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 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.[1]

This chapter provides two 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.

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

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 "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

The elements of Count One (conspiracy) are as follows:

(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[2]
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,

[2] 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).

(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:

Relevant Entities and Individuals

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.

VW Diesel Vehicles Sold in the United States

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.

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?

Deferred Prosecution Agreement

United States v. The Boeing Company, No. 4:21-CR-005-O (N.D. Tex. Jan. 7, 2021)

Defendant The Boeing Company (the "Company"), pursuant to authority granted by the Company's Board of Directors reflected in Attachment B, the United States Department of Justice, Criminal Division, Fraud Section (the "Fraud Section"), and the United States Attorney's Office for the Northern District of Texas (the "USAO-NDTX") enter into this deferred prosecution agreement (the "Agreement"). The terms and conditions of this Agreement are as follows:

1. The Company acknowledges and agrees that the Fraud Section will file the attached one-count criminal Information in the United States District Court for the Northern District of Texas charging the Company with Conspiracy to Defraud the United States, in violation of Title 18, United States Code, Section 371 (the "Information"). In so doing, the Company: (a) knowingly waives any right it may have to indictment on this charge, as well as all rights to a speedy trial pursuant to the Sixth Amendment to the United States Constitution, Title 18, United States Code, Section 3161, and Federal Rule of Criminal Procedure 48(b); and (b) knowingly waives any objection with respect to venue to any charges by the United States arising out of the conduct described in the Statement of Facts attached hereto as Attachment A (the "Statement of Facts") and consents to the filing of the Information, as provided under the terms of this Agreement, in the United States District Court for the Northern District of Texas. The Fraud Section agrees to defer prosecution of the Company pursuant to the terms and conditions described below.

2. 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 charged in the Information, and as set forth in the Statement of Facts, and that the allegations described in the Information and the facts described in the Statement of Facts are true and accurate. The Company agrees that, effective as of the date it signs this Agreement, in any prosecution that is deferred by this Agreement, it will not dispute the Statement of Facts set forth in this Agreement, and, in any such prosecution, the Statement of Facts shall be admissible as: (a) substantive evidence offered by the government in its case-in-chief and rebuttal case; (b) impeachment evidence offered by the government on cross-examination; and (c) evidence at any sentencing hearing or other hearing. In addition, in connection therewith, the Company agrees not to assert any claim under the United States Constitution, Rule 410 of the Federal Rules of Evidence, Rule 11(f) of the Federal Rules of Criminal Procedure, Section 1B1.1(a) of the United States Sentencing Guidelines ("USSG" or "Sentencing Guidelines"), or any other federal rule that the Statement of Facts should be suppressed or is otherwise inadmissible as evidence in any form.

3. This Agreement is effective for a period beginning on the date on which the Information is filed and ending three years from that date (the "Term"). The Company agrees, however, that, in the event the Fraud Section determines, in its sole discretion, that the Company has knowingly violated any provision of this Agreement or has failed to completely perform or fulfill each of its obligations under this Agreement, an extension or extensions of the Term may be imposed by the Fraud Section, in its sole discretion, for up to a total additional time period of one year, without prejudice to the right of the Fraud Section to proceed as provided in Paragraphs 26-30 below. Any extension of the Agreement extends all terms of this Agreement, including the terms of the reporting requirement in Attachment D, for an equivalent period. Conversely, in the event the Fraud Section finds, in its sole discretion, that there exists a change in circumstances sufficient to eliminate the need for the reporting requirement in Attachment D, and that the other provisions of this Agreement have been satisfied, the Agreement may be terminated early. If the Court refuses to grant exclusion of time under the Speedy Trial Act, Title 18, United States Code, Section 3161(h)(2), the Term shall be deemed to have not begun, and all the provisions of this Agreement shall be deemed null and void, except that the statute of limitations for any prosecution relating to the conduct described in the Statement of Facts shall be tolled from the date on which this Agreement is signed until the date the Court refuses to grant the exclusion of time plus six months, and except for the provisions contained within Paragraph 2 of this Agreement.

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

a. The nature and seriousness of the offense conduct, which involved two of the Company's 737 MAX Flight Technical Pilots deceiving the Federal Aviation Administration's Aircraft Evaluation Group ("FAA AEG") about an important aircraft part called the Maneuvering Characteristics Augmentation System ("MCAS") that impacted the flight control system of Boeing's 737 MAX.

Through this deception, the Company interfered with the FAA AEG's lawful function to evaluate MCAS and to include information about MCAS in the 737 MAX FSB Report, and fraudulently obtained from the FAA AEG a differences-training determination for the 737 MAX that was based on incomplete and inaccurate information about MCAS;

b. The Company did not receive voluntary disclosure credit pursuant to the Corporate Enforcement Policy in the Department of Justice Manual 9-47.120, or pursuant to the Sentencing Guidelines, because it did not timely and voluntarily disclose to the Fraud Section the offense conduct described in the Statement of Facts;

c. The Company received partial credit for its cooperation with the Fraud Section's investigation into the Company's above-described deception of the FAA AEG; the Company's cooperation ultimately included voluntarily and proactively identifying to the Fraud Section potentially significant documents and Company witnesses and voluntarily organizing voluminous evidence that the Company was obligated to produce; such cooperation, however, was delayed and only began after the first six months of the Fraud Section's investigation, during which time the Company's response frustrated the Fraud Section's investigation;

d. The Company engaged in remedial measures after the offense conduct, including: (i) creating a permanent aerospace safety committee of the Board of Directors to oversee the Company's policies and procedures governing safety and its interactions with the FAA and other government agencies and regulators; (ii) creating a Product and Services Safety organization to strengthen and centralize the safety-related functions that were previously located across the Company; (iii) reorganizing the Company's engineering function to have all Boeing engineers, as well as the Company's Flight Technical Team, report through the Company's chief engineer rather than to the business units; and (iv) making structural changes to the Company's Flight Technical Team to increase the supervision, effectiveness, and professionalism of the Company's Flight Technical Pilots, including moving the Company's Flight Technical Team under the same organizational umbrella as the Company's Flight Test Team, and adopting new policies and procedures and conducting training to clarify expectations and requirements governing communications between the Company's Flight Technical Pilots and regulatory authorities, including specifically the FAA AEG. The Company also made significant changes to its top leadership since the offense occurred;

e. The Company ultimately provided to the Fraud Section 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 prior to the Agreement;

f. The Company's prior history of misconduct includes a criminal conviction from 1989 for an employee illegally obtaining confidential military planning documents, and a criminal non-prosecution agreement from 2006 for an employee engaging in procurement fraud. The Company's history also includes

a civil FAA settlement agreement from 2015 related to safety and quality issues concerning the Company's Boeing Commercial Airplanes business unit;

g. After the offense conduct, the Company undertook the remedial efforts described above and enhanced and has committed to continuing to enhance its compliance program and internal controls, including ensuring that its compliance program satisfies the minimum elements set forth in Attachment C to this Agreement (Corporate Compliance Program);

h. The Fraud Section determined that an independent compliance monitor was unnecessary based on the following factors, among others: (i) the misconduct was neither pervasive across the organization, nor undertaken by a large number of employees, nor facilitated by senior management; (ii) although two of the Company's 737 MAX Flight Technical Pilots deceived the FAA AEG about MCAS by way of misleading statements, half-truths, and omissions, others in the Company disclosed MCAS's expanded operational scope to different FAA personnel who were responsible for determining whether the 737 MAX met U.S. federal airworthiness standards; (iii) the state of the Company's remedial improvements to its compliance program and internal controls; and (iv) the Company's agreement to meet with and report to the Fraud Section as set forth in Attachment D to this Agreement (Enhanced Reporting Requirements);

i. The Company has agreed to continue to cooperate with the Fraud Section as described in Paragraph 5, below;

j. Accordingly, after considering (a) through (i) above, the Fraud Section believes that the appropriate resolution in this case is a Deferred Prosecution Agreement with the Company; a criminal monetary penalty in the amount of $243,600,000, which reflects a fine at the low end of the otherwise-applicable Sentencing Guidelines fine range; $1,770,000,000 in compensation to the Company's airline customers; $500,000,000 in additional compensation to the heirs, relatives, and/or legal beneficiaries of the crash victims of Lion Air Flight 610 and Ethiopian Airlines Flight 302; and the Company's agreement to meet with and report to the Fraud Section as set forth in Attachment D to this Agreement.

5. The Company and its subsidiaries and affiliates shall cooperate fully with the Fraud Section in any and all matters relating to the conduct described in this Agreement and the attached Statement of Facts and other conduct under investigation by the Fraud Section, until the later of the date upon which all investigations and prosecutions arising out of such conduct are concluded, or the end of the Term. At the request of the Fraud Section, the Company and its subsidiaries and affiliates shall also cooperate fully with other domestic or foreign law enforcement and regulatory authorities and agencies in any investigation of the Company, its subsidiaries, affiliates, or any of their present or former officers, directors, employees, and agents in any and all matters relating to the conduct described in this Agreement and the attached Statement of Facts and other conduct. The Company's and its subsidiaries' and affiliates' cooperation pursuant to this Paragraph is subject to applicable law and regulations, as well as valid claims of attorney-client privilege or attorney work product doctrine; however, the Company and its subsidiaries

and affiliates must provide to the Fraud Section a log of any information or cooperation that is not provided based on an assertion of law, regulation, or privilege, and the Company and its subsidiaries and affiliates bear the burden of establishing the validity of any such assertion. The Company and its subsidiaries and affiliates agree that their cooperation pursuant to this paragraph shall include, but not be limited to, the following:

a. Upon request of the Fraud Section, the Company and its subsidiaries and affiliates shall truthfully disclose all factual information with respect to their activities and those of their present and former directors, officers, employees, agents, and consultants, including any evidence or allegations and internal or external investigations, about which the Company and its subsidiaries and affiliates have any knowledge or about which the Fraud Section may inquire. This obligation of truthful disclosure includes, but is not limited to, the obligation of the Company and its subsidiaries and affiliates to provide to the Fraud Section, upon request, any document, record or other tangible evidence about which the Fraud Section may inquire of the Company and its subsidiaries and affiliates.

b. Upon request of the Fraud Section, the Company and its subsidiaries and affiliates shall designate knowledgeable employees, agents, or attorneys to provide to the Fraud Section the information and materials described in Paragraph 5(a) above on behalf of the Company and its subsidiaries and affiliates. It is further understood that the Company and its subsidiaries and affiliates must at all times provide complete, truthful, and accurate information.

c. The Company and its subsidiaries and affiliates shall use their best efforts to make available for interviews or testimony, as requested by the Fraud Section, present or former officers, directors, employees, agents, and consultants of the Company and its subsidiaries and affiliates. 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 under this Paragraph shall include identification of witnesses who, to the knowledge of the Company and its subsidiaries and affiliates, 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 pursuant to this Agreement, the Company and its subsidiaries and affiliates consent to any and all disclosures to other governmental authorities, including United States authorities and those of a foreign government of such materials as the Fraud Section, in its sole discretion, shall deem appropriate.

6. In addition to the obligations in Paragraph 5, during the Term, should the Company learn of any evidence or allegation of a violation of U.S. fraud laws committed by the Company's employees or agents upon any domestic or foreign government agency

(including the FAA), regulator, or any of the Company's airline customers, the Company shall promptly report such evidence or allegation to the Fraud Section.

7. The Company and the Fraud Section agree that the Total U.S. Criminal Monetary Amount to be paid by the Company pursuant to this Agreement is $2,513,600,000, which comprises the following components as further described below: (i) a criminal monetary penalty of $243,600,000 (the "Criminal Monetary Penalty"); (ii) $1,770,000,000 in compensation to Boeing's airline customers (the "Airline Compensation Amount"); and (iii) $500,000,000 in compensation to the heirs, relatives, and/or legal beneficiaries of the crash victims of Lion Air Flight 610 and Ethiopian Airlines Flight 302 (the "Crash-Victim Beneficiaries Compensation Amount").

8. The Company acknowledges that no tax deduction may be sought in connection with the payment of the Criminal Monetary Penalty. The Company shall not seek or accept directly or indirectly reimbursement or indemnification from any source with regard to the Criminal Monetary Penalty or any other agreement entered into with any other enforcement authority or a regulator concerning the facts set forth in the Statement of Facts.

9. The Fraud Section and the Company agree that application of the Sentencing Guidelines to determine the applicable fine range yields the following analysis:

a. The 2018 USSG are applicable to this matter.

b. Offense Level. Based upon USSG § 2B1.1, the total offense level is 34, calculated as follows:

(a)(2)	Base Offense Level	6
(b)(1)(N)	Gain of More Than $150,000,000	+26
(b)(10)	Sophisticated Means	+ 2
TOTAL		34

Base Fine. Based upon USSG § 8C2.4(a)(2), which imposes a base fine equal to the pecuniary gain to the organization from the offense if such gain is greater than the amount indicated in the Offense Level Fine Table, the base fine is $243,600,000 (representing Boeing's cost-savings, based on Boeing's assessment of the cost associated with the implementation of full-flight simulator training for the 737 MAX).

c. Culpability Score. Based upon USSG § 8C2.5, the culpability score is 5, calculated as follows:

(a)	Base Culpability Score	5
(b)(4)	The organization had 50 or more employees and an individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense	+2
(g)(2)	The organization cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct	-2

Calculation of Fine Range:

Base Fine	$243,600,000
Multipliers	1.0 (min) / 2.0 (max)
Fine Range	$243,600,000/ $487,200,000

10. The Company agrees to pay the Criminal Monetary Penalty of $243,600,000 to the United States Treasury no later than ten (10) business days after the Agreement is fully executed pursuant to payment instructions provided by the Fraud Section in its sole discretion. The Fraud Section and the Company agree that the Criminal Monetary Penalty is appropriate given the facts and circumstances of this case, including the Relevant Considerations described in Paragraph 4.

11. The Criminal Monetary Penalty is final and shall not be refunded. Furthermore, nothing in this Agreement shall be deemed an agreement by the Fraud Section that $243,600,000 is the maximum penalty that may be imposed in any future prosecution, and the Fraud Section is not precluded from arguing in any future prosecution that the Court should impose a higher fine, although the Fraud Section agrees that under those circumstances, it will recommend to the Court that any amount paid under this Agreement should be offset against any fine the Court imposes as part of a putative future judgment.

12. The Company agrees to pay a total Airline Compensation Amount of $1,770,000,000 to its airline customers for the direct pecuniary harm that its airline customers incurred as a result of the grounding of the Company's 737 MAX. The Airline Compensation Amount shall be offset by any payments already made by the Company, as of the date this Agreement is fully executed, to any of its airline customers for the direct pecuniary harm that its airline customers incurred as a result of the grounding of the Company's 737 MAX. The Company shall pay any remaining amounts due under the Airline Compensation Amount to its airline customers by the end of the Term and shall provide documentation to the Fraud Section evidencing the amounts paid.

13. The Company agrees to pay a total Crash-Victim Beneficiaries Compensation Amount of $500,000,000 to the heirs, relatives, and/or legal beneficiaries of the crash victims of Lion Air Flight 610 and Ethiopian Airlines Flight 302. No later than ten (10) business days after the filing of the Information, the Company shall establish an escrow account ("Escrow Account") into which it shall deposit the full Crash-Victim Beneficiaries Compensation Amount. No monies will be paid out of the Escrow Account without prior approval by the Fraud Section.

14. The parties agree that the appointment of a Crash-Victim Beneficiaries Compensation Claims Administrator (the "Administrator") is appropriate and necessary to determine the proper administration and disbursement of the Crash-Victim Beneficiaries Compensation Amount that the Company will pay to the beneficiaries of the crash victims.

15. The Administrator, consistent with a process imposed and required by the Fraud Section, will make recommendations to the Fraud Section regarding: (a) the individuals who should receive payments from the Crash-Victim Beneficiaries Compensation Amount; and (b) the compensation amounts that these individuals should receive. Only the Fraud Section shall be empowered to make final decisions regarding: (a) the individuals who should receive the victim payments from the Crash-Victim Beneficiaries Compensation Amount; and (b) the compensation amounts that these individuals should receive.

16. The Company agrees to pay for all costs, fees, and expenses incurred by the Administrator. The Company shall execute an engagement letter with the Administrator that must be approved, in advance of execution, by the Fraud Section.

17. Within twenty (20) business days after the filing of the Information, the Company shall submit a written proposal identifying three (3) candidates to serve as the Administrator, setting forth the candidates' qualifications and credentials. The Fraud Section retains the right, in its sole discretion, to choose the Administrator from among the candidates proposed by the Company. Any submission or selection of the Administrator by either the Company or the Fraud Section shall be made without unlawful discrimination against any person or class of persons. The Fraud Section and the Company will use their best efforts to complete the selection process within thirty (30) calendar days of the execution of this Agreement.

18. The Company agrees that it will not employ or be affiliated with the Administrator for a period of not less than two years from the date on which the Administrator's term expires. Nor will the Company discuss with the Administrator the possibility of further employment or affiliation during the Administrator's term. Upon agreement by the parties, this prohibition will not apply to other claims administration responsibilities that the Administrator may undertake in connection with resolutions with foreign or other domestic authorities.

19. The Company agrees that it will not use the fact that any beneficiary of the crash victims of Lion Air Flight 610 and Ethiopian Airlines Flight 302 seeks or receives any compensation from the Crash-Victim Beneficiaries Compensation Amount to seek to preclude such beneficiary from pursuing any other lawful claim that such beneficiary might have against the Company.

20. Subject to Paragraphs 26-30, the Fraud Section agrees, except as provided in this Agreement, that it will not bring any criminal or civil case against the Company relating to any of the conduct as described in the attached Statement of Facts or the Information filed pursuant to this Agreement. The Fraud Section, 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.

a. This Agreement does not provide any protection against prosecution for any future conduct by the Company.
b. In addition, this Agreement does not provide any protection against prosecution of any individuals, regardless of their affiliation with the Company.

21. The Company represents that it has implemented and will continue to implement a compliance and ethics program designed, implemented, and enforced to prevent and detect violations of the U.S. fraud laws throughout its operations, including those of its subsidiaries, affiliates, agents, and joint ventures, and those of its contractors and subcontractors whose responsibilities relate to the Company's interactions with any domestic or foreign government agency (including the FAA), regulator, or any of its airline customers, including, but not limited to, the minimum elements set forth in Attachment C.

22. In order to address any deficiencies in its internal controls, policies, and procedures, the Company represents that it has undertaken, and will continue to undertake in the future, in a manner consistent with all of its obligations under this Agreement, a review of its existing internal controls, policies, and procedures regarding compliance with U.S. fraud laws, focusing on the Company's interactions with domestic or foreign government agencies (including the FAA), regulators, and any of its airline customers. Where necessary and appropriate, the Company agrees to adopt a new compliance program, or to modify its existing one, including internal controls, compliance policies, and procedures in order to ensure that it maintains an effective compliance program, including a system of internal controls, designed to effectively detect and deter violations of U.S. fraud laws. The compliance program, including the internal controls system, will include, but not be limited to, the minimum elements set forth in Attachment C.

23. The Company agrees that it will report to the Fraud Section periodically, at no less than three-month intervals during the Term, regarding remediation, implementation, and

testing of its compliance program and internal controls, policies, and procedures described in Attachment C. During the Term, the Company shall (i) conduct an initial review and submit an initial report, and (ii) conduct and prepare at least two follow-up reviews and reports, as described in Attachment D.

24. In consideration of the undertakings agreed to by the Company herein, the Fraud Section agrees that any prosecution of the Company for the conduct set forth in the attached Statement of Facts or Information will be and hereby is deferred for the Term. To the extent there is conduct disclosed by the Company that is not set forth in the attached Statement of Facts or Information, such conduct will not be exempt from further prosecution and is not within the scope of or relevant to this Agreement.

25. The Fraud Section further agrees that if the Company fully complies with all of its obligations under this Agreement, the Fraud Section will not continue the criminal prosecution against the Company described in Paragraph 1 and, at the conclusion of the Term, this Agreement shall expire. Six months after the Agreement's expiration, the Fraud Section shall seek dismissal with prejudice of the Information filed against the Company described in Paragraph 1, and agree not to file charges in the future against the Company based on the conduct described in this Agreement, the attached Statement of Facts, or the Information. If, however, the Fraud Section determines during this six-month period that the Company breached the Agreement during the Term, as described in Paragraphs 26-30, the Fraud Section's ability to extend the Term, as described in Paragraph 3, or to pursue other remedies, including those described in Paragraphs 26-30, remains in full effect.

26. If, during the Term, (a) the Company commits any felony under U.S. federal law; (b) the Company provides in connection with this Agreement deliberately false, incomplete, or misleading information, including in connection with its disclosure of information about individual culpability; (c) the Company or its subsidiaries and affiliates fail to cooperate as set forth in Paragraphs 5 and 6 of this Agreement; (d) the Company fails to implement a compliance program as set forth in Paragraphs 21-22 of this Agreement and Attachment C; or (e) the Company and its subsidiaries and affiliates otherwise fail to completely perform or fulfill each of their obligations under the Agreement, regardless of whether the Fraud Section becomes aware of such a breach after the Term is complete, the Company and its subsidiaries and affiliates shall thereafter be subject to prosecution for any federal criminal violation of which the Fraud Section has knowledge, including, but not limited to, the charges in the Information described in Paragraph 1, which may be pursued by the Fraud Section in the United States District Court for the Northern District of Texas or any other appropriate venue. Determination of whether the Company has breached the Agreement and whether to pursue prosecution of the Company and its subsidiaries and affiliates shall be in the Fraud Section's sole discretion. Any such prosecution may be premised on information provided by the Company, its subsidiaries and affiliates, or their personnel. Any such prosecution relating to the conduct described in the attached Statement of Facts or relating to conduct known to the Fraud Section 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 may be commenced against the Company, or its subsidiaries and affiliates, notwithstanding the expiration of the statute of limitations, between the signing of this Agreement and 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 is 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.

27. In the event the Fraud Section determines that the Company has breached this Agreement, the Fraud Section agrees to provide the Company with written notice of such breach prior to instituting any prosecution resulting from such breach. Within thirty days of receipt of such notice, the Company shall have the opportunity to respond to the Fraud Section 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 shall consider in determining whether to pursue prosecution of the Company.

28. In the event that the Fraud Section determines that the Company has breached this Agreement: (a) all statements made by or on behalf of the Company or its subsidiaries and affiliates to the Fraud Section or to the Court, including the attached Statement of Facts, and any testimony given by the Company or its subsidiaries and affiliates 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 against the Company or its subsidiaries and affiliates; and (b) the Company or its subsidiaries and affiliates 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, Section 1B1.1(a) of the USSG, or any other federal rule that any such statements or testimony made by or on behalf of the Company 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, or any person acting on behalf of, or at the direction of, the Company or its subsidiaries and affiliates 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.

29. The Company acknowledges that the Fraud Section has made no representations, assurances, or promises concerning what sentence may be imposed by the Court if the Company breaches this Agreement and this matter proceeds to judgment. The Company further acknowledges that any such sentence is solely within the discretion of the Court

and that nothing in this Agreement binds or restricts the Court in the exercise of such discretion.

30. On the date that the period of deferred prosecution specified in this Agreement expires, the Company, by the Chief Executive Officer of the Company and the Chief Financial Officer of the Company, will submit the certification set forth in Attachment E and certify to the Fraud Section that the Company has met its disclosure obligations pursuant to Paragraph 6 of 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 Title 18, United States Code, Sections 1001 and 1519, and it will be deemed to have been made in the judicial district in which this Agreement is filed. . . .

31. The Company expressly agrees that it shall not, through present 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. Any such contradictory statement shall, subject to cure rights of the Company described below, constitute a breach of this Agreement, and the Company thereafter shall be subject to prosecution as set forth in Paragraphs 26-30 of this Agreement. The decision whether any public statement by any such person contradicting a fact contained in the attached Statement of Facts will be imputed to the Company for the purpose of determining whether it has breached this Agreement shall be at the sole discretion of the Fraud Section. If the Fraud Section determines that a public statement by any such person contradicts, in whole or in part, a statement contained in the attached Statement of Facts, the Fraud Section 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 attached Statement of Facts provided that such defenses and claims do not contradict, in whole or in part, a statement contained in the attached Statement of Facts. This Paragraph does not apply to any statement made by any present or 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. . .

ATTACHMENT A

STATEMENT OF FACTS

1. The following Statement of Facts is incorporated by reference as part of the Deferred Prosecution Agreement (the "Agreement") between the United States Department of Justice, Criminal Division, Fraud Section (the "Fraud Section"), the United States Attorney's Office for the Northern District of Texas (the "USAO-NDTX") and The Boeing Company ("Boeing" or the "Company"). The Company hereby agrees and stipulates that the following information is true and accurate. The Company admits, accepts, and acknowledges that it is responsible for the acts of its officers, directors,

employees, and agents as set forth below. Should the Fraud Section or the USAO-NDTX pursue the prosecution that is deferred by this Agreement, the Company agrees that it will neither contest the admissibility of, nor contradict, this Statement of Facts in any such proceeding. The following facts establish beyond a reasonable doubt the charge set forth in the Information attached to this Agreement:

At all times relevant to this Statement of Facts, with all dates being approximate and inclusive:

2. The Boeing Company ("Boeing") was a U.S.-based multinational corporation that designed, manufactured, and sold commercial airplanes to airlines worldwide. Boeing operated from various locations, including in and around Seattle, Washington.

3. Boeing's airline customers included major U.S.-based airlines headquartered in the Northern District of Texas and elsewhere.

4. The Boeing 737 was a commercial airplane that could seat approximately 200 passengers and was one of Boeing's best-selling airplane models. Boeing began designing, manufacturing, and selling the Boeing 737 in the 1960s. Over time, Boeing designed, manufactured, and sold new versions of the Boeing 737 to its airline customers, including major U.S.-based airlines.

5. In or around June 2011, Boeing began developing and marketing a new version of its Boeing 737 called the 737 MAX. The 737 MAX was designed by Boeing as a competitive answer to a new version of an airplane developed by one of Boeing's top rivals in commercial airplanes, Company-1. Like the new version of Company-1's airplane, the 737 MAX promised increased fuel efficiency over its prior version, the 737 Next Generation ("737 NG"). With this increased efficiency, the 737 MAX offered fuel-cost savings for airlines.

6. Before any U.S.-based airline could operate a new commercial airplane, U.S. regulations required the Federal Aviation Administration ("FAA"), an organization within the United States Department of Transportation, to evaluate and approve the airplane for commercial use. Without this approval, a U.S.-based airline would not be permitted to operate the airplane.

7. As part of this evaluation and approval process, the FAA had to make two distinct determinations: (i) whether the airplane met U.S. federal airworthiness standards; and (ii) what minimum level of pilot training would be required for a pilot to fly the airplane for a U.S.-based airline. These two determinations were made by entirely different groups within the FAA that were composed of different personnel with different organizational structures and different reporting lines.

8. The FAA Aircraft Evaluation Group ("AEG") was principally responsible for determining the minimum level of pilot training required for a pilot to fly the airplane for a U.S.-based airline. To make that determination, the FAA AEG compared the new

version of the airplane (such as the 737 MAX) to a similar, prior version of the airplane (such as the 737 NG). After evaluating the differences between the new and prior versions of the airplane, the FAA AEG mandated the minimum level of pilot training, known as "differences training," for the new version.

9. Based on the nature and extent of the differences between the new and prior version of the airplane, the FAA AEG assigned a level of differences training ranging from "Level A" through "Level E." These levels of differences training ranged in rigor, with "Level A" being the least intensive and "Level E" the most intensive. As relevant here, "Level B" differences training generally included computer-based training ("CBT") training, and "Level D" differences training generally included full-flight simulator training.

10. At the conclusion of the FAA's evaluation of the new version of the airplane, the FAA AEG published a Flight Standardization Board Report ("FSB Report"). Among other things, the FSB Report contained relevant information about certain airplane systems and parts that the airplane manufacturer was required to incorporate into airplane manuals and pilot-training materials for all U.S.-based airlines that would fly the airplane. The FSB Report also contained the FAA AEG's differences-training determination.

11. Boeing's 737 MAX Flight Technical Team was principally responsible for identifying and providing to the FAA AEG all information that was relevant to the FAA AEG in connection with the FAA AEG's publication of the 737 MAX FSB Report. The 737 MAX Flight Technical Team was separate and distinct from another group within Boeing that was responsible for providing information to the FAA for certification of whether the airplane met U.S. federal airworthiness standards.

12. From in or around early 2012 until in or around early 2014, Boeing Employee-1 was a Technical Pilot for Boeing's 737 MAX Flight Technical Team. In or around early 2014, Boeing Employee-1 became Boeing's 737 MAX Chief Technical Pilot. In that role, Boeing Employee-1 led the 737 MAX Flight Technical Team. In or around July 2018, Boeing Employee-1 left Boeing to work for a major U.S.-based airline.

13. From in or around mid-2014 until in or around July 2018, Boeing Employee-2 was a Technical Pilot for Boeing's 737 MAX Flight Technical Team. In or around July 2018, after Boeing Employee-1 left Boeing, Boeing Employee-2 became Boeing's 737 MAX Chief Technical Pilot. In that role, Boeing Employee-2 led the 737 MAX Flight Technical Team.

14. Boeing Employee-1 and Boeing Employee-2 understood that the FAA AEG relied on them, as members of Boeing's 737 MAX Flight Technical Team, to identify and provide to the FAA AEG all information that was relevant to the FAA AEG in connection with the FAA AEG's publication of the 737 MAX FSB Report, including information that could impact the FAA AEG's differences-training determination.

15. Boeing Employee-1 and Boeing Employee-2 also understood that, because flight controls were vital to flying modern commercial airplanes, differences between the flight controls of the 737 NG and the 737 MAX were especially important to the FAA AEG for purposes of its publication of the 737 MAX FSB Report and the FAA AEG's differences-training determination.

16. From at least in and around November 2016 through at least in and around December 2018, in the Northern District of Texas and elsewhere, Boeing, through Boeing Employee-1 and Boeing Employee-2, knowingly, and with intent to defraud, conspired to defraud the FAA AEG.

17. At all times during the conspiracy, Boeing Employee-1 and Boeing Employee-2 were acting within the scope of their employment and with the intention, at least in part, to benefit Boeing. The purpose of the conspiracy was to defraud the FAA AEG by impairing, obstructing, defeating, and interfering with the lawful function of the FAA AEG by dishonest means in connection with its publication of the 737 MAX FSB Report and its differences-training determination for the Boeing 737 MAX, in order to bring about a financial gain to Boeing and to benefit Boeing Employee-1 and Boeing Employee-2 in connection with the Boeing 737 MAX.

18. As Boeing knew, "Level B" differences training was significantly less expensive for airlines to complete than "Level D." For example, a pilot could complete "Level B" differences training from anywhere in the world in a matter of hours using a computer or tablet. In contrast, a pilot could complete "Level D" differences training only by appearing in person wherever the pilot's airline operated a full-flight simulator. Apart from the cost of acquiring one or more multimillion-dollar simulators and other related expenses, airlines that were required by the FAA AEG to train pilots on a full-flight simulator could also lose revenue that the pilot might otherwise have generated from flying airline passengers during that time. Accordingly, if the FAA AEG required a less rigorous level—such as "Level B"—of differences training for the 737 MAX in the 737 MAX FSB Report, the 737 MAX would be a more attractive option for Boeing's airline customers already flying the 737 NG than switching to an entirely new airplane, such as the new version of Company-1's airplane, as such customers would save significant money in pilot-training costs by transitioning to the 737 MAX.

19. Principally for this reason, Boeing's stated objectives in designing the 737 MAX included securing the FAA AEG's determination to require no greater than "Level B" differences training in the 737 MAX FSB Report. Boeing Employee-1 and Boeing Employee-2 understood as much. For example, in or around November 2014, Boeing Employee-2 wrote in an internal Boeing electronic chat communication to Boeing Employee-1 that "nothing can jepordize [sic] level b[.]" In or around December 2014, Boeing Employee-1 wrote in an email to another Boeing employee that "if we lose Level B [it] will be thrown squarely on my shoulders. It was [Boeing Employee-1], yes [Boeing Employee-1]! Who cost Boeing tens of millions of dollars!"

20. To achieve its promised fuel efficiency, the 737 MAX used larger engines than the 737 NG. These larger engines, and their placement under the airplane's wings, meant that the aerodynamics of the 737 MAX differed from those of the 737 NG.

21. These different aerodynamics created a new handling characteristic for the 737 MAX that caused the 737 MAX's nose to pitch up during a certain flight maneuver called a high-speed, wind-up turn. A high-speed, wind-up turn generally involved sharply turning the airplane at high speed (approximately Mach 0.6-0.8) in a corkscrew-like pattern.

22. A high-speed, wind-up turn was a "certification" maneuver, that is, a maneuver outside the limits of what the 737 MAX would be expected to encounter during a normal commercial passenger flight. Nevertheless, if Boeing did not fix the 737 MAX's pitch-up characteristic in high-speed, wind-up turns, the FAA could determine that the 737 MAX did not meet U.S. federal airworthiness standards.

23. To fix this pitch-up characteristic, Boeing created MCAS and incorporated it as a part of the 737 MAX's flight controls. MCAS was an aircraft "part" within the meaning of Title 18, United States Code, Sections 31(a)(7) and 38. In operation, MCAS would automatically cause the airplane's nose to pitch down by adjusting the 737 MAX's horizontal stabilizer (a horizontal tail located near the rear of the airplane). As originally designed, MCAS could only activate during a high-speed, wind-up turn.

24. In or around June 2015, Boeing Employee-1 and other Boeing employees briefed the FAA AEG on MCAS. During this briefing, Boeing described MCAS as a system that could only activate during a high-speed, wind-up turn. After the briefing, Boeing Employee-1 and another Boeing employee further discussed MCAS with an FAA AEG employee ("FAA AEG Employee-1") and reiterated to FAA AEG Employee-1 the limited operational scope of MCAS.

25. Subsequently, Boeing expanded MCAS's operational scope, including the speed range within which MCAS could activate, significantly altering its original design. Among other things, when the airplane registered a high angle of attack, the change expanded the speed range within which MCAS could activate from approximately Mach 0.6-0.8 to approximately Mach 0.2-0.8—that is, from only high-speed flight to nearly the entire speed range for the 737 MAX, including low-speed flight, which generally occurs at a lower altitude and in and around takeoff and landing. Boeing disclosed this expansion to FAA personnel, but only to those personnel who were responsible for determining whether the 737 MAX met U.S. federal airworthiness standards. Boeing did not disclose the expansion to the FAA AEG personnel responsible for publishing the 737 MAX FSB Report and making the training-related determination.

26. On or about August 16, 2016, before the FAA AEG published the 737 MAX FSB Report, the FAA AEG issued a provisional "Level B" differences-training determination for the 737 MAX. At the time of this provisional determination, the FAA AEG was unaware that Boeing had expanded MCAS's operational scope.

27. On or about the same day, Boeing Employee-1 recognized Boeing's achievement in an email to Boeing employees, including Boeing Employee-2, and wrote that the FAA AEG's provisional determination "culminates more than 3 years of tireless and collaborative efforts across many business units" and that the 737 MAX program management "is VERY happy."

28. As Boeing Employee-1 and Boeing Employee-2 knew, the FAA AEG based its provisional "Level B" differences training for the 737 MAX in part on its understanding that MCAS could only activate during the limited operational scope of a high-speed, wind up turn.

29. Boeing Employee-1 and Boeing Employee-2 also understood, as Boeing Employee-1 acknowledged in his email on or about August 16, 2016, that the FAA AEG's "Level B" differences determination for the 737 MAX was only a "provisional approval [. . .] assuming no significant systems changes to the airplane."

30. For example, in an email to Boeing employees including Boeing Employee-2 discussing a potential change to another part of the 737 MAX's flight controls on or about November 10, 2016, Boeing Employee-1 emphasized that "[o]ne of the Program Directives we were given was to not create any differences [. . .]. This is what we sold to the regulators who have already granted us the Level B differences determination. To go back to them now, and tell them there is in fact a difference [. . .] would be a huge threat to that differences training determination."

31. On or about November 15, 2016, during a test flight of the 737 MAX in a simulator, Boeing Employee-1 experienced what Boeing Employee-1 recognized as MCAS operating at lower speed. Boeing Employee-1 further recognized that this lower-speed operation was different from what Boeing had briefed and described to the FAA AEG.

32. On or about that same day, Boeing Employee-1 and Boeing Employee-2 discussed MCAS in an internal Boeing electronic chat communication, writing in part:

> Boeing Employee-1: Oh shocker alerT! [sic] / MCAS is now active down to [Mach] .2 / It's running rampant in the sim on me / at least that's what [a Boeing simulator engineer] thinks is happening
>
> Boeing Employee-2: Oh great, that means we have to update the speed trim description in vol 2
>
> Boeing Employee-1: so I basically lied to the regulators (unknowingly)
>
> Boeing Employee-2: it wasn't a lie, no one told us that was the case

33. At this point, Boeing Employee-1 and Boeing Employee-2 recognized that the FAA AEG was under the misimpression that MCAS operated only during a high-speed, wind up turn and could not operate at lower Mach speeds, such as at Mach 0.2. Boeing Employee-1 and Boeing Employee-2 therefore knew, at least as of the time of this chat

communication, that the FAA AEG's provisional "Level B" differences-training determination had been based in part on outdated and inaccurate information about MCAS.

34. Boeing Employee-1 and Boeing Employee-2 also knew that MCAS's expanded operational scope was relevant to the FAA AEG's decisions about the content of the 737 MAX FSB Report, including whether to include information about MCAS. Boeing Employee-1 and Boeing Employee-2 similarly understood that it was their responsibility to update the FAA AEG about any relevant changes to the 737 MAX's flight controls—such as MCAS's expanded operational scope.

35. Despite knowing that the FAA AEG had issued its provisional "Level B" determination without any awareness that MCAS's operational scope had been expanded to include high angle of attack conditions in nearly the entire speed range of ordinary commercial flight, Boeing Employee-1 and Boeing Employee-2 did not correct the FAA AEG's understanding of MCAS's operational scope or otherwise ensure that the FAA AEG's "Level B" determination was based on an accurate understanding of MCAS's operation. Instead, Boeing—through Boeing Employee-1 and Boeing Employee-2—intentionally withheld and concealed from the FAA AEG their knowledge of MCAS's expanded operational scope.

36. For example, shortly after the simulated test flight described in paragraph 30, Boeing Employee-1 talked with FAA AEG Employee-1, who asked Boeing Employee-1 about the simulated test flight. Boeing Employee-1 intentionally withheld and concealed from FAA AEG Employee-1 the fact that MCAS's operational scope had been expanded beyond what the FAA AEG relied upon when it issued its provisional "Level B" differences-training determination for the 737 MAX.

37. Around the time that Boeing Employee-1 and Boeing Employee-2 discussed MCAS's expanded operational scope, Boeing Employee-1 asked a Boeing senior engineer assigned to the 737 MAX program about MCAS's operational scope. The senior engineer confirmed to Boeing Employee-1 that MCAS could activate beyond the limited operational scope of a high-speed, wind-up turn. The senior engineer suggested that Boeing Employee-1 contact certain subject-matter experts at Boeing for more specific information about MCAS's operational scope.

38. On or about November 17, 2016, the FAA AEG emailed three Boeing employees, including Boeing Employee-1, Boeing Employee-2, and another Boeing employee, a draft of the forthcoming 737 MAX FSB Report. That same day, Boeing Employee-1 asked Boeing Employee-2 and the other Boeing employee to review the draft 737 MAX FSB Report "for any glaring issues."

39. On or about November 22, 2016, the other Boeing employee emailed the draft 737 MAX FSB Report back to the FAA AEG with proposed edits. Boeing Employee-1 and Boeing Employee-2 were included on this email. Boeing Employee-1 included a proposed edit to delete a reference to MCAS, and wrote, "We agreed not to reference

MCAS since it's outside normal operating envelope." Neither Boeing Employee-1 nor Boeing Employee-2 shared the fact of MCAS's expanded operational scope with the FAA AEG or otherwise corrected the FAA AEG's misimpression that MCAS's operational scope was limited to high-speed, wind-up turns.

40. In doing so, Boeing Employee-1 and Boeing Employee-2 deceived the FAA AEG into believing that the basis upon which the FAA AEG had initially "agreed" to remove any information about MCAS from the 737 MAX FSB Report—that MCAS could only activate during the limited operational scope of a high-speed, wind-up turn—remained the same. Boeing Employee-1 and Boeing Employee-2 withheld their knowledge of MCAS from the FAA AEG to avoid risking the FAA AEG taking any action that could threaten the differences-training determination for the 737 MAX.

41. On or about January 17, 2017, Boeing Employee-1 again reminded the FAA AEG in an email to delete any reference to MCAS from the forthcoming 737 MAX FSB Report, and wrote, "Flight Controls: Delete MCAS, recall we decided we weren't going to cover it [. . .] since it's way outside the normal operating envelope." Again, Boeing Employee-1 deceived the FAA AEG into believing that the basis upon which the FAA AEG had initially "decided" to remove any information about MCAS from the 737 MAX FSB Report—that MCAS could only activate during the limited operational scope of a high-speed, wind-up turn—remained the same.

42. By concealing MCAS's expanded operational scope from the FAA AEG, Boeing, through Boeing Employee-1 and Boeing Employee-2, defrauded, impaired, obstructed, defeated, and interfered with the FAA AEG's lawful function to evaluate MCAS and to include information about MCAS in the 737 MAX FSB Report.

43. Based on Boeing's misleading statements, half-truths, and omissions to the FAA AEG about MCAS, and in reliance on those statements and omissions, the FAA AEG agreed to delete all information about MCAS from the 737 MAX FSB Report.

44. From in or around January 2017 through in or around July 2017 (when the 737 MAX FSB Report was published), Boeing Employee-1 and Boeing Employee-2 sent and caused to be sent emails to representatives of various Boeing airline customers that had agreed to purchase the 737 MAX, including major U.S.-based airlines. In these emails, Boeing Employee-1 and Boeing Employee-2 or members of their 737 MAX Flight Technical Team referenced and included drafts of the forthcoming 737 MAX FSB Report and airplane manuals and pilot-training materials for Boeing's 737 MAX airline customers. None of these items contained any information about MCAS, consistent with Boeing Employee-1's and Boeing Employee-2's efforts to deceive the FAA AEG into deleting information about MCAS.

45. On or about July 5, 2017, the FAA AEG published the first 737 MAX FSB Report, which included the FAA AEG's "Level B" differences-training determination for the 737 MAX.

46. Because of Boeing's intentional withholding of information from the FAA AEG, the final version of the 737 MAX FSB Report lacked information about MCAS, and relevant portions of this 737 MAX FSB Report were materially false, inaccurate, and incomplete. In turn, airplane manuals and pilot-training materials for U.S.-based airlines lacked information about MCAS, and relevant portions of these manuals and materials were similarly materially false, inaccurate, and incomplete as a result.

47. After the FAA AEG published the final version of the 737 MAX FSB Report, Boeing continued to sell, and Boeing's U.S.-based airline customers were permitted to fly, the 737 MAX. Pilots flying the 737 MAX for Boeing's airline customers were not provided any information about MCAS in their airplane manuals and pilot-training materials.

48. On October 29, 2018, Lion Air Flight 610, a Boeing 737 MAX, crashed shortly after takeoff into the Java Sea near Indonesia. All 189 passengers and crew on board died.

49. Following the Lion Air crash, the FAA AEG learned that MCAS activated during the flight and may have played a role in the crash. The FAA AEG also learned for the first time about MCAS's expanded operational scope.

50. In and around the same time, Boeing employees, including Boeing Employee-2, met with personnel from the FAA AEG to discuss, among other things, MCAS's operational scope. After that meeting, Boeing Employee-2 told FAA AEG Employee-1 that he was previously unaware of MCAS's expanded operational scope and otherwise misled FAA AEG Employee-1 about Boeing Employee-2's prior knowledge of MCAS.

51. Also, in and around the same time, Boeing Employee-2 caused Boeing to present a false and misleading presentation to the FAA AEG about MCAS. Boeing investigated, among other things, what information Boeing Employee-1 and Boeing Employee-2 provided to the FAA AEG about MCAS. In connection with this investigation, Boeing Employee-2 caused Boeing to represent in a presentation to the FAA AEG that, during the training-evaluation process, Boeing and the FAA AEG had "discussed and agreed on [the] removal of MCAS" from the 737 MAX FSB Report and associated materials. This representation was misleading because Boeing Employee-2 had failed to disclose the "shocker alert" chat communication and the fact that the FAA AEG was deprived of relevant information about MCAS.

52. Following the Lion Air crash, Boeing proposed changes to the operational scope of MCAS, and the FAA AEG worked with Boeing to evaluate these changes to MCAS for purposes of pilot training.

53. On March 10, 2019, Ethiopian Airlines Flight 302, a Boeing 737 MAX, crashed shortly after takeoff near Ejere, Ethiopia. All 157 passengers and crew on board died. Following the Ethiopian Airlines crash, the FAA AEG learned that MCAS activated during the flight and may have played a role in the crash.

54. On March 13, 2019, the 737 MAX was officially grounded in the United States, indefinitely halting further flights of this airplane by any U.S.-based airline. . . .

ATTACHMENT C

CORPORATE COMPLIANCE PROGRAM

In order to address any deficiencies in its internal controls, compliance program, policies, and procedures relating to violations of U.S. fraud laws in connection with interactions with any domestic or foreign government agency (including the FAA), regulator, or any of its airline customers, The Boeing Company (the "Company") agrees to continue to conduct, in a manner consistent with all of its obligations under this Agreement, appropriate reviews of its existing internal controls, policies, and procedures.

Where necessary and appropriate, the Company agrees to adopt a new or to modify its existing compliance program, including internal controls, compliance policies, and procedures in order to ensure that it maintains an effective compliance program that is designed, implemented, and enforced to effectively deter and detect violations of U.S. fraud laws. At a minimum, this should include, but not be limited to, the following elements to the extent they are not already part of the Company's existing internal controls, compliance program, policies, and procedures:

1. The Company will ensure that its directors and senior management provide strong, explicit, and visible support and commitment to its corporate policy against violations of U.S. fraud laws and its compliance codes, and demonstrate rigorous adherence by example. The Company will also ensure that middle management, in turn, reinforces those standards and encourages employees to abide by them. The Company will create and foster a culture of ethics and compliance with the law in its day-to-day operations.

2. The Company will develop and promulgate clearly articulated and visible corporate policies against violations of U.S. fraud laws, which policies shall be memorialized in a written compliance code.

3. The Company will develop and promulgate compliance policies and procedures designed to reduce the prospect of violations of U.S. fraud laws and the Company's compliance code, and the Company will take appropriate measures to encourage and support the observance of ethics and compliance policies and procedures against violation of U.S. fraud laws by personnel at all levels of the Company. These policies and procedures shall apply to all directors, officers, and employees and, where necessary and appropriate, outside parties acting on behalf of the Company, including, but not limited to, agents, consultants, and joint venture partners (collectively, "agents and business partners"). The Company shall notify all employees that compliance with the policies and procedures is the duty of individuals at all levels of the Company.

4. The Company will develop these compliance policies and procedures on the basis of a periodic risk assessment addressing the individual circumstances of the Company.

5. The Company shall review its compliance policies and procedures regarding U.S. fraud laws no less than annually and update them as appropriate to ensure their continued

effectiveness, taking into account relevant developments in the field and evolving industry standards.

6. The Company will assign responsibility to one or more senior corporate executives of the Company for the implementation and oversight of the Company's compliance code, policies, and procedures regarding U.S. fraud laws. Such corporate official(s) shall have the authority to report directly to independent monitoring bodies, including internal audit, the Company's Board of Directors, or any appropriate committee of the Board of Directors, and shall have an adequate level of stature and autonomy from management as well as sufficient resources and authority to maintain such autonomy.

7. The Company will implement mechanisms designed to ensure that its compliance code, policies, and procedures regarding U.S. fraud laws are effectively communicated to all directors, officers, employees, and, where necessary and appropriate, agents and business partners. These mechanisms shall include: (a) periodic training for all directors and officers, all employees in positions of leadership or trust, any positions that require such training (*e.g.*, internal audit, sales, legal, compliance, finance), and, where necessary and appropriate, agents and business partners; and (b) corresponding certifications by all such directors, officers, employees, agents and business partners, certifying compliance with the training requirements. The Company will conduct training in a manner tailored to the audience's size, sophistication, or subject matter expertise and, where appropriate, will discuss prior compliance incidents.

8. The Company will maintain, or where necessary establish, an effective system for providing guidance and advice to directors, officers, employees, and, where necessary and appropriate, agents and business partners, on complying with the Company's compliance code, policies, and procedures regarding U.S. fraud laws, including when they need advice on an urgent basis.

9. The Company will maintain, or where necessary establish, an effective system for internal and, where possible, confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, agents and business partners concerning violations of U.S. fraud laws or the Company's compliance code, policies, and procedures regarding U.S. fraud laws.

10. The Company will maintain, or where necessary establish, an effective and reliable process with sufficient resources for responding to, investigating, and documenting allegations of violations of U.S. fraud laws or the Company's compliance code, policies, and procedures regarding U.S. fraud laws. The Company will handle the investigations of such complaints in an effective manner, including routing the complaints to proper personnel, conducting timely and thorough investigations, and following up with appropriate discipline where necessary.

11. The Company will implement mechanisms designed to effectively enforce its compliance code, policies, and procedures, including appropriately incentivizing compliance and disciplining violations.

12. The Company will institute appropriate disciplinary procedures to address, among other things, violations of U.S. fraud laws and the Company's compliance code, policies, and procedures regarding the U.S. fraud laws by the Company's directors, officers, and employees. Such procedures should be applied consistently and fairly, and in a manner consistent with the violation, regardless of the position held by, or perceived importance of, the director, officer, or employee. The Company shall implement procedures to ensure that where misconduct is discovered, reasonable steps are taken to remedy the harm resulting from such misconduct, and to ensure that appropriate steps are taken to prevent further similar misconduct, including assessing the internal controls, compliance code, policies, and procedures and making modifications necessary to ensure the overall compliance program regarding U.S. fraud laws is effective.

13. The Company will develop and implement policies and procedures for mergers and acquisitions requiring that the Company conduct appropriate risk-based due diligence on potential new business entities, including appropriate due diligence regarding U.S. fraud laws by legal, accounting, and compliance personnel.

14. The Company will ensure its compliance code, policies, and procedures regarding U.S. fraud laws apply as quickly as is practicable to newly-acquired businesses or entities merged with the Company, and will promptly (a) train the directors, officers, employees, agents, and business partners consistent with Paragraphs 7-8; and (b) where warranted, conduct an audit of all newly acquired or merged businesses as quickly as is practicable concerning compliance with U.S. fraud laws.

15. In order to ensure that its compliance program does not become stale, the Company will conduct periodic reviews and testing of its compliance code, policies, and procedures regarding U.S. fraud laws designed to evaluate and improve their effectiveness in preventing and detecting violations of U.S. fraud laws and the Company's code, policies, and procedures regarding U.S. fraud laws, taking into account relevant developments in the field and evolving industry standards. The Company will ensure that compliance and control personnel have sufficient direct and indirect access to relevant sources of data to allow for timely and effective monitoring and/or testing. Based on such review and testing and its analysis of any prior misconduct, the Company will conduct a thoughtful root cause analysis and timely and appropriately remediate to address the root causes. . . .

Problem 17-2

Only one individual was charged criminally in the Boeing matter, Mark Forkner ("Employee-1" in the statement of facts above). Following a trial, on March 23, 2022, a jury in Dallas federal court acquitted Forkner. Assume that Congress had passed a new statute requiring the government to obtain court approval for a DPA, after a hearing,

under a standard directing the court to determine whether the DPA is "in the interests of justice" and "fair, reasonable, and proportionate." If you were the federal judge to whom the Boeing DPA had been assigned under such a law, would you have approved or rejected the DPA, and with what reasoning?

Compare these recent examples to the VW and Boeing 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. Recall 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?