



## POLICY & ACTION FROM CONSUMER REPORTS

August 5, 2016

The Honorable John C. Cruden  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611

Submitted by email to [pubcomment-ees.enrd@usdoj.gov](mailto:pubcomment-ees.enrd@usdoj.gov).

***In re: Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation; Case No: MDL No. 2672 CRB (JSC); D.J. Ref. No. 90-5-2-1-11386—Comments of Consumers Union on the Partial Consent Decree***

Dear Mr. Cruden:

Consumers Union, the policy and mobilization arm of Consumer Reports,<sup>1</sup> welcomes the opportunity to comment on the partial consent decree submitted by the U.S. Department of Justice (DOJ) to the U.S. District Court for the Northern District of California in the case titled *In re: Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation*. We generally support this settlement as fair, adequate, and reasonable, but urge several modifications be made before the agreement is finalized.

Since September 2015, when the public learned of the alleged emissions cheating by the settling defendants (collectively, Volkswagen or VW), Consumer Reports has marshaled capabilities across our organization to make sense of Volkswagen’s defeat devices and hold the company accountable through research, testing, journalism, and policy work. Consumers deserve a strong voice in the response to Volkswagen’s deceit, and we are working to ensure they are heard.

On September 24, 2015, Consumer Reports President and Chief Executive Officer Marta Tellado publicly called for Volkswagen to rectify its betrayal through four types of actions,

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<sup>1</sup> Consumers Union is the policy and mobilization arm of Consumer Reports. Consumers Union is an expert, independent, nonprofit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. It conducts this work in the areas of food and product safety, telecommunications reform, health reform, financial reform, and other areas. Consumer Reports is the world’s largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit organization rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

including financial, environmental, mechanical, and ethical restitution.<sup>2</sup> Consumer Reports immediately suspended its “recommended” rating for the VW Jetta and Passat diesel models until we could retest the vehicles with any approved emissions modification performed and assess whether the repair has adversely affected performance or fuel economy.<sup>3</sup> We urged the federal government and California to punish Volkswagen commensurate with this betrayal and mobilized consumers to demand that the company face appropriate consequences, compensate its customers, and remediate the environment.<sup>4</sup>

As additional details of Volkswagen’s deception became public, our testers and journalists investigated VW “Clean Diesel” advertising, evaluated vehicle performance in “cheat” mode, and gave voice to affected consumers who wrote us.<sup>5</sup> We were grateful that the Justice Department and the Federal Trade Commission (FTC) filed suits against Volkswagen, and immediately began our evaluation of the proposed deal—from a consumer-facing perspective—when the agencies, along with the Environmental Protection Agency (EPA) and the State of California, announced the settlement package including this consent decree.<sup>6</sup>

For the portion of claims that it settles, this consent decree largely meets the standards that Consumer Reports described for making consumers and the environment whole.<sup>7</sup> Under the decree, Volkswagen compensates consumers by offering to fix, buy back, or cancel leases for affected vehicles. Owners receive financial restitution of at least what we called for: the full current value of the car, plus compensation for lost value attributable to VW’s deceit. If an emissions modification is approved, consumers have meaningful options for choosing whether to keep their car or return it without any obligation to remain a customer of the company. In

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<sup>2</sup> Marta Tellado, Ph.D. “Will Volkswagen's penalty be high enough?” CNN Opinion (Sept. 24, 2015) (online at [www.cnn.com/2015/09/24/opinions/tellado-volkswagen-scandal](http://www.cnn.com/2015/09/24/opinions/tellado-volkswagen-scandal)).

<sup>3</sup> “VW, Audi Cited by EPA for Cheating on Diesel Emissions Tests,” Consumer Reports (Sept. 30, 2015) (online at [www.consumerreports.org/cro/cars/vw--audi-cited-by-epa-for-cheating-on-diesel-emissions-tests](http://www.consumerreports.org/cro/cars/vw--audi-cited-by-epa-for-cheating-on-diesel-emissions-tests)).

<sup>4</sup> *Id.*; Consumers Union, “To the new VW CEO: Meet this test.” (Sept. 2015) (online at [secure.consumersunion.org/site/Advocacy?cmd=display&page=UserAction&id=3081](http://secure.consumersunion.org/site/Advocacy?cmd=display&page=UserAction&id=3081)).

<sup>5</sup> *See, e.g.*, “Consumer Reports Tests VW Diesel Fuel Economy, Performance in ‘Cheat’ Mode,” Consumer Reports (Oct. 9, 2015) (online at [www.consumerreports.org/cro/cars/testing-volkswagen-diesel-fuel-economy-and-performance-in-cheat-mode](http://www.consumerreports.org/cro/cars/testing-volkswagen-diesel-fuel-economy-and-performance-in-cheat-mode)); “Did Volkswagen Use ‘Cheat Mode’ as a Selling Point?” Consumer Reports (Oct. 19, 2015) (online at [www.consumerreports.org/volkswagen/did-volkswagen-use-cheat-mode-as-a-selling-point](http://www.consumerreports.org/volkswagen/did-volkswagen-use-cheat-mode-as-a-selling-point)); “The People Speak Out on Volkswagen Dieselgate,” Consumer Reports (Oct. 2, 2015) (online at [www.consumerreports.org/cro/cars/the-people-speak-out-on-volkswagen-dieselgate](http://www.consumerreports.org/cro/cars/the-people-speak-out-on-volkswagen-dieselgate)); “Volkswagen Diesel Owners Share Their Stories,” Consumer Reports (May 19, 2016) (online at [www.consumerreports.org/volkswagen-emissions/volkswagen-diesel-owners-share-stories-with-consumer-reports](http://www.consumerreports.org/volkswagen-emissions/volkswagen-diesel-owners-share-stories-with-consumer-reports)); “Some VW Owners: Don’t Take My TDI Away From Me,” Consumer Reports (June 23, 2016) (online at [www.consumerreports.org/cars/dont-take-my-tdi-away-from-me](http://www.consumerreports.org/cars/dont-take-my-tdi-away-from-me)).

<sup>6</sup> Consumers Union, “Consumers Union on Justice suit against Volkswagen over emissions scandal,” press release (Jan. 4, 2016) (online at [consumersunion.org/news/consumers-union-on-justice-suit-against-volkswagen-over-emissions-scandal](http://consumersunion.org/news/consumers-union-on-justice-suit-against-volkswagen-over-emissions-scandal)); “FTC Charges Volkswagen With False Advertising,” Consumer Reports (Mar. 29, 2016) (online at [www.consumerreports.org/volkswagen/ftc-charges-volkswagen-with-false-advertising](http://www.consumerreports.org/volkswagen/ftc-charges-volkswagen-with-false-advertising)); Consumers Union, “Consumers Union Applauds ‘Unprecedented’ Volkswagen Settlement,” press release (June 28, 2016) (online at [consumersunion.org/news/consumers-union-applauds-unprecedented-volkswagen-settlement](http://consumersunion.org/news/consumers-union-applauds-unprecedented-volkswagen-settlement)).

<sup>7</sup> *See* “What VW Should Do for Its Diesel Owners,” Consumer Reports (June 26, 2016) (online at [www.consumerreports.org/volkswagen/what-vw-should-do-for-its-diesel-owners](http://www.consumerreports.org/volkswagen/what-vw-should-do-for-its-diesel-owners)).

undertaking any emissions modification, VW pays consumers restitution for the deceit and provides them appropriate incentives to take the time and trouble to get their cars fixed. Critically, Volkswagen also will address the environmental and air quality damage from its decisions by making a substantial investment in zero emission vehicle (ZEV) technologies, and mitigate past, ongoing, and future emissions through appropriate offsets.

However, there is much more the federal government and states can and should do to hold Volkswagen fully accountable. If this settlement is finalized, regulators must wield tough oversight of VW to ensure that it implements its recall, investment, and mitigation programs appropriately. Also, while this settlement covers the majority of affected vehicles, a resolution must be reached that penalizes VW and compensates consumers and the environment for the impact of illegal devices in diesel vehicles with 3.0-liter engines. Finally, civil penalties and any appropriate criminal penalties must be assessed against the company and its executives as a deterrent against future wrongdoing. Consumer Reports strongly urges federal and state officials to complete the job and take these critical actions.

In addition, there are some needed improvements to the proposed partial consent decree. Below, we offer DOJ, California, and the Court the following more detailed facts and considerations to examine during review of the settlement. There are several shortcomings of the proposed decree that we urge the three entities to address before finalizing the agreement.

- I. The Buyback and Lease Termination Options Are Entirely Justified, but Should Be Revised to Increase Buyback Values, Allow More Time for Eligible Sellers to Identify Themselves, and Protect All Lessees from Incurring Recall-Related Costs
- II. Any Approved Emissions Modification Program Should Clearly Inform Consumers of Buyback or Lease Termination Alternatives, Allow Them to Choose These Options After Receiving a Modification, and Better Protect Them from Improper Liability Waivers or Releases
- III. The Recall Requirements Are Tough, but Key Aspects Should Be Tougher to Protect Consumers and Get Highly Polluting Cars Off the Road Faster
  - A. The Recall Rate Target of 85% by June 2019 is Appropriately Ambitious, but Should Include Earlier, Staggered Targets to Motivate Quick Action
  - B. Requirements for Salvage, Resale, and Export Are Generally Appropriate, but Labeling and Disclosure Obligations Should Extend to Consumers Abroad
  - C. Regulators Have Broad Oversight Tools, but Certain Penalties Should Be Stronger
- IV. The Zero Emission Vehicle Investment Will Help Pay For the Harm Done, but Should Not Be Fulfilled through Government Incentives or Excess Public Outreach
- V. VW Must Completely Offset Any Past, Present, and Future Emissions through the Mitigation Trust
- VI. Conclusion

**I. The Buyback and Lease Termination Options Are Entirely Justified, but Should Be Revised to Increase Buyback Values, Allow More Time for Eligible Sellers to Identify Themselves, and Protect All Lessees from Incurring Recall-Related Costs**

Under the settlement, Volkswagen must offer owners and lessees of eligible vehicles the opportunity, for two years, to have their cars bought back by the company at a replacement value of the vehicle as of September 17, 2015, or to have their leases terminated at no cost. These consumers would also receive an additional cash restitution payment of between \$5,100 and \$9,800 for owners and approximately half that amount for lessees.

Consumer Reports considers these buyback and lease termination options to be entirely justified, and we are pleased that the settlement offers these options for 100% of the covered non-compliant vehicles. Consumers were sold a different product than advertised, and they deserve the ability to no longer be a customer of Volkswagen, if they so choose. We agree with the parties to the settlement that these options are warranted by the need for prompt action to remedy the deception of consumers and the widespread Clean Air Act violations, that the noncompliance is clear, and there are no practical engineering solutions at present that would provide sufficient remedies in lieu of the proposed recall program.<sup>8</sup> In fact, while recent press reports have indicated progress on a fix,<sup>9</sup> it is still possible that no adequate emissions repair will be achievable—making a buyback and lease termination program all the more necessary to ensure the settlement makes consumers and the environment whole.

Under the settlement, Volkswagen’s buyback offer must be at no less than the Retail Replacement Value, which is defined as “the cost of retail purchase of a comparable replacement vehicle of similar value, condition, and mileage as of September 17, 2015.”<sup>10</sup> This is an appropriate definition, and overall, consumers taking advantage of the buyback option under this settlement would likely receive cash payments in line with their cars’ value plus compensation.

However, we do note that the settlement also states that the “offer of buybacks and fulfilment of their buyback obligations under the FTC Order and Class Action settlement satisfies the requirements” of the buyback under the Justice Department’s settlement, despite the fact that the Class Action settlement requires the use of a car’s NADA Clean Trade-In value for determining the price paid.<sup>11</sup> This is instead of using the NADA Clean Retail value or a value between the two, which is approximately the price that a consumer could expect to receive if selling the car privately.

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<sup>8</sup> Partial Consent Decree, Preamble at 3.

<sup>9</sup> See, e.g., “Volkswagen May Be Nearing Agreement Over U.S. Recall,” Wall Street Journal (July 25, 2016) (online at [www.wsj.com/articles/volkswagen-may-be-nearing-agreement-over-u-s-recall-1469451003](http://www.wsj.com/articles/volkswagen-may-be-nearing-agreement-over-u-s-recall-1469451003)); “Exclusive: California regulator says testing to begin on Volkswagen diesel fix,” Reuters (July 29, 2016) (online at [www.reuters.com/article/us-volkswagen-emissions-exclusive-idUSKCN10921J](http://www.reuters.com/article/us-volkswagen-emissions-exclusive-idUSKCN10921J));

<sup>10</sup> Partial Consent Decree, Appendix A at 3.

<sup>11</sup> Partial Consent Decree, Appendix A at 6; Consumer Class Action Settlement Agreement and Release at 4, 16, 60 (June 28, 2016) (online at [www.cand.uscourts.gov/filelibrary/1782/Consumer\\_Settlement\\_Agreement.pdf](http://www.cand.uscourts.gov/filelibrary/1782/Consumer_Settlement_Agreement.pdf)).

While recognizing the overall adequacy of the buyback prices that consumers would receive, Consumer Reports believes it would be more accurate for the settlement not to use the NADA Clean Trade-In value as the figure to represent the value of a consumer's car prior to public knowledge of the VW deceit. This figure is closer to the wholesale value of the car, rather than its retail replacement value. Using, at a minimum, an estimated private sale price (approximately between the Clean Trade-In and Clean Retail values) would be more consistent with the Justice Department settlement's definition of Retail Replacement Value, and would lead to buyback offers for consumers that would be at least several hundred dollars higher. Moreover, using the Clean Trade-In figure instead of a more appropriate one undermines the value to consumers of the owner restitution under the Class Action settlement, which is supposed to mean monetary compensation "in addition to the Vehicle Value Payment or Approved Emissions Modification."<sup>12</sup>

Another category of affected consumers are those who sold their vehicle after September 18, 2015, and during the claims period. The settlement stipulates that the consumer who sold the car—the "eligible seller"—and the new owner would split the owner restitution payment approximately 50/50 between themselves. While Consumer Reports supports this solution, and find it to be appropriate and adequate, the proposed timeline concerns us. To qualify for eligible seller restitution payment, consumers have only 45 days to identify themselves. This means that with preliminary approval granted by the Court on July 26, 2016, these individuals must contact Volkswagen, such as at [www.VWCourtSettlement.com](http://www.VWCourtSettlement.com) or [www.AudiCourtSettlement.com](http://www.AudiCourtSettlement.com), by September 16, 2016. We are concerned that this will not be enough time for Volkswagen to properly notify those who are eligible and for those notified to respond. With this deadline rapidly approaching, we strongly urge the parties to the settlement and the Court to address our concerns at the upcoming August status hearing, and that in the finalized settlement, the timeline be extended for eligible sellers to identify themselves, to ensure that all affected consumers have an opportunity to receive the restitution payment to which they are entitled.

With regard to the lease termination option, Consumer Reports is pleased that consumers who leased an affected vehicle from VW Credit have the option of a complete lease termination that includes full cancellation of the remaining term of the lease with no financial or other penalty or cost to the consumer. We particularly support the explicit language in the settlement ensuring that VW companies "pay any amounts necessary to accomplish the return of the vehicle without penalty to the Eligible Lessee, including, without limitation, early termination fees owed to third parties."<sup>13</sup> Because fees for excess wear and use are exempted from this provision and may still be charged to the lessee, we encourage consumers to make sure they receive an itemized invoice of any such charges, review them carefully, and challenge them if they are inappropriate.

In addition, we question whether this settlement provides adequate protections for those consumers who leased an affected car from an entity other than VW Credit. It is possible that the leasing companies that own these cars may decide to cancel the lease and become "eligible

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<sup>12</sup> Consumer Class Action Settlement Agreement and Release at 12-13.

<sup>13</sup> Partial Consent Decree, Appendix A at 6.

owners” so that they can participate in the recall program and obtain, for instance, a buyback.<sup>14</sup> Depending on the terms of the lease, the current lessees could be left without transportation unexpectedly through no fault of their own, or even incur financial costs associated with the termination of their lease.<sup>15</sup> We urge the Court, government agencies, and VW to revise the consent decree to require leasing companies other than VW Credit to provide lessees adequate advance notice and no-cost lease termination in order to become eligible owners.

## **II. Any Approved Emissions Modification Program Should Clearly Inform Consumers of Buyback or Lease Termination Alternatives, Allow Them to Choose These Options After Receiving a Modification, and Better Protect Them from Improper Liability Waivers or Releases**

Consistent with our belief that consumers must have meaningful options in responding to Volkswagen’s deceit, Consumer Reports supports including an emissions modification program as an option under the settlement, if EPA and the California Air Resources Board (CARB) verify that a repair would substantially reduce emissions. According to EPA, any approved emissions modification “will reduce NO<sub>x</sub> [nitrogen oxide] emissions from the vast majority of vehicles by approximately 80 to 90 percent compared to their original condition.”<sup>16</sup> According to CARB, “the consent decree establishes stringent criteria for approving an emissions modification that will reduce emissions from these vehicles by 80% to 90% or more, without any substantial reduction of fuel economy or performance.”<sup>17</sup>

While we appreciate the major emissions reductions that an approved emissions modification could bring, we do remain concerned that such a modification would not actually meet federal or state emissions standards. Ultimately, VW is not able to give consumers the car they thought they were buying or leasing, and it cannot make the cars stop polluting at an illegal level. The impact of VW’s cheating is ongoing, and will continue—underscoring the necessity of additional accountability measures, in the form of tough civil and potentially criminal penalties, to deter wrongdoing in the future.

Nevertheless, Consumer Reports supports an adequate emissions modification because it is preferable to offering just a buyback or lease termination for consumers who want to keep their car. This settlement program also comes with strong terms ensuring that any approved emissions modification is free, open to all eligible owners or lessees regardless of class action participation, has no end date, and includes Lemon Law-type protections and an extended

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<sup>14</sup> Partial Consent Decree, Appendix A at 2.

<sup>15</sup> We do recognize that the FTC Order allows for “specific arrangements” to be made “in exceptional cases” for leasing companies other than VW Credit to obtain an approved emissions modification without canceling or terminating the lease. Federal Trade Commission, [Proposed] Partial Stipulated Order for Permanent Injunction and Monetary Judgment at 6-7 (June 28, 2016) (online at [www.ftc.gov/system/files/documents/cases/proposed\\_partial\\_stipulated\\_order\\_filed\\_copy\\_0.pdf](http://www.ftc.gov/system/files/documents/cases/proposed_partial_stipulated_order_filed_copy_0.pdf)).

<sup>16</sup> Environmental Protection Agency, “Volkswagen Clean Air Act Partial Settlement” (June 28, 2016) (online at [www.epa.gov/enforcement/volkswagen-clean-air-act-partial-settlement](http://www.epa.gov/enforcement/volkswagen-clean-air-act-partial-settlement)).

<sup>17</sup> California Air Resources Board, “Volkswagen Diesel Vehicle Consent Decree Frequently Asked Questions” (June 28, 2016) (online at [www.arb.ca.gov/msprog/vw\\_info/vw\\_faq.htm](http://www.arb.ca.gov/msprog/vw_info/vw_faq.htm)).

warranty.<sup>18</sup> In addition, we agree with the parties to the settlement that permitting an approved emissions modification helps avoid undue waste and environmental harm.<sup>19</sup>

Consumer Reports urges Volkswagen to use all tools at its disposal to get the word out to consumers about the emissions modification, and urges it to communicate not just through U.S. mail and a public website, but also through email, social media, press outlets, and other means. While the provisions in the settlement requiring Volkswagen to notify consumers about the availability or non-availability of an approved emissions modification are adequate, to reach the 85% recall rate target—which we discuss in greater detail in the following section—we expect the company will need to go well beyond these minimum requirements for notice.<sup>20</sup> As it does so, we urge regulators to carefully monitor these communications to ensure that VW is abiding by its obligation to “make clear” that the owner or lessee alternatively has a right to participate in the buyback or lease termination options.<sup>21</sup> Consumers should not be misled into believing that a buyback or lease termination is any less of an acceptable option for them than an emissions modification. Additionally, we urge VW to disclose information on a public website about an approved emissions modification immediately once it has been approved, rather than waiting two days, so that consumers who see the news and want to get more information right away can do so.<sup>22</sup>

As discussed, we support that the settlement requires Volkswagen to offer consumers an extended emissions warranty and a Lemon Law-type remedy covering any approved emissions modification. However, Consumer Reports thinks that consumers initially choosing the emissions modification should have another option, given that the car may perform differently once a fix has been made. These consumers should be granted a period of time after the modification, perhaps 30 days, during which they can decide that they are not satisfied with the car, and can change their minds and participate in the buyback or lease termination program. They should receive the full cash payment to which they would have been entitled had they selected the buyback or lease termination option in the first place.

Consumer Reports anticipates that giving consumers this option—or a similar option that protects them from being stuck with a modified car that they do not want—would assist Volkswagen in reaching its 85% recall rate targets. We have received comments from hundreds of consumers about their manipulated diesel vehicles. While these comments have not been verified independently, based on what we have heard, there is a portion of VW customers who are wary of reductions in performance or fuel economy and are very reluctant to return their cars for an emissions modification. Some suggest that cash compensation would motivate them, while others told us they will resist a fix, saying “they just might force me to sell it back. [They’re] not going to get their hands on my car” and “[t]he retrofit will almost certainly affect the performance of the car. I live in an area with no emissions checks, so I won’t be forced to do

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<sup>18</sup> Partial Consent Decree, Appendix A at 7.

<sup>19</sup> Partial Consent Decree, Preamble at 4.

<sup>20</sup> Partial Consent Decree, Appendix A at 3-5.

<sup>21</sup> Partial Consent Decree, Appendix A at 4.

<sup>22</sup> Partial Consent Decree, Appendix A at 5.

anything.”<sup>23</sup> To encourage the participation of these reluctant consumers, Volkswagen will need to indemnify them against unsatisfactory performance or fuel economy by ensuring they have a second chance to take the buyback or lease termination.

We also share several comments about the period after an eligible vehicle receives an approved modification. While we agree with the settlement’s goals in ensuring that Volkswagen must not require consumers to release the company from liability in exchange for receiving an emissions modification, Consumer Reports is concerned that the current wording of this provision—prohibiting the release when required “solely” in exchange for receiving the modification—is too narrow.<sup>24</sup> We would urge that, in the finalized decree, the word “solely” be deleted from subparagraphs 5.1.2 and 8.2.5 of Appendix A. We would strongly urge Volkswagen to refrain from seeking to improperly require consumers to sign away their legal rights. We would also urge regulators and consumers to watch the marketplace vigilantly for such a practice and to make it publicly known if they find this practice is occurring. This action would ensure that consumers have information they need about choosing the emissions modification, as opposed to a buyback or lease termination.

Consumer Reports strongly supports other provisions in the settlement related to the period after a vehicle receives an approved modification. This includes labeling and other disclosures required by this settlement for vehicles that have received an emissions modification, including disclosures to subsequent purchasers and a new Monroney fuel economy label.<sup>25</sup> Any consumer who may purchase or lease one of these modified cars in the future has a right to know how the car was changed and which components were added as a part of this recall program, as well as its up-to-date emissions levels and fuel economy.

### **III. The Recall Requirements Are Tough, but Key Aspects Should Be Tougher to Protect Consumers and Get Highly Polluting Cars Off the Road Faster**

#### *A. The Recall Rate Target of 85% by June 2019 is Appropriately Ambitious, but Should Include Earlier, Staggered Targets to Motivate Quick Action*

Under the settlement, Volkswagen must remove from commerce, or perform an approved emissions modification on, at least 85% of the affected 2.0-liter vehicles by June 30, 2019. VW must also meet a separate 85% recall rate in California. If Volkswagen fails to reach the 85% recall rate target, the company must pay additional funds into the Environmental Mitigation Trust established under this settlement. The company must pay \$85 million for each percentage point by which it falls short of the national recall target and \$13.5 million for each percentage point by which it falls short of the California recall target.

Consumer Reports thinks that an 85% recall rate by June 30, 2019, is an appropriately ambitious target for Volkswagen, and we are pleased that the settlement provides tough

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<sup>23</sup> “Some VW Owners: Don’t Take My TDI Away From Me,” Consumer Reports (June 23, 2016) (online at [www.consumerreports.org/cars/dont-take-my-tdi-away-from-me](http://www.consumerreports.org/cars/dont-take-my-tdi-away-from-me)).

<sup>24</sup> Partial Consent Decree, Appendix A at 7.

<sup>25</sup> Partial Consent Decree, Appendix A at 8.



consequences for the company if it fails to meet this target. VW will need to promote its recall program vigorously and creatively to reach the 85% level. According to the National Highway Traffic Safety Administration (NHTSA), an average of 25% of cars recalled for safety defects every year go unrepaired.<sup>26</sup> Volkswagen faces a distinct challenge in reaching an 85% recall rate for its diesels, in which the recall is not related to an acute safety hazard but rather to Clean Air Act and other environmental violations. In addition to communicating to consumers in novel ways, the company will need to make the recall as convenient as possible for consumers. This should include flexible appointment scheduling, pick-ups, and loaner vehicles as needed—regardless of whether or not the dealer service is occurring under warranty—to ensure that consumers determine it is worth their time to participate in the recall.

While we support the settlement’s recall rate target, Consumer Reports also notes that there may be drawbacks to having only one target deadline nearly three years from now, as opposed to staggered deadlines over the course of several years. Staggered deadlines would provide additional built-in incentives for quick action, and help ensure that Volkswagen gets its highly polluting vehicles off the road as soon as possible. Consumers would be made whole faster, and less NO<sub>x</sub> would be emitted into the air. By contrast, having one deadline in 2019 could lead to a backloaded recall process in which more unmodified VW and Audi diesels remain on the road for a longer period of time. To avoid the unnecessary pollution that would result, we strongly urge the Court and regulators to pressure VW to carry out its recall program as expeditiously as possible and at the very least set targets to achieve steady progress toward full recall completion in each periodic report it files with government agencies.

To reach the 85% target, Volkswagen should not hesitate to offer consumers additional incentives to take part in the recall, in addition to the restitution payments and steps the company will take to communicate with consumers and to make the recall as convenient as possible for them. We are pleased that the settlement makes clear that nothing prohibits VW from offering such incentives, while also stating that these incentives cannot be offered in lieu of any options to consumers under the settlement.<sup>27</sup>

At Consumer Reports, we will be watching Volkswagen’s recall program closely to ensure that it works for consumers. This will include monitoring the tools and methods that the company uses to reach the 85% recall rate target. As discussed, we think this appropriately ambitious target may drive VW to be particularly creative in its consumer outreach. If so, we look forward to documenting the lessons of this recall program that could help other companies with product recalls—and the regulators that oversee them—achieve the highest possible rate of recall completion.

*B. Requirements for Salvage, Resale, and Export Are Generally Appropriate, but Labeling and Disclosure Obligations Should Extend to Consumers Abroad*

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<sup>26</sup> National Highway Traffic Safety Administration, “The ‘Safe Cars Save Lives’ campaign urges consumers to check for open recalls at least twice a year,” press release (Jan. 21, 2016) (online at [www.nhtsa.gov/About+NHTSA/Press+Releases/ci.nhtsa-launches-safe-cars-save-lives-campaign-01212015.print](http://www.nhtsa.gov/About+NHTSA/Press+Releases/ci.nhtsa-launches-safe-cars-save-lives-campaign-01212015.print)).

<sup>27</sup> Partial Consent Decree, Appendix A at 9.

For vehicles returned to Volkswagen that lack an approved emissions modification, the settlement takes the right approach. Rendering functional vehicles inoperable and recycling them is by no means ideal from the perspective of minimizing waste; however, in this case, it is necessary. The components in the affected diesels that are integral to VW's deceit violate the Clean Air Act, among other statutes, and must not be permitted to run. We are pleased that the settlement allows these returned vehicles to be salvaged for parts, while also—critically—exempting the engine control unit, diesel oxidation catalyst, or diesel particulate filter from being salvaged, resold, or exported.<sup>28</sup>

More generally, we support that the settlement permits VW only to resell or export vehicles if they have received an approved emissions modification. It would be highly inappropriate to simply export these vehicles' emissions problems to another country.<sup>29</sup> If VW does export modified vehicles, we urge that the agreement make clear that the company must extend its labeling and disclosure obligations under this settlement to potential owners or lessees abroad.

### *C. Regulators Have Broad Oversight Tools, but Certain Penalties Should Be Stronger*

Consumer Reports applauds the settlement's comprehensive reporting requirements. The settlement specifies that Volkswagen must provide EPA, CARB, and the California Attorney General's office with detailed reports on all aspects of the settlement. This includes reports on Volkswagen's progress toward reaching the recall rate targets, detailed accounts on each eligible vehicle, and a compilation of all notices used to inform consumers. The settlement also includes a particularly keen requirement for the company to report to regulators summaries or copies of all bulletins, notices, or other similar communications sent to authorized dealerships about the recall program.<sup>30</sup> We support these reporting requirements and urge Volkswagen to be clear and forthright with regulators, and for these overseeing agencies to make these reports public. In this way, all interested parties can help ensure that Volkswagen keeps to the settlement's terms.

Consumer Reports also supports the settlement's stipulated penalties in the event that Volkswagen fails to meet any of a variety of requirements. These penalties act as incentives to ensure that Volkswagen meets its obligations. While most of the penalties would provide appropriate deterrence, the penalties for failure to submit reports and unauthorized waiver or release of liability should be stronger to better reflect the potential severity of the impact of these violations on the environment and consumers.<sup>31</sup> Increasing these penalties further would better ensure that Volkswagen does not make a business decision to pay relatively modest fines instead of complying with the terms of the settlement.

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<sup>28</sup> Partial Consent Decree, Appendix A at 10.

<sup>29</sup> *Id.*

<sup>30</sup> Partial Consent Decree, Appendix A at 10-12.

<sup>31</sup> Partial Consent Decree, Appendix A at 12-13.

#### **IV. The Zero Emission Vehicle Investment Will Help Pay For the Harm Done, but Should Not Be Fulfilled through Government Incentives or Excess Public Outreach**

Consumer Reports has long supported investment in the development of electric vehicles, including zero emission vehicles (ZEVs). Our surveys have found strong consumer support for electric vehicles, with 65% of those surveyed in California—where the market for electric vehicles is most mature—showing interest in the continuation of electric vehicle technological innovation and more than half considering electric cars for their next purchase.<sup>32</sup> Additionally, more than half of surveyed drivers in several Northeast states showed interest in electric vehicles, with 35% considering an electric vehicle for their next purchase.<sup>33</sup> We support California’s ZEV program, which our research has found helps consumers save on fuel costs and helps bring ZEVs to cost-competitiveness with internal combustion engine vehicles.<sup>34</sup>

Consumer Reports believes that a \$2 billion investment in ZEV technology is an appropriate way for Volkswagen to pay for its harm to the environment. Consumers were told that their 2.0-liter vehicles were low emission vehicles, when in reality they emitted up to 40 times the legal limit of nitrogen oxides (NO<sub>x</sub>), leading to more polluted air. By having Volkswagen invest in ZEV technology, innovation, and infrastructure, the settlement can help prevent future emissions from further harming our air, and can lead the company to compensate for some of the environmental damage it has done.

While Consumer Reports supports the settlement’s requirement for Volkswagen to invest \$2 billion in Zero Emission Vehicle (ZEV) technology and infrastructure, we caution against Volkswagen being able to receive loans, grants, or other incentives from federal or state agencies to carry out this ZEV investment. We believe that if Volkswagen were allowed to apply these incentives to the settlement, it would constitute “double dipping” by disincentivizing Volkswagen from investing \$2 billion of its funds and instead using federal or state funds for this purpose. We would recommend that the consent decree be modified to clarify that any subsidies Volkswagen receives during this time period make those specific investments ineligible as a creditable cost. Additionally, we would suggest that DOJ ensure that public outreach is capped at 5% of the investments, so that the stipulated money results in tangible benefits. Consumer Reports also encourages the draft investment plans to align with the “Guiding Principles to Promote Electric Vehicles and Charging Infrastructure” that the White House published in July 2016, to ensure that the investment plans are the most beneficial for consumers and the environment.<sup>35</sup>

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<sup>32</sup> “More Than Half of California Drivers Considering Electric Cars, Survey Shows,” Consumer Reports (May 27, 2016) (online at [www.consumerreports.org/cars/electric-vehicle-interest-strong-california-northeast](http://www.consumerreports.org/cars/electric-vehicle-interest-strong-california-northeast)).

<sup>33</sup> Consumers Union, “In the Northeast, Survey Shows Strong Interest Big Potential for Electric Vehicles,” press release (May 26, 2016) (online at [consumersunion.org/news/ev-survey-in-the-northeast](http://consumersunion.org/news/ev-survey-in-the-northeast)).

<sup>34</sup> Consumers Union, “New Consumers Union Report Finds California’s Clean Transportation Policies Provide Net Savings for Consumers,” press release (Mar. 31, 2016) (online at [consumersunion.org/news/report-california-clean-transportation-policies-provide-net-savings-for-consumers](http://consumersunion.org/news/report-california-clean-transportation-policies-provide-net-savings-for-consumers)).

<sup>35</sup> White House, “FACT SHEET: Obama Administration Announces Federal and Private Sector Actions to Accelerate Electric Vehicle Adoption in the United States” (July 21, 2016) (online at [www.whitehouse.gov/the-press-office/2016/07/21/fact-sheet-obama-administration-announces-federal-and-private-sector](http://www.whitehouse.gov/the-press-office/2016/07/21/fact-sheet-obama-administration-announces-federal-and-private-sector)).

## V. VW Must Completely Offset Any Past, Present, and Future Emissions through the Mitigation Trust

Consumer Reports fully supports the settlement's requirement for Volkswagen to establish a \$2.7 billion Environmental Mitigation Trust fund. The trust is intended to fully mitigate the total lifetime excess NO<sub>x</sub> emissions from the 2.0-liter vehicles covered by the settlement. All 50 States, Puerto Rico, the District of Columbia, and Indian tribes can be beneficiaries, and receive a specific allocation of funds from the total \$2.7 billion that they can use on projects that best fit their citizens' needs from the listed eligible mitigation actions. These eligible mitigation actions include projects to reduce NO<sub>x</sub> from heavy-duty diesel sources near population centers, such as delivery trucks and school and transit buses. We encourage beneficiaries to carefully consider programs that will directly benefit populations most susceptible to adverse health consequences caused by NO<sub>x</sub> emissions exposure.

We emphasize the importance of completely offsetting any past, present, and future NO<sub>x</sub> emissions based on the adverse health consequences associated with NO<sub>x</sub>. The Environmental Protection Agency (EPA) notes that even short-term NO<sub>x</sub> exposure can lead to, or worsen, adverse health effects such as respiratory disease, heart disease, increased hospital admissions, and premature death.<sup>36</sup> Children, the elderly, people with preexisting lung conditions, and those who spend time outdoors are especially susceptible to NO<sub>x</sub>-related health consequences. Given the large amount of excess NO<sub>x</sub> emissions from Volkswagen 2.0-liter vehicles, it is imperative that Volkswagen continue to reduce population exposure to these harmful gases.

## VI. Conclusion

In summary, Consumers Union appreciates the opportunity to comment on the partial consent decree in the case *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*. We generally support this settlement as fair, adequate, and reasonable, but have shared facts and considerations that should be examined and addressed before finalizing the agreement, including:

- The buyback and lease termination options are entirely justified, but should be revised to increase buyback values, allow more time for eligible sellers to identify themselves, and protect all lessees from incurring recall-related costs;
- Any approved emissions modification program should clearly inform consumers of buyback or lease termination alternatives, allow them to choose these options after receiving a modification, and better protect them from improper liability waivers or releases;
- The recall requirements are tough, but key aspects should be tougher to protect consumers and get highly polluting cars off the road faster;

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<sup>36</sup> Environmental Protection Agency, "Nitrogen Dioxide: Health" (Feb. 23, 2016) (online at [www3.epa.gov/airquality/nitrogenoxides/health.html](http://www3.epa.gov/airquality/nitrogenoxides/health.html)).

- The recall rate target of 85% by June 2019 is appropriately ambitious, but should include earlier, staggered targets to motivate quick action;
- Requirements for salvage, resale, and export are generally appropriate, but labeling and disclosure obligations should extend to consumers abroad;
- Regulators have broad oversight tools, but certain penalties should be stronger;
- The zero emission vehicle investment will help pay for the harm done, but should not be fulfilled through government incentives or excess public outreach; and
- VW must completely offset any past, present, and future emissions through the mitigation trust.

Going forward, we strongly urge regulators to wield robust oversight of Volkswagen to ensure that the company implements its recall, investment, and mitigation programs appropriately, and that it offers meaningful solutions for the 3.0-liter engine diesel vehicles that it has not yet addressed. We also call on federal and state officials to assess tough civil penalties and any appropriate criminal penalties against the company in order to hold it fully accountable. These penalties are essential to deterring future wrongdoing that harms consumers and the environment, and ensuring that Volkswagen’s deceit—the most severe in automotive history—is never repeated.

Respectfully submitted,

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