of time for purposes of the application of the statute of limitations. Provided, however, that nothing in this Agreement shall revive a statute of limitations that expired prior to the time that this Agreement was executed.

In the event the Fraud Section and the Office determine that the Company has breached this Agreement, the Fraud Section and the Office agree to provide the Company with written notice of such breach prior to instituting any prosecution resulting from such breach. Within sixty days of receipt of such notice, the Company shall have the opportunity to respond to the Fraud Section and the Office in writing to explain the nature and circumstances of such breach, as well as the actions the Company has taken to address and remediate the situation, which explanation the Fraud Section and the Office shall consider in determining whether to pursue prosecution of the Company.

In the event that the Fraud Section and the Office determine that the Company has breached this Agreement:

(a) all statements made by or on behalf of the Company to the Fraud Section and the Office or to the Court, including the attached Statement of Facts, and any testimony given by the Company before a grand jury, a court, or any tribunal, or at any legislative hearings, whether prior or subsequent to this Agreement, and any leads derived from such statements or testimony, shall be admissible in evidence in any and all criminal proceedings brought by the Fraud Section and the Office against the Company, or its subsidiaries; and (b) the Company, or its subsidiaries, shall not assert any claim under the United States Constitution, Rule 11(f) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any either federal rule that any such statements or testimony made by or on behalf of the Company, or its subsidiaries, prior or subsequent to this Agreement, or any leads derived therefrom, should be suppressed or are otherwise inadmissible. The decision whether conduct or statements of any current director, officer, or employee of the Company, or of any person acting on behalf of and at the direction of the Company, will be imputed to the Company for the purpose of determining whether the Company has violated any provision of this Agreement shall be in the sole discretion of the Fraud Section and the Office. . . .

This Agreement is binding on the Company and the Fraud Section and the Office but specifically does not bind any other component of the Department of Justice, other federal agencies, or any state, local, or foreign law enforcement or regulatory agencies, or any other authorities, although the Fraud Section and the Office will bring the cooperation of the Company and its compliance with its other obligations under this Agreement to the attention of such agencies and authorities if requested to do so by the Company.

It is further understood that the Company and the Fraud Section and the Office may disclose this Agreement to the public.

This Agreement sets forth all the terms of the agreement between the Company and the Fraud Section and the Office. No amendments, modifications or additions to this Agreement shall be valid unless they are in writing and signed by the Fraud Section, the Office, the attorneys for the Company, and a duly authorized representative of the Company. . . .

ATTACHMENT A: STATEMENT OF FACTS

The following Stipulated Statement of Facts ("Statement of Facts") is incorporated by reference as part of the Non-Prosecution Agreement (the "Agreement") between the United States Department of Justice, Criminal Division, Fraud Section and the United States Attorney's Office for the Eastern District of Virginia, and Walmart Inc. ("Walmart" or the "Company"). Walmart hereby agrees and stipulates that the following information is true and accurate. Walmart admits, accepts, and acknowledges that it is responsible for the acts of its officers, directors, employees, and agents as set forth below:

<u>Relevant Entities and Individuals</u>

1. Walmart was, at all times relevant to the conduct described in this Statement of Facts, a Bentonville, Arkansas-based retail company. Walmart had, at all relevant times, three segments: Walmart U.S., Sam's Club, and Walmart International. Walmart U.S. and Sam's Club were responsible for Walmart' s United States operations, while Walmart International oversaw the Company's operations outside the United States. Each

segment was headquartered in Bentonville, Arkansas. Walmart's shares were publicly traded on the New York Stock Exchange, and the Company therefore was an "issuer" within the meaning of the Foreign Corrupt Practices Act ("FCPA"), Title 15, United States Code, Section 78dd-l, *et seq*.

2. In or around 2000, Walmart operated retail stores in seven countries. By in or around 2012, Walmart operated in approximately two dozen countries, including Mexico, India, Brazil, and China.

3. Walmart Senior Attorney #1 was a senior attorney at Walmart starting in 2002. In 2009, he was promoted to a senior executive non-legal position and left Walmart in 2013.

4. Walmart Senior Attorney #2 was a senior attorney at Walmart from 2001 to 2010.

5. Walmart's Internal Audit Services ("IAS"), which was renamed Global IAS, required that foreign subsidiary audit teams conduct periodic Business Practices Audits, which were designed to audit foreign subsidiary anti-corruption related internal accounting controls. IAS reviewed these audits.

6. Generally, during the relevant time period, the CEO of each of certain Walmart foreign subsidiaries reported to the CEO of Walmart International. The CFO and General Counsel of each of certain Walmart foreign subsidiaries reported to the CEOs of the respective foreign subsidiaries. In turn, the CEO, CFO, and General Counsel of Walmart International reported to the CEO, CFO, and General Counsel of Walmart, respectively. The head of IAS and, later, the head of Global IAS, reported to the CFO of Walmart and the Chairman of the Audit Committee of Walmart's Board of Directors.

7. Walmart's Mexican Subsidiary ("Mexico Subsidiary") was a publicly traded company in Mexico. At all times relevant to this Agreement, Walmart owned a majority of Mexico Subsidiary's shares. Mexico Subsidiary is Walmart's largest foreign subsidiary, with more than 2,000 stores and more than 200,000 employees.

8. Mexico Subsidiary Executive #1 was a senior executive at Mexico Subsidiary in the early 2000s, during which time he was also an employee of Walmart. He became a senior executive at Walmart in 2005. He held those positions until 2008 and left the Company in 2012.

9. Senior Mexico Subsidiary Attorney was a senior attorney at Mexico Subsidiary from 2004 to 2012.

10. Mexico Subsidiary Attorney was an attorney in Mexico Subsidiary's Real Estate department from 1991 to 2004.

11. India JV Partner was a business conglomerate based in New Delhi, India.

12. India Wholesale Business was a joint venture between Walmart and India JV Partner that developed and operated wholesale stores in India.

13. India Retail Business was owned by India JV Partner, operated as a franchisee of Walmart, and developed and operated retail stores in India.

14. India Wholesale Business and India Retail Business operated as separate companies created in 2007. The two companies integrated certain of their administrative functions, including legal and compliance, in approximately 2010. India Wholesale Business and India Retail Business employed numerous third-party intermediaries ("TPIs") and consultants who assisted in obtaining licenses and permits necessary for operating stores in India.

15. India Retail Employee #1 was the head of the Licenses and Permits team for India Wholesale Business and India Retail Business from approximately October 2011 through approximately November 2012. In that role, India Retail Employee #1 reported directly to India Wholesale Business's General Counsel.

16. India Retail Employee #2 worked in the Licenses and Permits team and obtained licenses and permits for India Wholesale Business and India Retail Business from approximately 2011 through approximately mid-2013. In that role, India Retail Employee #2 reported directly to India Retail Employee #1.

17. WMT Brasilia S.a.r.l. was a wholly owned subsidiary of Walmart and was a majority owner of Walmart's wholly-owned subsidiary in Brazil, which was headquartered in Sao Paulo, Brazil ("WMT Brasilia"). Accordingly, WMT Brasilia was the majority owner of stores operating as Walmart Brazil.

18. Brazil Intermediary was a TPI hired by two Brazilian construction companies to obtain permits for two Walmart Brazil stores.

19. China Subsidiary was Walmart's wholly-owned subsidiary in China.

Background

20. As detailed below, from in or around July 2000 until in or around April 2011, certain Walmart personnel responsible for implementing and maintaining the Company's internal accounting controls related to anti-corruption were aware of certain failures involving these controls, including relating to potentially improper payments to government officials in certain Walmart foreign subsidiaries, but nevertheless failed to implement sufficient anti-corruption related internal accounting controls that, among other things, ensured: (a) that sufficient anti- corruption-related due diligence was conducted on all TPIs who interacted with foreign officials; (b) that sufficient anti-corruption related internal accounting controls relating to payments to TPIs existed; (c) that proof was required that TPIs had performed services before Walmart paid them; (d) that TPIs had written contracts that included anti-corruption clauses; (e) that donations ostensibly made to foreign government agencies were not converted to personal use by foreign officials; and (f) that policies covering gifts, travel, and entertainment sufficiently addressed giving things of value to foreign officials and were implemented. Despite these issues being raised to some Walmart personnel responsible for implementing and maintaining the Company's internal accounting controls related to anti-corruption, as explained below, sufficient changes were not made to Walmart's internal accounting controls related to anti-corruption until in or around April 2011. Consequently, as explained below, these failures allowed Walmart foreign subsidiaries in Mexico, India, Brazil, and China to hire certain TPIs without establishing sufficient controls to prevent those TPIs from making improper payments to government officials in order to obtain store permits and licenses.

Warnings to Senior Walmart Executives About Anti-Corruption Risks and Control Failures

21. In or around December 2003, Walmart developed an anti-corruption policy and procedures guide, followed by an implementation work plan in or around March 2004. Walmart did not adopt the anti-corruption policy until in or around March 2005.

22. On or about December 12, 2008, Walmart issued an updated Global Anti-Corruption Policy (the "2008 Policy"). Under the 2008 Policy, TPIs included "all agents, consultants, shareholders or any other representatives acting on behalf of [Walmart] or its Affiliated Companies." For every TPI to be retained or renewed, a due diligence review was required to include, at minimum, the following: (1) a "Business Unit review," including, among other things, the "business case for retaining the Intermediary and the proposed fee structure"; (2) approved anti-corruption language in the TPI contract; (3) an FCPA certification by the TPI; (4) an independent due diligence review; and (5) approval in writing of the due diligence review of the TPI by the foreign subsidiary's compliance officer, in consultation with a Walmart compliance officer, who was required to conduct a final legal review of the TPI to ensure all due diligence requirements had been met. However, the 2008 Policy was not sufficiently implemented, so certain of Walmart's foreign subsidiaries did not follow all of the requirements set forth therein, and Walmart failed to ensure compliance with the 2008 Policy.

23. On or about April 6, 2009, Walmart International announced the creation of a Walmart International Compliance Office that revised the existing anti-corruption standard. The concept for the new standard was "Freedom within a Framework." Instead of taking a centralized approach to ensuring that sufficient anti-corruption related internal accounting controls were implemented throughout Walmart's foreign subsidiaries, the new anti-corruption standard allowed individual markets to design and implement their own program as long as it met certain global standards.

24. In or around late 2010, Walmart issued a new "Global Anti-Corruption Policy" (the "Draft 2010 Policy"). Although the Draft 2010 Policy set forth the Company's anti-corruption requirements in greater detail than previous policies, the Draft 2010 Policy still required Walmart's foreign subsidiaries to implement their own local anti-corruption policies. The Draft 2010 Policy left it to the foreign subsidiaries' business units and legal teams to conduct TPI risk assessments and determine "the appropriate level of due diligence required." The Draft 2010 Policy was never implemented.

25. From in or around July 2000 until in or around April 2011, Walmart's anti-corruption related internal accounting controls were insufficient in Mexico, India, Brazil, and China, and, in a number of instances as detailed below, those insufficiencies were reported to certain senior Walmart employees and executives. These failures in controls allowed Walmart's foreign subsidiaries in Mexico, India, Brazil, and China to hire TPIs without ensuring that those TPIs did not make improper payments to government officials in order to obtain store permits and licenses. The failures in internal accounting controls related to anti-corruption allowed the foreign subsidiaries in Mexico, India, Brazil, and China to open stores faster than they would have with sufficient internal accounting controls related to anti-corruption. Consequently, Walmart earned additional profits through these subsidiaries by opening certain of its stores faster.

26. In or around April 2011, Walmart recognized that the existing anti-corruption compliance program was not sufficient and hired an international law firm and an international consulting firm to conduct a global compliance review for the purpose of reviewing and testing Walmart's anti-corruption compliance program in various foreign subsidiaries around the world, including subsidiaries in Mexico, India, Brazil, and China. Despite Walmart' s remediation beginning in or around April 2011, India continued to have certain internal control failures that resulted in hiring certain TPIs without ensuring those TPIs did not make improper payments to government officials until in or around November 2011, as described below.

Mexico

27. Walmart began operating in Mexico in or around 1991. Walmart grew in Mexico by acquiring other companies and by opening its own stores through Mexico Subsidiary. Before Mexico Subsidiary opened a store in Mexico, it had to obtain many licenses and permits from government departments and agencies. The employees of the government agencies that approved permits and licenses were "foreign official[s]" as that term is defined in the FCPA, Title 15, United States Code, Section 78dd-1(f)(1). In or around September 2005, over a year after he was separated from the Mexico Subsidiary in or around August 2004, Mexico Subsidiary Attorney told a senior attorney at Walmart International and an outside attorney hired by Walmart that when he worked at Mexico Subsidiary, he directed TPIs to make improper payments to government officials. Mexico Subsidiary did not have sufficient internal accounting controls related to anti-corruption to ensure that TPIs did not make improper payments to government officials or that donations made to municipalities and other local governmental entities were proper and that the goods donated were not being converted to personal use. Although Walmart learned that both TPIs and donations posed serious corruption risks, Walmart did not implement internal accounting controls related to anti-corruption sufficient to provide reasonable assurances that Mexico Subsidiary did not make improper payments to government officials through either method until in or around April 2011.

28. From at least in or around 1999 to in or around 2004, Mexico Subsidiary obtained certain real estate permits and licenses required to open and operate stores by using TPIs. On or about September 21, 2005, Mexico Subsidiary Attorney, who was responsible for obtaining real estate licenses and permits for Mexico Subsidiary, contacted Walmart and said that when he worked at Mexico Subsidiary he had overseen a scheme for several prior years in which TPIs made improper payments to government officials to obtain permits and licenses for Mexico Subsidiary. He also said that Mexico Subsidiary had paid approximately $6,000,000 to TPIs, some of which was paid in improper payments to government officials and that in some cases, Mexico Subsidiary Attorney made the payments himself. In most cases, however, Mexico Subsidiary Attorney explained that Mexico Subsidiary made improper payments to government officials through TPIs called "gestores," who were attorneys and ostensibly provided legal services but in reality did nothing for Mexico Subsidiary other than make improper payments. Although Mexico Subsidiary was permitted to use only law firms that were authorized to represent it and had 11 such law firms, Mexico Subsidiary Attorney said that he used the gestores, who were not authorized to work for Mexico Subsidiary, to obtain permits and licenses. Unlike the authorized law firms, the gestores did not have contracts with Mexico Subsidiary, were not subject to any anti-corruption due diligence, did not include anti-corruption clauses in their contracts, and did not send Mexico Subsidiary detailed bills or other documents showing the work they had done. Mexico

Subsidiary Attorney stated that several Mexico Subsidiary executives, including Mexico Subsidiary Executive #1 and Senior Mexico Subsidiary Attorney, knew about and approved of the scheme, but that he was the only employee of Mexico Subsidiary who had any contact with the gestores.

29. In or around October 2005, Mexico Subsidiary Attorney explained that the gestores scheme worked as follows:

a. Mexico Subsidiary would determine which government officials needed to receive an improper payment to obtain a permit or license. Mexico Subsidiary Attorney would then tell one of the gestores which official to make an improper payment to.

b. The gestor would send Mexico Subsidiary Attorney an invoice with a false justification for the payment, which was usually identified as legal services.

c. Mexico Subsidiary recorded the gestores' payments in each store's budget as line items for "external services" or "contract services."

d. Most of the gestores' invoices included a numeric or alphabetic code developed by Mexico Subsidiary Attorney and another Mexico Subsidiary employee specifying why Mexico Subsidiary had made an improper payment to the official. The codes, referred to as "clave" codes, indicated the improper advantage that Mexico Subsidiary received in exchange for the improper payment, including: (1) avoiding a requirement; (2) influence, control, or knowledge of privileged information known by the government official; and (3) payments to eliminate fines. Mexico Subsidiary Attorney said that the meanings of the codes were known only to the gestores, himself, Mexico Subsidiary Executive #1, and two other Mexico Subsidiary executives.

e. After Mexico Subsidiary Attorney received the invoice from the gestor, it paid the gestor with a manual check. The gestores kept between 6 to 8 percent of the payment and used the rest of the money to make an improper payment to the government official.

f. The government official then issued the permit or license for Mexico Subsidiary.

30. Walmart employees knew of the corruption risks associated with obtaining permits and licenses in Mexico since at least in or around 2004, but did not address those risks by implementing sufficient internal accounting controls related to anti-corruption. For example:

a. In or around October 2005, Mexico Subsidiary Attorney stated that in or about early 2002, Mexico Subsidiary Attorney told Mexico Subsidiary Executive #1 several times that Mexico Subsidiary had made improper payments through gestores to obtain licenses and permits and that Mexico Subsidiary Executive #1 approved Mexico Subsidiary's continuing the scheme.

b. In or around November or December 2004, Mexico Subsidiary's audit team prepared a draft report evaluating Mexico Subsidiary's internal accounting controls related to anti-corruption. The draft report said the gestores payments and donations made by Mexico Subsidiary to local entities were "unusual." The draft report noted internal accounting controls related to anti-corruption concerns. For instance, it noted two related problems with Mexico Subsidiary using manual checks to pay external vendors. First, it found that Mexico Subsidiary's use of manual checks to pay outside vendors made it difficult to identify why payments were made. Second, it said that internal accounting controls applicable to manual checks did not require sufficient descriptions. In preparing the final version of the internal audit report, senior Mexico Subsidiary employees in Mexico Subsidiary's audit team removed the statement that the payments to gestores were "unusual."

31. After Walmart employees working in the United States learned of the allegations from Mexico Subsidiary Attorney in or around 2005, Walmart sought advice from outside counsel in Mexico and in the United States. Outside counsel in Mexico interviewed Mexico Subsidiary Attorney multiple times, and sent memoranda reflecting those interviews to Walmart. Walmart Senior Attorney #1, Walmart Senior Attorney #2, the same senior attorney at Walmart International, and other Walmart executives received those reports. Outside counsel in the United States reviewed the allegations and drafted an investigative plan.

32. Instead of hiring outside counsel to conduct an investigation, Walmart used its own employees from IAS and its Corporate Security Group, who were not implicated in the allegations, to perform a limited preliminary inquiry to determine whether the allegations were credible and whether a full investigation was necessary. The investigators obtained evidence corroborating some of Mexico Subsidiary Attorney's allegations.

33. In addition, one Mexico Subsidiary employee told the investigators that, when Mexico Subsidiary had problems obtaining licenses, it would determine how much it had to pay and would give a check payable to the municipality to a government official, who would then give Mexico Subsidiary a receipt. The same employee said that although he was not sure whether improper payments were made to government officials, Mexico Subsidiary used gestores "smooth out the road" so that "there would not be any bumps during the request for a license" and conceded that it was unusual that Mexico Subsidiary paid the gestores when most of the payments were supported by only one invoice and that no records showed what work the gestores did, with whom the gestores met, or how many hours the gestores worked.

34. In or around December 2005, Corporate Security and IAS prepared investigation reports. The Corporate Security report identified potential violations of laws. Also, the Corporate Security report and IAS report recommended several investigative next steps. Walmart did not follow the recommendations.

35. Instead, in or about December 2005 or January 2006, Walmart Senior Attorney #1 and another Walmart executive tasked a senior officer of Mexico Subsidiary and Senior Mexico Subsidiary Attorney, who Mexico Subsidiary Attorney had alleged knew about the improper payments scheme, with leading the remainder of the investigation.

36. In or around early 2006, as part of Walmart's investigation into Mexico Subsidiary Attorney's allegations of improper payments, Walmart Senior Attorney #1 conducted a limited interview of Mexico Subsidiary Executive #1, who had by then been promoted to a senior position at Walmart.

37. On or about May 9, 2006, Senior Mexico Subsidiary Attorney wrote his final report about the gestores investigation. The report stated that no evidence existed to substantiate that Mexico Subsidiary made unlawful payments to government officials.

38. Between in or around late 2004 and in or around 2010, as discussed below, Walmart employees learned about other corruption risks associated with obtaining permits and licenses and learned of allegations of a risk of improper payments to obtain permits and licenses in Mexico, but Walmart did not address those risks by implementing sufficient anti-corruption related internal accounting controls or take remedial actions until in or around April 2011.

39. Although Mexico Subsidiary's use of real estate gestores stopped after Mexico Subsidiary Attorney was separated from the Company in or around August 2004 and before Walmart's 2005 investigation into the gestores allegations, its use of donations to municipalities and other local governmental entities, already identified as a corruption risk, increased as discussed below.

40. From in or around 2006 until in or around 2011, Mexico Subsidiary had a practice of donating goods and services to municipalities and other local governmental entities. Some of the goods donated, such as cars, which were valued at approximately $11,000 to $17,000, and computers, were capable of being converted to personal use. Walmart did not begin to implement sufficient internal accounting controls related to anti-corruption, including those to ensure that these donations were proper and that the goods donated were not being converted to personal use until in or around April 2011.

41. On or about November 19, 2009, Mexico Subsidiary informed Walmart International that local government officials in Mexico had closed certain Mexico Subsidiary stores in an attempt to get Mexico Subsidiary to make improper payments to government officials. Walmart did not investigate this issue or implement sufficient internal accounting controls related to anti-corruption to provide reasonable assurances that Mexico Subsidiary did not make improper payments until in or around April 2011.

<u>India</u>

42. In or around late 2005, Walmart began to explore long-term business opportunities in India and quickly learned that, similar to its operations in Mexico, it would face corruption risks in India obtaining licenses and permits. Walmart also learned of specific corruption risks with India JV Partner. The internal accounting controls related to anti-corruption that Walmart implemented in India, however, were insufficient to mitigate the risk of corruption.

43. Before Walmart began operating in India, it hired a consulting firm to assess potential business risks there. The report stated that Walmart would "be targeted by corrupt individuals and organizations seeking bribes or kickbacks in exchange for favorable business relationships or the easing of bureaucratic restrictions." The report also said that corruption would likely cause Walmart "delays in the processing of permits, licenses and other paperwork." The consulting firm advised that Walmart could mitigate its corruption risk with "[s]trict adherence" to the FCPA and by establishing "strong internal controls and management oversight."

44. After Walmart learned of potential corruption concerns related to India JV Partner, in or around late 2006, one Walmart employee was concerned with the willingness of an employee of India JV Partner to follow the FCPA and told a Walmart executive in an email message that the India JV Partner employee had given him a "wink and a nod" when the employee "brought up transparency and clean transactions relative to the FCPA" and the India JV Partner employee admitted that "speed payments" were used in the past by the India JV Partner.

45. Between in or around 2008 and in or around early 2011, Walmart's audit team in India conducted at least six reviews of India Wholesale Business. All of those reviews identified weaknesses in anti-corruption related internal accounting controls that required remediation and were sent to Walmart executives in the United States and to IAS.

46. Between in or around 2008 and in or around early 2011, one or more Walmart senior employees in the United States knew or had reason to know that at India Wholesale Business: certain India Wholesale Business vendors operated without contracts; certain India Wholesale Business third party contracts lacked standard FCPA provisions; certain India Wholesale Business employees had failed to sign anti-corruption certifications and there was no procedure for obtaining those certifications; certain India Wholesale Business disbursements lacked supporting documents; certain India Wholesale Business employees had not completed FCPA training; and there was no formal third party due diligence process at India Wholesale Business.

47. On or about July 23, 2011, senior Walmart and Walmart International executives received an anonymous whistleblower allegation stating that an employee of India Wholesale Business and India Retail Employee #1 were involved in a scheme to make improper payments to government officials in order to obtain store operating permits and licenses, and that a senior legal employee of India Wholesale Business knew about the scheme. A senior Walmart International executive forwarded the whistleblower email to Walmart International's human resources department and stated, "[s]eems there are some specifics here that we can check out." Over the next two months, some Walmart and Walmart International executives received two additional emails from the same whistleblower following up on the initial email, but Walmart never investigated the allegations.

48. Despite the audit reports discussing control deficiencies and the whistleblower report alleging improper payments to government officials, Walmart did not implement and maintain a system of sufficient internal accounting controls related to anti-corruption to address anti-corruption concerns in India. Because of Walmart's failure to implement sufficient internal accounting controls related to anti-corruption, from in or about 2009 through in or about at least 2011, India Wholesale Business and India Retail Business were able to retain TPIs that made improper payments to government officials in order to obtain store operating permits and licenses during that period. These improper payments were then recorded in the joint venture's books and records with vague descriptions like "misc fees," "miscellaneous," "professional fees," "incidental," and "government fee."

49. On or about September 28, 2011, a TPI wrote to India Retail Employee #2 regarding a store as follows: "For settling Trade Non Food License we have to pay Rs. 1800000/- [approx. $36,800] as agreed and

committed by yourself and [India Retail Employee #1] on 19-09-2011. I am receiving daily several calls for payment in case if we fail to pay then there would be a major problem which I am sorry to say we would not be in a position to protect."

50. On or about November 24, 2011, the General Counsel for India Retail Business executed a vendor services agreement with a TPI that lacked standard anti-corruption provisions and audit rights provisions. Those provisions were removed by an employee of the joint venture prior to the execution of the contract. Audit reports prepared by IAS in or around November 2008 and in or around March 2011 and circulated to certain employees at Walmart in the United States had noted the omission of key provisions of Walmart's anti-corruption standards from its standard contracts in India.

Brazil

51. Walmart International executives became aware of corruption risks in Brazil as early as in or around July 2000. However, Walmart did not implement due diligence procedures for third parties at Walmart Brazil, undertake risk-based assessments or reviews, or implement an anti-corruption policy or anti-corruption related controls until in or around 2008.

52. On or about November 13, 2008, a Walmart Brazil Business Practices audit report was sent to certain executives of Walmart International. That report did not find instances of non-compliance, but identified weaknesses in anti-corruption related internal accounting controls that required remediation.

53. In or around December 2008, Walmart issued the 2008 Policy, which included enhancements to its global anti-corruption policy and procedures guide. The 2008 Policy provided, among other things, that TPIs could not be retained without a due diligence review. The 2008 Policy also outlined specific rules for record-keeping regarding TPIs. In or around mid-2008, Walmart International disseminated these enhancements to Walmart Brazil.

54. Between in or around 2010 and in or around early 2011, Walmart International employees continued to receive internal audit reports and memoranda noting weaknesses in anti-corruption related internal accounting controls at Walmart Brazil that required remediation, some of which were identified in the 2008 Walmart Brazil internal audit report.

55. From in or around 2008 through in or around early 2011, one or more Walmart senior employees in the United States knew or had reason to know that at Walmart Brazil: certain anti-corruption related internal controls were not in place sufficient to ensure that all of Walmart Brazil's service contracts were properly kept and stored to enable Walmart Brazil to ensure its books, records, and accounts were accurate and fairly reflected its disbursement transactions; and a formal third party due diligence process was not implemented at Walmart Brazil as required.

56. As a result of Walmart's failure to implement sufficient internal accounting controls related to anti-corruption at Walmart Brazil despite repeated findings in the internal audit reports that such anti-corruption related internal accounting controls were lacking, Walmart Brazil continued to retain and renew contracts

with TPIs without conducting the required due diligence, and improper payments were paid by certain of these TPIs. Specifically, between in or around 2008 and in or around April 2012, Walmart Brazil engaged and paid a TPI construction company ("Brazil Construction Company") a total of approximately $52 million to build eight Walmart stores in Brazil. Walmart Brazil did not conduct any due diligence on Brazil Construction Company prior to hiring it in 2008. Later, in or around late 2009, Brazil Construction Company failed a preliminary round of vendor due diligence. It failed another round of due diligence in or around April 2012. In or around April 2012, the Walmart Brazil Ethics and Compliance department informed the Construction and Indirect Sourcing Departments at Walmart Brazil that the construction company had failed due diligence "due to cases of corruption" and that no further contracts were to be signed with the company. No further contracts were signed by Walmart Brazil with Brazil Construction Company. In or around late 2009, the Walmart Brazil Ethics and Compliance Department had no mechanism in place to ensure that third parties who failed preliminary due diligence were suspended pending final due diligence, and in or around late 2009 Walmart Brazil did not ensure that the Brazil Construction Company was no longer used or paid. In or around 2009, without the knowledge of Walmart Brazil employees, the Brazil Construction Company made improper payments to government officials in connection with the construction of two stores in Brazil.

57. From in or around December 2009 through in or around 2010, as construction neared completion on a Walmart Brazil store, Walmart Brazil directed Brazil Construction Company to retain Brazil Intermediary as a TPI to obtain operational licenses and permits needed to open the store on a compressed timeline. But rather than hiring Brazil Intermediary directly, Walmart Brazil instead amended the contracts with Brazil Construction Company to include a description of Brazil Intermediary's work and the cost associated with that work. All of this occurred despite red flags indicating that Brazil Intermediary was a government employee and was an individual, not a business with a registered corporate form.

58. Walmart Brazil hired Brazil Intermediary indirectly through Brazil Construction Company, and through the construction company that worked on the second store, because Walmart Brazil employees, including a Walmart Brazil executive, knew they could not hire Brazil Intermediary directly because of several red flags. A Walmart Brazil Government Affairs employee informed a Walmart Brazil Ethics and Compliance employee that he believed Brazil Intermediary was a government official and that Walmart Brazil itself was not allowed to hire civil servants. Further, a member of Walmart Brazil's construction department believed that Walmart Brazil could not hire Brazil Intermediary directly because Brazil Intermediary used to be a government official and did not have a company.

59. In or around 2009, Brazil Intermediary made improper payments to government inspectors in connection with the construction of a Walmart Brazil store in Brazil. According to a former employee of Brazil Construction Company that worked on the first store, the former employee, without the knowledge or awareness of Walmart Brazil, gave Brazil Intermediary cash in connection with obtaining construction licenses. The former employee did so despite Brazil Intermediary's claim to him (also made without the knowledge or awareness of Walmart Brazil) that some of the money was for "people I have to pay," which the former employee stated he understood to mean improper payments to government inspectors. Brazil Intermediary's ability to obtain licenses and permits quickly earned Brazil Intermediary the nickname "sorceress" or "genie" within Walmart Brazil, which an employee described as having an ability to sort things

out like "magic."

China

60. Walmart proposed training China Subsidiary's management about the FCPA in or around the first quarter of 2003. That training was not held. On or around October 2003, the International Division of IAS issued an FCPA Compliance Review report for China Subsidiary which included a finding that China Subsidiary employees had provided gifts with an average dollar value of less than $20 to government officials to build and maintain relationships with government officials and help obtain approvals for business licenses.

61. That same year, Walmart's Audit Committee and other executives, including at least one Walmart executive who had later learned of the gestores allegations in Mexico in 2005, received a summary of the audit. Nonetheless, Walmart did not provide FCPA training to China Subsidiary personnel until years later and as a result, the problems relating to the provision of small gifts to government officials were repeatedly noted in subsequent internal audit reports distributed to certain Walmart executives, including at least one executive who learned of the gestores allegations in Mexico in 2005, in the United States until in or around early 2011.

62. On or about October 18, 2006, China Subsidiary's audit team issued a China Subsidiary Business Practices Review report which identified certain FCPA awareness and training deficiencies. In addition to the reports described above, the China Subsidiary internal audit team conducted regular Business Practices audits between in or around 2003 and in or around 2011. The China Subsidiary internal audit team flagged numerous weaknesses in internal accounting controls related to anti-corruption at China Subsidiary, sometimes repeatedly, but many of these weaknesses were not addressed. In fact, from in or around April 2007 until in or around January 2010, Walmart and China Subsidiary failed to address nearly all of the anti-corruption related internal controls audit findings. Walmart did not begin to significantly enhance internal accounting controls related to anti-corruption at China Subsidiary until in or around April 2011.

63. Between in or around 2007 and in or around 2010, one or more Walmart senior employees in the United States knew or had reason to know that at China Subsidiary: certain third party contracts with China Subsidiary lacked required anti-corruption provisions and some also lacked documentation of required third party due diligence, approvals, and required FCPA certifications; certain payments were made by China Subsidiary without required documentation or approvals; the majority of China Subsidiary department heads surveyed were unaware of the purpose of the FCPA and were not provided with any formal training on the FCPA or Walmart's anti-corruption policy.

Problem 17-2	
(a)	Why might it have taken seven years to resolve the Walmart FCPA matter after the whistleblower account first appeared on the front page of the *New York Times*?
(b)	Why might Walmart have received an NPA, while VW pled guilty? Why might Walmart's settlement have included a guilty plea by its Brazil subsidiary?
(c)	Did Walmart pay an appropriate amount in this NPA settlement? How would you develop an answer to that question?

Compare these recent examples to the VW and Walmart cases:

1. Recall from Chapter 5 the facts of the FCPA matter involving **Goldman Sachs and the Malaysian investment fund 1MDB**. The matter was resolved with a plea agreement (in the form of a "C" plea) with Goldman's Malaysia subsidiary and a deferred prosecution agreement (DPA) with Goldman itself. The Goldman subsidiary pled guilty to violating the anti-bribery provisions of the FCPA and the punishment was folded into the overall agreed penalties in the DPA with Goldman.

In the DPA, Goldman agreed, among other things, (1) that a criminal information would be filed in the Eastern District of New York charging Goldman with a violation of the anti-bribery provisions of the FCPA; (2) to admit the statement of facts reproduced in Chapter 5; (3) to pay a $2.3 billion penalty; (4) to disgorge $600 million in profits; (4) to implement and report on a new corporate compliance program (without an outside monitor); and (5) to continue full cooperation in the investigation.

The government agreed to dismiss the FCPA charge after three years if Goldman complies with its obligations under the DPA. In the DPA, the government described Goldman's cooperation as receiving "partial credit," because Goldman delayed in producing some useful information, and stated that Goldman received no voluntary self-reporting credit. *See* Press Release, U.S. Dep't of Justice, Goldman Sachs Resolves Foreign Bribery Case and Agrees to Pay Over $2.9 Billion (Oct. 22, 2020), https://www.justice.gov/usao-edny/pr/goldman-sachs-resolves-foreign-bribery-case-and-agrees-pay-over-29-billion.

2. Compare the **Boeing 737-MAX scandal**. Boeing and the DOJ entered into a DPA, under which Boeing agreed, among other things, (1) that a criminal information would be filed in the Northern District of Texas charging Boeing with conspiracy to defraud the United States; (2) to admit to a statement of facts describing how two key Boeing employees misled the Federal Aviation Administration about the extent of the engineering changes in the MAX from prior 737 models, and the training implications of those changes; (3) to pay a fine of $240 million as well as $2.2 billion in compensation to victims and customers; (4) to implement and report on a new corporate compliance program (without an outside monitor); and (5) to continue full cooperation in the investigation.

The government agreed to dismiss the criminal information after three years if Boeing complies with its obligations under the DPA. In the DPA, the government described Boeing's cooperation as receiving "partial credit," because Boeing delayed in producing some useful information, and stated that Boeing received no voluntary self-reporting credit. *See* Press Release, U.S. Dep't of Justice, Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay over $2.5 Billion (Jan. 7, 2021), https://www.justice.gov/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion.

3. Finally, consider the **Purdue Pharma opioids matter** described in Chapter 6. Purdue and the DOJ entered into a plea agreement (in the form of a "C" plea), under which Purdue agreed (1) to plead guilty in the District of New Jersey to conspiring to defraud the U.S. government and conspiring to violate the FDCA, as well as two distinct conspiracies to violate the anti-kickback statute; (2) to admit to the statement of facts reproduced in Chapter 6; (3) to pay a $3.5 billion fine and forfeit an additional $2 billion (provided such payments are approved by the judge overseeing Purdue's ongoing reorganization proceeding in bankruptcy court); and (4) to continue full cooperation with investigations, including by creating and maintaining an open document repository for all non-privileged evidence relating to the opioid scandal. The government agreed not to prosecute Purdue as a corporation further in opioid-related matters, except for an investigation of potential FCPA violations that is ongoing. *See* Press Release, U.S. Dep't of Justice, Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlement with Members of the Sackler Family (Oct. 21, 2020), https://www.justice.gov/opa/pr/justice-department-announces-global-resolution-criminal-and-civil-investigations-opioid.

C. The Role of the Judiciary

Finally, return to the question of the judiciary's role. Recall the court opinions from Chapter 1 discussing limits on the ability of judges to review the substantive merits of settlements in the form of DPAs. In the following case, you can see the approach of a UK judge to a major settlement under the UK's regime governing DPAs, which statutorily requires judicial approval of such settlements.

SERIOUS FRAUD OFFICE v. ROLLS ROYCE ENERGY SYSTEMS INC., 2017 WL 00219524 (UK Crown Court at Southwark, Jan. 17, 2017)

Sir Brian Leveson P:

This is the third (and, by far, the largest) application for approval by the court of a deferred prosecution agreement ("DPA") reached between the Serious Fraud Office ("SFO") and two entities now ultimately owned by Rolls-Royce Holdings plc namely Rolls-Royce plc ("Rolls-Royce") and its Delaware incorporated subsidiary, Rolls-Royce Energy Systems Inc ("RRESI"). It covers the conduct of Rolls-Royce and RRESI in Nigeria, Indonesia and Russia along with the conduct of Rolls-Royce alone in Thailand, India, China and Malaysia.

Rolls-Royce Holdings plc (listed on the London Stock Exchange and forming part of the FTSE 100 index) is properly considered to be a company of central importance to the United Kingdom, with a reputation in the field of engineering second to none. . . .

Rolls-Royce and its subsidiaries employ some 50,000 people, in more than 50 countries. This case concerns the conduct of its civil aerospace business which manufactures engines for the commercial large aircraft and corporate jet markets and generates approximately 50% of its revenue, defence aerospace business which manufactures engines for the military transport market and is the second largest provider of defence aero engine products and services in the world (generating approximately 20% of its revenue), and its former energy business concerned with the manufacture of gas turbines and compressors to power off-shore platforms, the transport of oil and gas through pipelines, and the generation of electricity which generates less than 10% of its revenue, part of which was conducted by RRESI.

Against that background, it can properly be described as devastating and of the very greatest gravity that the conduct of this institution should fall to be examined within the context of a criminal investigation and that the investigation (in very large part conducted and voluntarily revealed to the SFO by Rolls-Royce itself) should reveal the most serious breaches of the criminal law in the areas of bribery and corruption (some of which implicated senior management and, on the face of it, controlling minds of the company). It involves:

i) agreements to make corrupt payments to agents in connection with the sale of Trent aero engines for civil aircraft in Indonesia and Thailand between 1989 and 2006;

ii) concealment or obfuscation of the use of intermediaries involved in its defence business in India between 2005 and 2009 when the use of intermediaries was restricted;

iii) an agreement to make a corrupt payment in 2006/7 to recover a list of intermediaries that had been taken by a tax inspector from Rolls-Royce in India;

iv) an agreement to make corrupt payments to agents in connection with the supply of gas compression equipment in Russia between January 2008 and December 2009;

v) failing to prevent bribery by employees or intermediaries in conducting its energy business in Nigeria and Indonesia between the commencement of the Bribery Act 2010 and May 2013 and July 2013 respectively, with similar failures in relation to its civil business in Indonesia;

vi) failure to prevent the provision by Rolls-Royce employees of inducements which constitutes bribery in its civil business in China and Malaysia between the commencement of the Bribery Act 2010 and December 2013.

Further, in relation to the conduct of Rolls-Royce, there have been discussions between the SFO and the Department of Justice in the United States and discussions between the Department of Justice and the Brazilian Ministério Público Federal, to ensure a coordinated global resolution of the relevant conduct. Parallel to this DPA, it is intended that a similar type of agreement reached with the Department of Justice (which has been fully disclosed in these proceedings) and a settlement with the Brazilian authorities will be announced. The American agreement covers the conduct of Rolls-Royce's energy business (in Brazil, Kazakhstan and Thailand) and also addresses conduct relating to Rolls-Royce and RRESI arising from an investigation into its use of an intermediary called Unaoil.

Deferred Prosecution Agreements

Although the concept of a DPA has been fully explained in both judgments which follow the first two agreements (SFO v Standard Bank plc and SFO v XYZ Ltd), it is worth summarising the structure as prescribed by s. 45 and Schedule 17 of the Crime and Courts Act 2013 ("the 2013 Act"). In short, a DPA is potentially available for certain economic or financial offences to a body corporate, a partnership or an unincorporated association in respect of whom the only criminal sanction is financial: it does not cover (nor does it protect from prosecution) any individual. It provides a mechanism whereby, subject to the approval of the court, prosecution can be avoided by entering into an agreement on negotiated terms with a prosecutor designated by the 2013 Act.

The court's role is as follows. Following the commencement of negotiations and what might become an agreement, the scheme mandates that a hearing must be held in private for the purposes of ascertaining whether the court will declare that the proposed DPA is "likely" to be in the interests of justice and its proposed terms are fair, reasonable and proportionate: see paras. 7(1) and (4) of Schedule 17 of the 2013 Act. Reasons must be given and, if a declaration is declined, a further application is permitted (paras. 7(2) and (3) *ibid*). In that way, the court retains control of the ultimate outcome and, if the agreement is not approved, the possibility of prosecution is not jeopardised as a consequence of any publicity that would follow if these proceedings had not been held in private.

If a declaration has been granted pursuant to para. 7(1) of Schedule 17 and the DPA is finalised on the terms previously identified, para. 8 of Schedule 17 comes into play. This provides:

(1) Where a prosecutor and P have agreed the terms of a DPA, the prosecutor must apply to the Crown Court for a declaration that –

(a) the DPA is in the interests of justice, and

(b) the terms of the DPA are fair, reasonable and proportionate.

(2) But the prosecutor may not make an application under sub-paragraph 1 unless the court has made a declaration under paragraph 7(1) (declaration on preliminary hearing).

(3) A DPA only comes into force when it is approved by the Crown Court making a declaration under sub-paragraph (1).

(4) The court must give reasons for its decision on whether or not to make a declaration under sub-paragraph (1).

(5) A hearing at which an application under this paragraph is determined may be held in private.

(6) But if the court decides to approve the DPA and make a declaration under sub-paragraph (1) it must do so, and give its reasons, in open court.

(7) Upon approval of the DPA by the court, the prosecutor must publish –

(a) the DPA

(b) the declaration of the court under paragraph 7 and the reasons for its decision to make the declaration,

(c) in a case where the court initially declined to make a declaration under paragraph 7, the court's reason for that decision, and

(d) the court's declaration under this paragraph and the reasons for its decision to make the declaration,

unless the prosecutor is prevented from doing so by an enactment or by an order of the court under paragraph 12 (postponement of publication to avoid prejudicing proceedings)."

Thus, even having agreed that a DPA is likely to be in the interests of justice and that its proposed terms are fair, reasonable and proportionate, the court continues to retain control and can decline to conclude that it is, in fact, in the interests of justice or that its terms are fair, reasonable and proportionate. To that end, it remains open to continue the argument in private, again on the basis that, if a declaration under para. 8(1) is not forthcoming, a prosecution is not jeopardised although it has to be recognised that, absent a material change of circumstances between the para. 7 hearing and the para. 8 hearing, it is difficult to see how the court could conclude that a DPA which it considered likely to be in the interests of justice with terms fair, reasonable and proportionate was not, in fact, in the interests of justice with terms which are fair, reasonable and proportionate. . . .

In addition to examining the internal investigations (including the interviews, Rolls-Royce having waived any claim for legal professional privilege on a limited basis), the SFO, with what Sir Edward, for the SFO, recognised was "the extraordinary cooperation of Rolls-Royce", has conducted its own extensive investigation. This investigation has included:

i) obtaining from Rolls-Royce the key documents identified by the internal investigations including memoranda of interviews, along with access generally to Rolls-Royce hard copy documents;

ii) obtaining from Rolls-Royce complete digital repositories or email containers where available of in excess of 100 key employees or former employees, without filtering the material for potential privilege, but, instead, permitting issues of privilege to be resolved by independent counsel;

iii) obtaining documentary evidence through requests for mutual legal assistance;

iv) arresting domestic and overseas intermediaries and former Rolls-Royce employees (including searches of their premises) and conducting numerous interviews of suspects and others whether voluntarily or under compulsion;

v) making other targeted requests and review of material (all of which have been voluntarily provided), such as compliance material, including historic internal reviews; personnel files; employee notebooks; telephones; marketing services agent files; and accountancy records.

The full and extensive nature of this co-operation has led to the acquisition, and application of digital review methods to over 30 million documents. All this has been in the context of an investigation concerning conduct in multiple jurisdictions, across four business lines and spanning a long period of time. Sir Edward has made clear (and the Statement of Facts confirms) that the proactive approach to co-operation adopted by Rolls-Royce has led to the SFO receiving pertinent information which may not otherwise have come to its attention. Rolls-Royce's approach has included:

i) genuine cooperation with the SFO in the conduct of Rolls-Royce's own internal investigation, including deferring interviews until the SFO had first completed its interview, and the audio recording of interviews where requested;

ii) disclosure of all interview memoranda was made (on a limited waiver basis), despite Rolls-Royce's belief that the material was capable of resisting an order for disclosure, on the basis that it was privileged;

iii) providing all material requested by the SFO voluntarily, that is to say without requiring recourse to compulsory powers (in one case at least effectively relinquishing control to the SFO); and

iv) consulting the SFO in respect of developments in media coverage, and seeking the SFO's permission before winding up companies that may have been implicated in the SFO's investigation.

I have recited the extent of the assistance provided by Rolls-Royce because it is highly material both to the interests of justice and the assessment of the balance between prosecution and DPA and also to the appropriate discount to allow from the financial penalty imposed. In both SFO v Standard Bank plc (U20150854) and SFO v XYZ Ltd [U20150856], the DPA followed what was a self-report at a time that the SFO neither had knowledge of, nor known means of likelihood of learning about, the conduct which led to the DPA (see [27]-[28] of the decision dated 30 November 2015 and [24]-[25] of the redacted decision dated 8 July 2016 respectively). In this case, the SFO had been alerted because of the public internet posting and had initiated an inquiry.

The fact that an investigation was not triggered by a self-report would usually be highly relevant in the balance but the nature and extent of the co-operation provided by Rolls-Royce in this case has persuaded the SFO not only to use the word "extraordinary" to describe it but also to advance the argument that, in the particular circumstances of this case, I should not distinguish between its assistance and that of those who have self-reported from the outset. Given that what has been reported has clearly been far more extensive (and of a different order) than is may have been exposed without the co-operation provided, I am prepared to accede to that submission. . . .

I must consider the conduct covered by the proposed DPA in this case which . . . involves (as Sir Edward submitted and Mr. Perry did not challenge) the following aggravating features:

i) The conduct involved offences relating to the bribery of foreign public officials, commercial bribery and the false accounting of payments to intermediaries.

ii) The offences were multi-jurisdictional, numerous and spread across Rolls-Royce's defence aerospace, civil aerospace and energy businesses.

iii) The offences have caused and/or will cause substantial harm to the integrity/confidence of markets.

iv) The offending was persistent and spanned from 1989 until 2013.

v) The offending involved substantial funds being made available to fund bribe payments.

vi) The conduct displayed elements of careful planning.

vii) The conduct related to the award of large value contracts which, taken together, ultimately earned over £250 million of gross profit (although care must be used in relation to this term which is based on calculations reached by accountants instructed by the SFO and Rolls-Royce and agreed by the parties and does not necessarily reflect the way in which the accounting profession would approach gross profit for reporting standards).

viii) The conduct involved senior (on the face of it, very senior) Rolls-Royce employees. . . .

Although entirely a consequence of its own conduct, for the sake of completeness, I record that the costs of the work done by Rolls-Royce in connection with its investigation and work with prosecutors in multiple jurisdictions, together with the cost of the intermediary review and the appropriate professional financial advice, as at December 2016, amounted to £123,115,643 and will doubtless continue to increase. . . .

Rolls-Royce has taken the following steps to enhance its ethics and compliance procedures such that organisation and governance has been improved by the recruitment of experienced compliance personnel in key positions (including Head of Risk and Head of Compliance) as well as additional Compliance Officers and the appointment of designated Local Ethics Advisers. There has been a significant re-organisation of reporting lines which ensures that compliance officers are independent of business divisions. In addition, there are:

i) Enhanced policies and procedures covering high risk areas of Rolls-Royce's business divisions.

ii) Top level commitment to ethics and compliance through improved communication and annual manager led ethics training.

iii) Development of a risk assessment framework and implementation of risk assessment procedures into business divisions.

iv) Improved due diligence in respect of intermediaries comprising business justification, external due diligence, approval by an Adviser Panel (consisting of Lord Gold and both the Head of Risk at Rolls-Royce and one of its senior external legal advisers) together with ongoing monitoring.

v) Regular compulsory training on compliance issues for all staff with extensive monitoring of anti-bribery and corruption procedures including regular audit by Rolls-Royce's Audit Committee of anti-bribery and corruption procedures and investigations of issues.

vi) Implementation of compliance procedures and training in respect of concessions provided in the Civil Aerospace industry.

Rolls-Royce has also specifically addressed the potential risks arising from its intermediaries by reviewing 250 intermediary relationships across the company. This has led to the suspension of 88 intermediaries and led to a material reduction in the number of intermediaries used across the Rolls-Royce Group.

Further, as a consequence of the internal investigation, Rolls-Royce has conducted disciplinary proceedings in respect of 38 employees in its Civil Aerospace, Energy and Marine divisions leading to 11 employees leaving RR during stages of the disciplinary process and decisions to dismiss six employees; others have suffered sanction short of dismissal.

I am told that, up to December 2016, these steps (excluding the intermediary review and disciplinary proceedings) have cost Rolls-Royce £15,175,331.46 and that the review is ongoing. In that regard, a term of the DPA deals with issues of compliance and the SFO has identified issues to be addressed which would be included within the conditions of the DPA. Suffice to say that I entirely accept that Rolls-Royce could not have done more to address the issues that have now been exposed. I comment only that it is a real tragedy that it did not do so following the well-known observations of Kofi Annan, in the foreword to the 2004 UN Convention against Corruption which spoke about it as "an insidious plague".

The cultural change is evidenced by the steps which I have just described but I have pressed Rolls-Royce to disclose its present constitution and, in particular, the membership of its Board. Had any member of the today's senior management who was implicated or been in a position where they should have been aware of the culture and practices which I have described and were clearly endemic at Rolls-Royce remained in his or her position, this, itself, would have been of real significance and could have affected my approach.

I am informed (and accept) that no current member of the Board was involved in any of the conduct described in the Statement of Facts and that conduct occurring after 1 July 2011 did not involve any of the (then) directors. The Group President (appointed in January 2016) was previously on the Board and now has responsibility for operational functions (e.g. IT, Group Property, Quality etc.); his focus as a director (since 2005) has been on engineering, technology and research. The Chief Executive, the Chief Financial Officer and the Company Secretary have all been appointed since January 2014.

As for the non-executive directors, none are or have been involved in the day to day running of the business. The Chairman (who was a non-executive director from 1 March 2013) was appointed in May 2013 and is not a member of the executive leadership team. Four non-executive directors were in post from 2008, 2011 (two) and 2012 and four have been appointed since January 2014. The Senior Independent Director was appointed in 2015.

This is the Board that has clearly authorised all that Rolls-Royce has done since 2012 and is to be highly commended for that. In the circumstances, I am satisfied that both the senior management and those responsible for the strategic direction of Rolls- Royce are different to those responsible for the running of the company (and its culture) during the period when the events which I have described occurred.

The final consideration identified in SFO v XYZ Ltd is the impact of prosecution on employees and others innocent of any misconduct or what might otherwise be described as the consequences of a conviction. To understand the extent of that impact, it is first necessary to consider the impact on Rolls-Royce.

First, a conviction would undeniably affect the ability of Rolls-Royce to trade in the world where, as I started this judgment by observing, it is a world leader and has a reputation for excellence. It is well known that many countries operate public sector procurement rules which would debar participation following conviction. Thus, I have no difficulty in accepting that which I am informed to the effect that, as at the end of 2014, a minimum in the order of 15% of the Rolls-Royce order book was from entities subject to public sector procurement rules in countries with mandatory debarment and, approximately, a further 15% was from entities subject to public sector procurement rules in countries with discretionary debarment pursuant to express legislation.

Furthermore, it is not difficult to visualize that the direct losses to revenue which would be caused by debarment would have a long term financial effect consequent upon losing contracts which, for commercial aircraft, can extend for 25 to 30 years. There would also be incumbency effects of a short term debarment, leading to longer term exclusion from other contracts and reduced research & development caused by the loss of a key revenue stream.

Debarment and exclusion would clearly have significant, and potentially business critical, effects on the financial position of Rolls-Royce. This could lead to the worst case scenario of a very negative share price impact, and, potentially, more serious impacts on shareholder confidence, future strategy, and therefore viability.

These repercussions for Rolls-Royce risk additional repercussions to third party interests, including:

i) adverse effect to the UK defence industry, where Rolls-Royce has a critical role in supplying engines for UK military and naval vessels, nuclear propulsion technology for nuclear submarines, and aftermarket services;

ii) consequential financial effects on the supply chain;

iii) impairment of competition in highly concentrated markets, where there are limited alternative sources of supply and significant barriers to entry;

iv) a potentially significant fall in share price, which is likely to be made more dramatic by the debarment consequences of a conviction;

v) possible group-wide redundancies and/or restructuring; and potential weakening of Rolls-Royce's financial covenant for pensions.

I have no difficulty in accepting that these features demonstrate that a criminal conviction against Rolls-Royce would have a very substantial impact on the company, which, in turn, would have wider effects for the UK defence industry and persons who were not connected to the criminal conduct, including Rolls-Royce employees, and pensioners, and those in its supply chain. None of these factors is determinative of my decision in relation to this DPA; indeed, the national economic interest is irrelevant. Neither is my decision founded on the proposition that a company in the position of Rolls-Royce is immune from prosecution: it is not. It is not because of who or what Rolls-Royce is that is relevant but, rather, the countervailing factors that I have to weigh in the balance when considering the public interest and the interests of justice. As I have made clear before, and repeat, a company that commits serious crimes must expect to be prosecuted and if convicted dealt with severely and, absent sufficient countervailing factors, cannot expect to have an application for approval of a DPA accepted. . . .

My reaction when first considering these papers was that if Rolls-Royce were not to be prosecuted in the context of such egregious criminality over decades, involving countries around the world, making truly vast corrupt payments and, consequentially, even greater profits, then it was difficult to see when any company would be prosecuted. A possible exception could be the corporate vehicle for fraud, set up for that purpose and, in the public interest, requiring dissolution (although that also might be achieved in different ways). As for the non-penal consequences of conviction, the purpose of the procurement rules is specifically to discourage corruption and they should not be circumvented.

On the other hand, I accept that Rolls-Royce is no longer the company that once it was; its new Board and executive team has embraced the need to make essential change and has deliberately sought to clear out all the disreputable practices that have gone before, creating new policies, practices and cultures. Its full co-operation and willingness to expose every potential criminal act that it uncovers and the work being done on compliance and creating that culture goes a long way to address the obvious concerns as to the past.

So the question becomes whether it is necessary to inflict the undeniably adverse consequences on Rolls-Royce that would flow from prosecution because of the gravity of its offending even though it may now be considered a dramatically changed organisation. In any event, it will have to suffer the undeniably adverse publicity that will flow from the facts of its business practices which will be exposed by the DPA so that the way in which it has done business will be obvious. Any public procurement exercise will be conducted in the light of its history and it will doubtless only win contracts on the merits of its products. That, of course, is as it should be. Neither will the conduct of Rolls-Royce escape sanction: it could only ever be fined and the DPA has to be approached on the basis that it must be broadly comparable to the fine that a court would have imposed on conviction following a guilty plea (see para. 5(4) of Schedule 17 of the 2013 Act).

In the circumstances, subject to the terms being fair, reasonable and proportionate, I have come to the conclusion that it is in the interests of justice that the conduct of Rolls-Royce be resolved through the mechanism of a DPA. It is to those terms that I now turn.

The essential basis of this DPA is that effective from the date of the declaration under paras. 8(1) and (3) of Schedule 17 to the 2013 Act for a period of five years (or four years if the SFO confirm in writing that the agreement has concluded by payment of the disgorgement and financial penalty and taking account of any remaining obligations), the SFO will agree, having preferred the indictment, to suspend it and, subject to compliance with the terms of the DPA, after its conclusion, will discontinue the proceedings.

Other conditions include the absence of any protection against prosecution of any present or former officer, employee or agent or against Rolls-Royce or RRESI for conduct not disclosed by them prior to the date of the agreement (or any future criminal conduct). There is also a condition that fresh proceedings may follow if Rolls-Royce provided inaccurate, misleading or incomplete information to the SFO and knew or ought to have known that it was inaccurate, misleading or incomplete.

Taken together, the requirements falling upon Rolls-Royce and RRESI which the court declared were likely to be in the interests of justice and were fair, reasonable and proportionate can be summarised as follows:

i) Past and future co-operation with the relevant authorities (as further described) in all matters relating to the conduct arising out of the circumstances of the draft Indictment;

ii) Disgorgement of profit on the transactions of £258,170,000;

iii) Payment of a financial penalty of £239,082,645;

iv) Payment of the costs incurred by the SFO (put at £12,960,754);

v) At its own expense, completing a compliance programme following the recommendations of the reviews commissioned by Rolls-Royce from Lord Gold (formerly of Herbert Smith Freehills LLP now of Gold Associates) of the approach to anti- bribery and corruption compliance (as further described).

It is also acknowledged that no tax reduction shall be sought in relation to any part of the payments (ii), (iii) and (iv) above in the UK or elsewhere, with time to pay the disgorgement and financial penalty in four instalments subject to simple interest at an annual rate of 80 basis points over GBP 6m LIBOR on any sum unpaid calculated from 30 June 2017. . . .

Putting entirely to one side the £15 million cost of the compliance programme (which Rolls-Royce and RRESI—to say nothing of the other Rolls-Royce entities—required in any event), the risk of potential liability in jurisdictions not covered by this DPA and the agreements reached with the United States and Brazil and the legal and other costs incurred by Rolls-Royce in the investigation of its conduct in multiple jurisdictions, the intermediary review, expert advice and negotiation of these agreements (which as I have noted above amounted, in December 2016, to £123 million), the total financial penalty (including costs to the SFO) arising out of the DPA with which I am concerned exceeds £½ billion.

In addition, included for the sake of completeness, the deferred prosecution agreement reached with the Department of Justice requires a financial payment of $169,917,710 and the leniency agreement with the Brazilian authorities a payment of US $25,579,645. . . .

Putting to one side the reputational damage that will flow from the conduct of Rolls-Royce and their employees and agents, leading to the DPA, the total financial impact of the penalties and costs imposed exceeds £500 million and I am satisfied that it achieves the objectives of punishment and deterrence. The financial advisors to the SFO and DOJ have confirmed that, taking into account Roll-Royce's financial circumstances, the penalty is substantial enough to have a real economic impact: when added to the costs incurred by Rolls-Royce it amounts to a sum in the region of £650 million. Mr. Whittam, for the SFO agrees with this view and submits that the penalty will bring home to both management and shareholders the need to operate within the law without putting it out of business which outcome would be inappropriate in these circumstances. Mr. Perry, for Rolls-Royce, accepts the accuracy of that submission. . . .

Thus, as I have observed in relation to previous DPAs, there is no question of the parties having reached a private compromise without appropriate independent judicial consideration of the public interest: furthermore, publication of the relevant material now serves to permit public scrutiny of the circumstances and the agreement. Suffice to say that I am satisfied that the DPA fully reflects the interests of the public in the prevention and deterrence of this type of crime. . . .

A cynic (or irresponsible company) might look at the costs which Rolls-Royce have incurred in their own investigation and wonder whether it be more sensible to keep quiet and hope that its conduct does not fall under the eye of the authorities. Quite apart from the total failure to acknowledge the difference between right and wrong, that is to fail to understand that such an approach carries with it cataclysmic risks. Whatever the costs Rolls-Royce have incurred, they are modest compared to the cost of seeking to brazen out an investigation which commences; absent self-disclosure and full co-operation, prosecution would require the attention of the company to be entirely focused on litigation at the expense of whatever business it is trying to conduct and conviction would almost inevitably spell a far greater disaster than has befallen Rolls-Royce. . . .

Problem 17-3
Does the UK system requiring judicial approval of DPAs appear superior to the current system for negotiated settlements in the U.S. under DOJ written policies and typical practices? Why or why not?