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The effects of corporate scandals can reverberate for years. Volkswagen, whose conspiracy to hide emissions from its diesel vehicles was first discovered in 2015, is still trying to repair its reputation. The damage will be felt for some time. The authors raise a question that has not been asked throughout this case: The company's auditors and lawyers missed opportunities to avoid the scandal?***Another high-mileage brand is now in the guinness world records book... impressive 81.17 mpg. Starting from VW's American base in Herndon, Virginia on June 22 and returning on July 7... The 2015 Golf TDI record covered 8,233.5 miles across the 48 contiguous states while burning 101.43 gallons of Shell diesel costing a total of $294.98.— Bob Nagy, VW Golf TDI sets a fuel economy record, the website of Kelley Blue Book, July 8, 2015, the Volkswagen Golf TDI diesel was crossing the country in the summer of 2015, as well as Volkswagen engineers, to meet with officials from the Environmental Protection Agency (EPA) and the California Air Resources Council (CARB). Regulators wanted to know why real-time emissions monitoring carried out on Volkswagen's open-road diesel vehicles revealed up to 35 times the amount of pollution recorded when the same cars were monitored at a government testing facility. On September 18, 2015, the EPA issued a Violation Notice to Volkswagen after determining that the company had manufactured and installed software (known as defeat devices) that substantially reduced the effectiveness of the diesel vehicle's emissions control system when it was on the open road. Violations covered six consecutive model years (2009-15). Signed by Phillip Brooks, director of the EPA's Air Enforcement Division, the letter was addressed to several Volkswagen and Audi corporate entities and copied to Volkswagen's external board. Volkswagen should have seen this in the coming days, months or even years before. The day before the Violation Notice, EPA and Volkswagen officials exchanged emails scheduling a high-level conference call the next morning at 9:00 a.m. The night before, Brooks, a veteran of the Justice Department's Environmental Enforcement Section, sent Volkswagen a sinister follow-up to ensure that its general counsel would be on the call: Please note that this is a call that Mr. [David] Geanacopolus would probably like to make a priority. During the call, the attorney general learned of the Notice of Violation. This was just the first in an extraordinary series of events that would ultimately lead to costly litigation and criminal charges against Volkswagen and its CEO. In 2016, Volkswagen was the ad in a nationwide consumer class and government civil enforcement action that resulted in a $15 billion settlement. Billion. In 2017, the company was fined $2.8 billion for criminal violations in the United States, and in 2018 was fined $1.2 billion in Germany. At the end of the second quarter of 2019, Volkswagen's costs associated with the scandal were more than $32 billion and increased as several lawsuits continued around the world. The pending litigation includes charges filed by the SEC for defrauding bond investors and an unprecedented class action lawsuit in Germany.These costs were incurred because Volkswagen was involved in an elaborate fraud that included installing software in diesel vehicles to cheat government emissions tests, false certification to government authorities that the vehicles were compliant, deceptive marketing of vehicles to consumers like clean diesel, and a blatant cover-up. This conspiracy was not a victimless crime. Published research led by MIT scientists predicts that excess particles (PM) and nitrogen oxide (NOx) emissions produced by fake clean diesel vehicles will lead to about 60 premature deaths in the United States and 1,200 in Europe (Steven Barrett et al., Impact of Volkswagen's Emissions Control Defeat Device on U.S. Public Health, Environmental Research Letters, Oct. 29, 2015, Guillaume P. Chossière et al., Public health impacts of surplus NOx emissions from Volkswagen diesel passenger vehicles in Germany, Environmental Research Letters, March 3, 2017, . To date, none of the auditors and lawyers associated with Volkswagen have been publicly identified as being the subject of any investigation related to the scandal. Did any of them miss opportunities to help prevent? This article provides a background outline of the scandal; addresses the state of Volkswagen's corporate culture, governance, risk management and sustainability practices at the time (i.e., its corporate DNA); and explores what standards apply to auditors and lawyers based on the facts reported so far. (To be clear, a review of the actions of VW's auditors and lawyers is beyond the scope of this article.) Environmental statutes, such as the Clean Air Act (CAA), are largely based on the protection of human health and not on the environment itself. In fact, in a unanimous historical opinion written by Justice Antonin Scalia, the Supreme Court interpreted the CAA as determining the EPA to consider exclusively human health and well-being —and preventing it from considering the costs of implementing the industry—in the enactment of national ambient air quality standards (NAAQS) for pollutants such as PM and NOx[Whitman v. American Trucking Associations, 531 USA 457, 473 (2001)] Stricter air quality standards, such as those maintained at American Trucking, with the increase of the supervisory authority and tools, allowed the federal government, with the help of states, to significantly reduce air pollution in recent years [Daniel Jacobs, The Role of Federal Application in Ozone Control, in McKee, D. (Ed.), Tropospheric Ozone: Human Health and Agricultural Effects, CRC Press, 1994]. The application is critical to protecting human health, especially in large metropolitan areas such as Los Angeles, which lies in the country's most polluted air basin (American Lung Association, State of the Air 2018, . To date, none of the auditors and lawyers associated with Volkswagen have been publicly identified as being the subject of any investigation related to the scandal. Did any of them miss opportunities to help prevent? Controlling car emissions is an important means of reducing air pollution, especially in large cities. Since its inception in 1970, the EPA has been under a congressional mandate to enact regulations aimed at reducing car emissions. In 1990, Congress enacted new emissions laws known as Level 1 standards and required the EPA to review whether further reductions were necessary and technologically viable to help states comply with NAAQS. In 2000, the EPA finally issued stricter Level 2 standards, including for NOx and PM, which were gradually placed gradually in automobiles and were in full force from model year 2007.Thus, the new emissions requirements were designed to protect people's health; they have evolved over time, giving car manufacturers ample notice and time to comply; and they were based on the available technology. In other words, they were necessary, reasonable, and attainable. But they posed a dilemma for Volkswagen if it were to achieve its ambition to become the world's leading automaker. In 2007, with a new CEO in charge, Volkswagen launched Strategy 2018, an aggressive new initiative with goals such as doubling annual vehicle sales (Stefan Schmid and Phillip Grosche, Managing the International Value Chain in the Automotive Industry, Bertelsmann Stiftung, 2008, . A key part of this strategy was to greatly expand sales of diesel vehicles in the United States (Jack Ewing, Faster, Higher, Farther: The Volkswagen Scandal, W.W. Norton & Company, 2017). To this end, in 2008, Volkswagen launched a new technology that claimed to achieve high fuel economy and performance, while attesting to strict new emissions standards —a technology that seemed to require magical thinking, at least in engineering circles (Dune Lawrence et al., How did Volkswagen's top engineers know? Bloomberg Businessweek, October 26, 2015, . Volkswagen solved its dilemma by engaging in an elaborate fraud. By compliance with the rules meant increased costs and lower fuel economy and road performance, which potentially hurt sales. So Volkswagen decided to use defeat devices to cheat -- programming the vehicles so that their emission control systems would only exceed emissions limits when in test mode. When on the road, the systems were disabled. Knowing that diesel vehicles would evade U.S. emissions standards, Volkswagen misrepresented them for years to obtain EPA and CARB certifications that would allow the vehicles to be sold in the U.S. When the EPA and CARB finally began to pick up, Volkswagen misled until regulators threatened to withhold certification of its 2016 model year diesels. Once it became clear that his number was on top, Volkswagen destroyed evidence of the fraud. During the years in which it perpetrated this fraud, Volkswagen consistently portrayed itself as having an ethical culture, good corporate governance, effective risk management and a strong commitment to sustainability. There's evidence to the contrary. For example, Fortune reported that Volkswagen has a history of scandals and episodes in which it skirted the law (Geoffrey Smith and Roger Parloff, Hoaxwagen, March 7, 2016, . Volkswagen's ownership and governance structures, including voting rights and the composition of its supervisory board, were not a recipe for good corporate governance (Charles Elson et al., The Bug at Volkswagen: Lessons in Co-Determination, Ownership and Structure of Councils, Journal of Applied Corporate Finance, December 2015, , and volkswagen's CFO apparently did not play the role of Chief Value Officer, as predicted by Mervyn King (Commonsense Principles of Corporate Governance, The CPA Journal,July 2017, . Volkswagen's own internal auditors -- after the fact -- recommended 31 measures to improve governance and compliance (Volkswagen Group 2016 Annual Report, . Meanwhile, all three pillars of sustainability -- economic, social and environmental -- collapsed under diesel fraud as costs increased, stakeholders were alienated and air polluted. Volkswagen has decided to use defeat devices to cheat -- programming the vehicles so that their emission control systems would only exceed emissions limits when in test mode. By the measure of the six integrated reporting capitals —financial, manufactured, intellectual, human, social and relationship and natural— that have gained favors in recent years, Volkswagen has also suffered dearly (Jane Gleeson-White, Six Capitals or Can Accountants Save the Planet? W.W. Norton & Company, 2014; Barry Melancon, Keynote Address of the 1st Annual Sustainability Investment Leadership Conference of the The CPA Journal, June 2016, . Diesel fraud has exposed Volkswagen to enormous tangible and intangible risks, and the consequences deposing tangible financial capital (more than $30 billion in costs, significant drop in stock price); social and relationship capital (decreased brand and trust, relationships with impaired stakeholders) and natural capital (increased pollution, associated morbidity and mortality). As a publicly traded company, Volkswagen's annual financial statements are subject to independent audit. Several International Auditing and Assurance Standards Board (IAASB) standards may be particularly relevant as to whether any of the annual audits performed during the fraud period could have detected potential warning signs (2016-17 International Quality Control Manual, Audit, Review, Other Warranties and Related Service Pronouncements, . The International Accounting Standard (IAS) 315, identifying and evaluating the risks of material misunderstanding through the understanding of the entity and its environment, requires auditors to evaluate whether management, with the supervision of those accused of governance, created and maintained a culture of honesty and ethical behavior (paragraph 14). In addition, auditors must understand the relevant factors of the company's industry, regulation and other external factors, its operations and its ownership and governance structures (paragraph 11). Awareness of a toxic corporate culture and poor ownership and corporate governance structures can lead the auditor to consider how these factors can affect business practices and controls and potentially lead to fraud. ISA 240, The Auditor's Responsibilities relating to Fraud in an Audit of Auditors of Financial Statements, states that auditors are responsible for obtaining reasonable assurance that the financial statements taken as a whole are free from material statements, whether caused by fraud or error (paragraph 5). Fraudulent financial reporting includes misrepresenting or internal omission of financial statements of events, transactions or other significant information (for. A3). Auditors should also keep in mind the three points of the fraud triangle: incentive or pressure, opportunity and rationalization (for. A1). Audit standards also require auditors to consider a company's legal and regulatory environment (ISA 250, Consideration of Laws and Regulations in a Financial Statement Audit), including conducting specified audit procedures to help identify non-compliance with these laws and regulations that may have a material effect on financial statements (paragraph 7). The application of these standards to the Volkswagen scandal raises a number of questions. If the auditors exercised additional scrutiny under the circumstances — which included a history of poor corporate ethics, weak corporate governance, a new aggressive sales strategy and bold claims of Advances? Could they have focused more heavily on assessing the control environment and fraud risk factors? Did the members of the audit team have sufficient industry expertise to assess business and audit risk, given the negative consequences that non-fraud assessment can have, not only for the company and its stakeholders, but also for the audit firm? The two most common guarantee frameworks used for sustainability reporting are ISAE 3000 and AA1000AS (Sunita Rao, Current State Sustainability Reporting Assurance, The CPA Journal, June 2017, . THE ISAE 3000 is most commonly used by CPA companies (mainly the Big Four), and the AA1000AS is most often used by specialized warranty providers/technical experts (Rao 2017). The ISAE 3000 allows a moderate or limited warranty [ISAE 3000 (Revised), 2013, para. 6], while the AA1000AS allows high or moderate warranty (AA1000AS, 2008, p. 10). Should auditors have exercised additional scrutiny under the circumstances —which included a history of poor ethical corporate culture, weak corporate governance, an aggressive new sales strategy, and bold claims of technological advances? From 2008 to 2013, Volkswagen's sustainability reports, prepared by the same company that carried out the financial audits, contained independent guarantee reports that were carried out under both AA1000AS and ISAE 3000, while for 2014 and 2015, they were carried out only under ISAE 3000. As of the 2015 sustainability report, the auditor makes it clear that its guarantee, while limited, should not be entrusted by stakeholders: The report is not intended for third parties to base any [financial] decision. We assume no responsibility for third parties. In the 2017 report, the judgment Our responsibility rests so only on the Company was added to the report between the two sentences above. Thus, the independent warranty provided to Volkswagen's sustainability reports has become increasingly limited over time. Would society and stakeholders be better served by sustainability reports at higher levels of assurance that are designed to better inform stakeholder decisions? Could increased scrutiny, in the form of more proactive and comprehensive inspections and assessments by the sustainability reporting assurance company, have detected the use of the defeat device for the ultimate benefit of Volkswagen and its holdings? Would it have been beneficial to have different companies auditing financial reports and sustainability reports, or did the use of the same company really provide a greater opportunity to uncover fraud? questions and many others can be handled more definitively with greater access to records that Volkswagen has not yet made publicly available. As in previous corporate debacles, where the role of the lawyers were asked (such as the Enron accounting scandal and the General Motors ignition switch case), observers may ask: what duty, if any, would Volkswagen's lawyers have to report fraud if they knew about it? It is possible that what Volks-wagen's lawyers knew and when they learned that he was approached by Jones Day, the VW law firm hired after conducting an internal investigation of the fraud. So far, however, jones day information, which was provided to the Justice Department as part of a successful effort to win a reduction in Volkswagen's criminal fine of more than $3 billion, otherwise remains secret despite requests. (German authorities searched the offices of the Munich law firm to seize the information, an action that was later confirmed by germany's constitutional court.) The duties of lawyers are discussed in the canons of ethics that generally govern the legal profession (each jurisdiction is different), which were revised after the passage of the Sarbanes-Oxley Act of 2002 (Cramton et al., Legal and Ethical Duties of Lawyers After Sarbanes-Oxley, 49 Villanova Law Review, January 2004, . In accordance with the Model Rules of Professional Conduct adopted by the American Bar Association (ABA), a lawyer cannot ethically facilitate conduct that he knows is illegal or fraudulent (Aba Model Rule 1.2). The rules reflect, however, a distinct tension between the client's right to confidentiality with the lawyer and the ethical obligations of the lawyer, with confidentiality generally weighing more heavily on the balance. Thus, according to the Model Rules, a lawyer may , but is not required to - report to the authorities the unlawful conduct of a client to the extent that the lawyer reasonably believes necessary ... to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial damage to the financial interests or property of another and also from which the client has used or is using the services of the lawyer [Aba Model Rule 1.6(b)(2)]. The comments to the ABA Model Rules reflect that the scenario is especially delicate when the lawyer has been representing a client with the understanding that the conduct was legal, but then discovers the criminal or fraudulent conduct midstream. The lawyer cannot assist the client in such conduct and must withdraw at this stage (Comment 10 to Rule 1.2). Would society and stakeholders be better served by sustainability reports at higher levels of assurance that are designed to better inform stakeholder decisions? The Model Rules also contain provisions that relate specifically to circumstances in which a lawyer an organizational client, such as a corporation. If the lawyer knows of a violation of the law that is likely to result in substantial damages to the corporation, the should act in the best interest of the corporation (i.e., not necessarily in the best interests of its officers and individual employees), including by reporting the matter up to the corporate ladder [Model Rule 1.13 (b)]. In some jurisdictions, if reporting the ladder does not result in the proper approach to the matter, the lawyer may — but is not required — report a clear violation to the authorities if it is reasonably certain that it will result in substantial damages to the corporation [Rule model 1.13(c)]. Thus, the applicable obligations can generally be summarised as follows, based on what the lawyer knew and when:The lawyer never knew about illegal or fraudulent conduct: No legal or ethical violationThe lawyer knew about the illegal or fraudulent conduct and helped to perpetrate it: ethical violation (and potentially legal violation)The lawyer knew about the illegal or fraudulent conduct in the middle of the way : must withdraw and report internally, and may report externally, if sufficiently serious. Volkswagen has been involved in a massive fraud with dire consequences for the company and its stakeholders. Its corporate culture facilitated both the conception and perpetuation of the charade. However, it remains an open question whether Volkswagen's auditors and lawyers may have missed opportunities to avoid the scandal. Scandal.