

Disclosure Violations Arising from Operational Wrongdoing

WRITTEN BY

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The recent SEC enforcement action against Volkswagen AG and its former CEO illustrates the securities law consequences of operational wrongdoing.^[1] As described by the SEC, from at least 2007 through 2015, Volkswagen sold “clean diesel” cars while concealing their emissions problems through use of an undisclosed defeat device. During that period Volkswagen sold billions of dollars of bonds and asset-backed securities in the United States touting its vehicle quality and environmental compliance without disclosing its emissions scheme and violation of legal emissions limits. According to the SEC, Volkswagen made false and misleading statements to investors and violated the antifraud provisions of the federal securities laws. The SEC’s complaint is pending in the U.S. District Court for the Northern District of California.

Volkswagen previously settled criminal fraud charges brought by U.S. authorities. It also managed to escape a civil securities class action lawsuit for failure to plead reliance, although an amended complaint has been filed.

The basic advice, of course, is to avoid the kind of operational wrongdoing that took place in Volkswagen, which inevitably will be accompanied by failures of disclosure. However, when it does occur, in dealing with remedial action, companies should be mindful of the securities law disclosure violations that likely occurred and take steps to mitigate exposure for those violations in their remedial actions. For example, a company should address as promptly as possible the prior activities and their potential consequences, including anticipating the claims that could arise as a result and the contingent liability disclosure that might be required.^[2]

[1] SEC Press Release 2019-34 (Mar. 14, 2019) [here](#).

[2] See *General Motors Company*, Release No. 34-79825 (Jan. 18, 2017) (settled enforcement action for deficient internal accounting controls relating to failure to properly assess and reflect contingent liabilities associated with a vehicle recall due to defective ignition switches).

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