From the Home Office

WFI Activity Advocates for Individual Investors

VW Emissions Case: $20 Billion in Claims and Counting

By Roger H. Ganser, Chairman, NAIC/BetterInvesting Board of Directors and Chairman, World Federation of Investors, and Dr. Henning Wegener, former Ambassador of the Federal Republic of Germany to Spain and honorary WFI director

(Editor's note: The views expressed in this article are solely those of the individual authors and not of any organization in which they serve or participate.)

Volkswagen's fraudulent default device scandal now totals over $20 billion in awarded claims in the U.S. car case, with additional claims being made by consumer, environmental, national and local governments throughout Europe and the U.K. Concurrently, Volkswagen has steadfastly denied that it needed to warn VW investors earlier about the scandal and the resulting financial claims against the company and their financial impact on VW investors.

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Last April Roger reported on the actions of the World Federation of Investors decision to become actively involved in the Volkswagen fraud case that has had a serious financial impact on individual investors around the world *(see May 2017 issue)*. This became all the more important as individual investors in Europe had no recourse because class action was not allowed. Consequently, the WFI formally endorsed a program to enable investors in Volkswagen AG, Porsche AG and Audi AG securities to seek recovery for losses in the value of these securities resulting from the emissions fraud committed by Volkswagen.

WFI has been a proactive advocate by informing, educating and facilitating individual investor participation in the Stichting Volkswagen Investors Claim, a nonprofit foundation established in the Netherlands to represent the interests of victims in seeking a resolution of investor claims against VW. The foundation's objective is to obtain relief for investors who have suffered investment losses as a result of the Volkswagen emissions fraud by means of open negotiations instead of costly legal challenges.

Roger is serving on the *stichting's* independent board of directors along with colleague Dr. Henning Wegener, former ambassador of the Federal Republic of Germany to Spain and past director general of the Spanish Association of Minority Shareholders of Listed Companies. Roger serves as chairman of the Stichting Supervisory board and Dr. Wegener serves as chairman of the Stichting Management board. Because of their close working relationship, Roger asked Dr. Wegener to be a co-author for this article. Dr. Wegener brings the political and cultural elements together when describing Volkswagen's behavior in the eyes of world markets.

The Stichting Foundation legal procedure is critical to protecting both European and U.S. investors. The Dutch Code of Civil Procedure allows for collective settlements in cross-border cases. The law has been tested successfully in several high-profile cases. Consequently, the foundation plays a key role in dispute resolution and may agree on a settlement for the benefit of the investors. VW investors from the U.S. are also forced to seek redress in Europe. Once again, the Stichting Foundation provides a means for international investor redress. Because of the broad international scope of the claims, the *stichting* has engaged counsel from the Netherlands (AKD), Austria (Breiteneder Rechtsanwälte Attorneys at Law) and the United States (Labaton Sucharow LLP).

Although Volkswagen AG has pleaded guilty in U.S. court to criminal conduct (including fraud and obstruction of justice) in connection with consumer and government car claims concerning the diesel emissions of its vehicles, Volkswagen has inexplicably continued to aggressively defend itself against securities fraud claims by investors in Volkswagen securities who have incurred billions of dollars in damages. Because the majority of Volkswagen's securities trade outside the United States, U.S. investors have had limited opportunities to seek a recovery.

In U.S. courts, actions have been filed by investors in Volkswagen ordinary and preferred shares traded in the form of American depositary receipts and Rule 144A bonds. In the last six months, Volkswagen's ordinary ADRs represented approximately 17 percent of the average trading volume of Volkswagen common stock, and its preferred ADRs represented approximately 0.12 percent of the average trading volume of Volkswagen preferred stock. The bond offerings at issue raised $8.3 billion. By Volkswagen's failing to disclose its fraud and the financial implications, it is believed that the risk rating on the bonds was very understated. To date, Volkswagen and its executives have sought to dismiss the ADR actions.

Volkswagen's approach has not differed with regard to the bondholders action, against which Volkswagen and its executives have filed three motions to dismiss. Despite all the evidence to the contrary, including Volkswagen's admission in its criminal proceeding, Volkswagen continues to deny liability to the investors and fails to seek a negotiated resolution to provide some compensation to them.

Stichting Volkswagen Investors Claim is seeking redress for losses incurred by investors in more than 200 securities affected by disclosures of Volkswagen's defeat-device misconduct, including Volkswagen ordinary shares, Volkswagen preferred shares, preferred shares of Volkswagen subsidiaries Porsche Automobil Holding SE and Audi AG, and various debt securities. In addition, Volkswagen International Finance N.V. with its seat in Amsterdam has extensive outstanding issuings and plays a key role in financing VW. Rates on bonds issued previously by Volkswagen and its subsidiaries most likely do not match the risk incurred when purchasing the bond. Such an excessively low rate on the bond ought to be considered financial damage.

A putative class action has been filed on behalf of purchasers of Volkswagen AG ADRs, alleging a drop in price purportedly resulting from the matters described in the Environmental Protection Agency's Notices of Violation. A putative class action has also been filed on behalf of purchasers of certain U.S. dollar-denominated Volkswagen bonds, alleging that these bonds were trading at artificially inflated prices because of Volkswagen's alleged misstatements and that the value of these bonds declined after the EPA issued its Notices of Violation. Volkswagen is of the opinion that it duly complied with its capital market obligations and no liability provisions have been recognized.

As chairman of the Stichting VW Investors Claim's Management Board, and as a German national and former government servant of 40 years standing, including in German Chancellor

Kohl's cabinet, Ambassador Wegener offers a unique perspective. The VW diesel fraud has produced ire and disappointment the world over, from Australia and South Korea to Canada and the U.S. But its effect naturally has been deeper and more gripping in Germany, as the country is the home of the car company, the fraud's perpetrators and the vast majority of shareholders.

For Germans the behavior of Volkswagen management in a mass fraud perpetrated consciously probably since 2005 or 2008 clashes with the pride of all Germans in the country's industrial and moral resurgence after the war, symbolized more than otherwise by the singular technical ingenuity and economic achievement of the Volkswagen Group. Volkswagen's manipulations are considered an attack on the honesty and probity of a country that has struggled so much to recover from the humiliation of the defeat and from moral shame. More than other groups Volkswagen, the world's biggest car producer, had become an icon of Germany's worth in the world. The dismay and disappointment over Volkswagen's deeds corresponds to a worldwide loss of reputation. It is a sad fact that in the aftermath of the discovery of the fraud, the Volkswagen Group encounters substantial difficulties in its sales efforts; even substantial discounts often cannot counterbalance this effect.

One would have expected that the Volkswagen Group would have considered compensation for damage done to millions of customers and investors, as well as reestablishing its dented reputation and the reputation of the entire country, as a priority of its action. Not so. Compensation has so far been granted only after immense pressure, mainly by the U.S. judiciary and administration. In Europe, Volkswagen offers no admission, no compensation and a refusal to entertain reasonable proposals for settlement.

The apparent discrimination in compensatory treatment between the U.S. and Germany – and victims elsewhere in Europe – adds to the dismay. Volkswagen management, in spite of steadily emerging evidence of complicity at the executive level, lets the drawbridge down in an almost autistic manner ("We have done nothing wrong," "We have not violated binding environmental standards," etc.). Meanwhile, the avalanche of compensation demands, many of them already in the courts, is building up to an alarming dimension in the billion euro range.

The *stichting* is well-placed to testify to this policy of rejection. Our letters to VW management have either not been replied to or only formally. At VW's 2016 general shareholder meeting, the *stichting* representative was not given the floor.

Worse, it appears that even Germany's local Lower Saxony government and federal government are not prepared in any way to bear down on VW management. The *stichting* has tried, in several letters, to appeal to their political responsibility for the company's future financial viability, pointing to the multibillion legal consequences of inactivity and urging openness for damage-mitigating settlements.

Yet the prime minister of Lower Saxony, which holds 20 percent of VW shares and is a weighty member of the company's supervisory board, had no substantive reply to our letters. The German economics minister, who bears an even heavier national responsibility for the financial survival of Volkswagen and the global image of the German economy, has so far not chosen to reply.

It is hard to dismiss the suspicion of deliberate connivance. German parliamentary reaction to the VW events has so far been inconclusive. The labor unions — strongly represented in the company executive level under German enterprise law and in charge of workers' rights and the company's future, have remained silent; this is possibly, as the media claim, because they're under the soothing influence of lush extra annual payments.

A bleak picture indeed, with the obvious resulting need to mobilize public opinion in the interest of the victims of VW's manipulations in pressing for early nonjudicial settlement. Doing this is also in the interest of the company, its current shareholders, and the German and European economy.

As this controversy continues to unfold, it is becoming increasingly likely that the center of the arguments will be within the European Union itself. The European Environment Agency's regulatory language leaves much room for interpretation. The *stichting* legal team is closely monitoring the trending public debate. VW, as well as the German government, takes the view that European regulation is not clear about (1) the emission norms and (2) the exceptional circumstances under which defeat devices are allowed.

Experts disagree with VW's particular explanation of the rules. European rules prohibit the use of defeat devices. An exception to this rule applies if the device is necessary to protect the engine. VW states this exception applies. Plaintiffs for car owners and VW investors state that such exception should have been disclosed.

The European legal systems contain the option to ask preliminary questions of the European Court of Justice to receive its opinion on matters of European law. It is a useful way to safeguard unity in court decisions through the European Union. A ruling of the European Court that would contradict VW's public views will probably have a large impact on VW's overall legal position in the wave of litigation that develops throughout Europe. The outcome could directly impact the ongoing investor cases, and it may also shed new light on the way VW has informed the markets.

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