

BRIBERY

Foreign Corrupt Practices Act Enforcement As Seen Through Wal-Mart's Potential Exposure



BY MIKE KOEHLER

High-profile instances of Foreign Corrupt Practices Act scrutiny focus attention on the law and its enforcement across a broad spectrum. In spring 2012, arguably the most high-profile instance of scrutiny in the FCPA's 35-year history occurred as Wal-Mart's alleged conduct in Mexico dominated the news cycle. Wal-Mart's scrutiny has been instructive in many ways at a key point in time for the FCPA.

This article uses Wal-Mart's potential FCPA exposure as a prism to view the current FCPA enforcement environment. Issues addressed in this article include the following:

- whether Congress intended in passing the FCPA to capture the type of payments at issue in Wal-Mart;
- what FCPA caselaw instructs as to the payments;
- whether what Congress intended or what courts have concluded even matters;
- the impact of Wal-Mart's scrutiny on the company as well as industry peers; and
- the politicization of Wal-Mart's scrutiny and its impact on FCPA reform.

The New York Times Article

Even though Wal-Mart disclosed FCPA scrutiny in a December 2011 SEC filing¹, to the casual observer, including all major media outlets, Wal-Mart's FCPA scrutiny began April 21 when the *New York Times* ran a front-page article titled "Vast Mexico Bribery Case

¹ Wal-Mart Form 10-Q filed Dec. 8, 2011.

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Hushed Up by Wal-Mart After Top-Level Struggle.”² The *Times* article was both unremarkable and remarkable.

Unremarkable Aspects of *Times* Article. The unremarkable portion of the *Times* article was that a foreign subsidiary of a multinational company operating in an FCPA high-risk jurisdiction allegedly made payments to “foreign officials” to facilitate the issuance of certain licenses or permits.

The *Times* article focused on Wal-Mart’s largest foreign subsidiary, Wal-Mart de Mexico, and suggested that Wal-Mart Mexico “orchestrated a campaign of bribery to win market dominance” and “paid bribes to obtain permits in virtually every corner” of Mexico.³ In the article, a former Wal-Mart Mexico real estate department executive described how the payments “targeted mayors and city council members, obscure urban planners, low-level bureaucrats who issues permits—anyone with the power to thwart Wal-Mart’s growth.”⁴ According to the article, the former executive said the payments “bought zoning approvals, reductions in environmental impact fees and allegiance of neighborhood leaders.” According to the *Times*, the idea behind the payments “was to build hundreds of new stores so fast that competitors would not have time to react.”⁵ The payments “accelerated growth,” got “zoning maps changed,” made “environmental objections vanish,” and “permits that typically took months to process magically materialized in days,” according to the article.⁶

Many of the payments were funneled through “trusted fixers, known as ‘gestores.’”⁷ According to the *Times*, Wal-Mart Mexico “had taken steps to conceal [the payments] from Wal-Mart’s headquarters in Bentonville, Ark.,” and Wal-Mart Mexico’s chief auditor altered reports sent to Bentonville discussing various problematic payments.⁸

² *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, New York Times (April 21, 2012), available at <http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html?pagewanted=all>.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Gestores often “funnel a portion of the fees they charge clients to corrupt officials to smooth the issuance of permits, approvals and other government stamps.” In Mexico, “where laws on zoning rules, construction codes and building permits are vague or laxly enforced, the difference between opening a store quickly and having it held up for months may depend on using a gestor.” See *Wal-Mart Bribery Allegations Put Focus on Mexican Middlemen Used to Grease Bureaucratic Wheels*, Associated Press (April 24, 2012), available at http://www.cbsnews.com/8301-202_162-57419686/wal-mart-bribery-allegations-put-focus-on-mexican-middlemen-used-to-grease-bureaucratic-wheels/.

⁸ See *supra* note 2.

By terming a portion of the *Times* article unremarkable, I do not mean to suggest that such payments will not attract scrutiny by the FCPA’s joint enforcers, the Department of Justice and the Securities and Exchange Commission. As explained in more detail below, the payments surely have attracted scrutiny. Rather, the unremarkable portion of the *Times* article, in addition to what is stated above, is that Wal-Mart is now one of approximately 100 companies that is the subject of FCPA scrutiny.

Remarkable Aspects of *Times* Article. The remarkable aspects of the *Times* article include the conduct (or lack thereof) of Wal-Mart and its top executives upon learning of the conduct of its Mexican subsidiary. Even in 2005 and continuing today, most business leaders, audit committees, and boards tend to overreact to potential FCPA issues and often reflexively launch broad internal investigations.

However, the payment issues at Wal-Mart Mexico apparently resulted in the opposite at Wal-Mart’s corporate headquarters. The *Times* article stated as follows as to events in 2005:

Wal-Mart dispatched investigators to Mexico City, and within days they unearthed evidence of widespread bribery. They found a paper trail of hundreds of suspected payments totaling more than \$24 million. They also found documents showing that Wal-Mart de Mexico’s top executives not only knew about the payments, but had taken steps to conceal them from Wal-Mart’s headquarters in Bentonville, Arkansas.⁹

According to the *Times*, Wal-Mart’s lead investigator, a former FBI agent, “recommended that Wal-Mart expand the investigation” but Wal-Mart’s own examination found that its “leaders shut it down.”¹⁰ The article states that “in one meeting where the bribery case was discussed, H. Lee Scott, Jr., then Wal-Mart’s chief executive, rebuked internal investigators for being overly aggressive.”¹¹ The *Times* article also contains several internal documents, including law firm Willkie Farr & Gallagher’s 2005 “investigative work plan” that called for tracing all payments to anyone who helped Wal-Mart Mexico obtain permits for the previous five years.¹² The *Times* stated as follows:

Willkie Farr recommended the kind of independent, spare-no-expenses investigation major corporations routinely undertake when confronted with allegations of serious wrongdoing by top executives. Wal-Mart’s leaders rejected this approach. Instead, records show, they decided Wal-Mart’s lawyers would supervise a far more limited “preliminary inquiry” by in-house investigators.¹³

According to the *Times*, in 2006 Wal-Mart again considered a full investigation of the conduct in Mexico, but in the end, the company largely delegated responsi-

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

bility for the investigation to Wal-Mart Mexico.¹⁴ Another remarkable aspect of the *Times* investigation is how Eduardo Castro-Wright (at the critical time period the CEO of Wal-Mart Mexico) was known by others at Wal-Mart to be involved in the Mexican payments, but was nevertheless thereafter continuously promoted by Wal-Mart.

Wal-Mart thus dominated the news cycle less because it joined a list of approximately 100 or so companies subject to FCPA scrutiny, a fact known by informed observers since December 2011. Rather, Wal-Mart dominated the news cycle more because of the conduct (or lack thereof) of Wal-Mart and its top executives upon learning of potential FCPA issues. Against this backdrop, it is useful to view the Wal-Mart story as a corporate governance sandwich with the FCPA merely a condiment.

In response to the *Times* article, Wal-Mart noted, among other things, that “many of the alleged activities . . . are more than six years old” and that “in a large global enterprise such as Wal-Mart, sometimes issues arise despite our best efforts and intentions.”¹⁵ A Wal-Mart statement continued as follows:

When [problematic issues] arise, we take them seriously and act quickly to understand what happened. We take action and work to implement changes so that the issue doesn't happen again. That's what we're doing today.¹⁶

Distinct Issues and Questions Raised by Wal-Mart's Scrutiny

In the midst of a media feeding frenzy and a divisive company serving as a political punching bag, it may appear old-fashioned to pause and analyze what type of payments Congress intended to capture in passing the FCPA and how courts have interpreted the FCPA in the rare instances FCPA enforcement theories have been subjected to judicial scrutiny.

As noted on my FCPA Professor website within days of the *Times* article¹⁷, Wal-Mart's FCPA scrutiny raises two distinct and important questions that can be asked about many instances of FCPA examinations in this new era of FCPA enforcement.

The Questions. The first question, and the easiest, is whether, *given the SEC's and DOJ's current enforcement theories*, the Mexican payments in connection with permitting, licensing, and inspection issues can expose Wal-Mart to an FCPA enforcement action? The answer is likely yes and in the past few years the enforcement agencies have brought several corporate FCPA enforcement actions premised on payments to obtain foreign licenses, permits, and the like.¹⁸

The second, and more important question, is whether Congress in passing the FCPA intended to capture pay-

ments occurring outside the context of foreign government procurement and involving ministerial and clerical acts by foreign officials?

Congressional Intent. The answer from the FCPA's legislative history is no.

In the mid-1970s Congress learned of a variety of foreign corporate payments to a variety of recipients and for a variety of reasons. Congress accepted and acknowledged in passing the FCPA that it was capturing only a narrow range of foreign payments.¹⁹

For instance, the relevant Senate report stated as follows:

The statute covers payments made to foreign officials for the purpose of obtaining business or influencing legislation or regulations. The statute does not, therefore, cover so-called “grease payments” such as payments for expediting shipments through customs or placing a transatlantic telephone call, securing required permits, or obtaining adequate police protection, transactions which may involve even the proper performance of duties. [. . .] The committee has recognized that the bill would not reach all corrupt payments overseas.²⁰

Likewise, the relevant House report stated as follows:

The bill's coverage does not extend to so-called grease or facilitating payments. [. . .] The language of the bill is deliberately cast in terms which differentiate between such payments and facilitating payments, sometimes called “grease payments.” For example, a gratuity paid to a customs official to speed the processing of a customs document would not be reached by the bill. Nor would it reach payments made to secure permits, licenses, or the expeditious performance of similar duties of an essentially ministerial or clerical nature which must of necessity be performed in any event. While payments made to assure or to speed the proper performance of a foreign official's duties may be reprehensible in the United States, the committee recognizes that they are not necessarily so viewed elsewhere in the world and that it is not feasible for the United States to attempt unilaterally to eradicate all such payments. As a result, the committee has not attempted to reach such payments. [. . .] The committee fully recognizes that the proposed law will not reach all corrupt payments overseas.²¹

Of particular note to the Wal-Mart payments at issue, a month prior to passage of the FCPA, Rep. Robert C. Eckhardt (D-Texas)—a congressional leader on the foreign payments issue—stated on the House floor as follows:

Payments to a [foreign official with ministerial or clerical duties] for instance, to complete a form that ought, in equity, to be completed, to give everybody equal treatment, to move the goods off a dock which he will not move without a tip, a mordida, I think, as they call it in the Spanish language, a facilitating payment, or a grease payment would not constitute a bribe.²²

Consistent with this Congressional intent, when the FCPA was passed in December 1977 it specifically excluded from the definition of foreign official “any employee of a foreign government or any department,

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See FCPA Professor, *Understanding Wal-Mart* (May 1, 2012), available at <http://www.fcpaprofessor.com/understanding-wal-mart>.

¹⁸ See e.g., Mike Koehler, *The Facade of FCPA Enforcement*, Georgetown Journal of Int'l Law at pgs. 972-975 (detailing recent FCPA enforcement actions concerning foreign licenses, permits, applications, and the like), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1705517.

¹⁹ See, e.g., *United States v. Carson*, No. 8:09-cr-00077, declaration of Professor Michael Koehler (C.D. Cal. March 21, 2011), available at <http://www.scribd.com/doc/49310598/U-S-v-Stuart-Carson-el-al-Declaration-of-Professor-Michael-Koehler>.

²⁰ Senate Report No. 114 (May 2, 1977) at p. 7.

²¹ House Report No. 95-640 at pgs. 4-8.

²² See Congressional Record—House (Nov. 1, 1977) at 36306.

agency, or instrumentality thereof whose duties are essentially ministerial or clerical.”²³ This was the FCPA’s original (albeit indirect) facilitating payment or grease payment exception. When Congress amended the FCPA in 1988 it, among other things, changed the definition of foreign official by removing this indirect facilitating payment exception from the definition by creating a stand-alone facilitating payment exception currently found in the statute.²⁴

The relevant House Report indicated that Congress did not seek to disturb Congress’s original intent and stated as follows:

The policy adopted by Congress in 1977 remains valid, in terms of both U.S. law enforcement and foreign relations considerations. Any prohibition under U.S. law against this type of petty corruption would be exceedingly difficult to enforce, not only by U.S. prosecutors but by company officials themselves. Thus while such payments should not be condoned, they may appropriately be excluded from the reach of the FCPA. U.S. enforcement resources should be devoted to activities that have a much greater impact on foreign policy.

Given the above legislative history as to the type of payments Congress intended to capture in passing the FCPA, and the obvious relevance to the Wal-Mart payments discussed in the *Times* article, it is noteworthy that the lengthy article was silent as to the above issues.

Relevant Caselaw

Even if a payment does not meet the FCPA’s facilitation payments exception, in order for there to be a violation of the FCPA’s anti-bribery provisions, the “obtain or retain business” element, among others, must also be met. The enforcement theory likely to be at issue in the Wal-Mart matter—that payments outside the context of foreign government procurement violate the law—has been subjected to judicial scrutiny, it is believed, four times as highlighted below.

United States v. Duran. In 1989, DOJ charged, among others, Alfredo G. Duran—an agent of AEA Aircraft Recovery, a business engaged in the recovery of seized aircraft—with conspiracy to violate the FCPA’s anti-bribery provisions. The government alleged that Duran and other defendants conspired to make payments to officials of the Dominican Republic in order to obtain the release of two aircraft seized by the Dominican Republic government.²⁵

Unlike other defendants who pleaded guilty, Duran, a former Florida state Democratic Party chairman, pleaded not guilty and put the government to its burden of proof at trial. At the close of the government’s case, Duran filed a motion for judgment of acquittal and argued that “no reasonable jury could find that the purpose of any of the alleged intended payments was to assist [. . .] in obtaining or retaining business.” Duran further contended that the government had “failed to adduce sufficient evidence to prove any intended payments were not facilitating or expediting payments for the purpose of expediting or securing routine govern-

mental action (i.e. grease payments).”²⁶ The motion stated that “the legislative history to the 1977 Act makes clear that the evil redressed by the Act was the use of bribery by U.S. corporations to obtain contracts for the sale of goods or services to foreign countries.”²⁷

The motion then noted that in 1988 Congress “created an exception for expediting or facilitating payments for the purpose of securing routine governmental action.”²⁸ The motion stated that by “clear implication, payments in respect of the awarding of procurement contracts of the foreign government are the type of payments targeted” by the FCPA.²⁹

As to the evidence at trial, the motion stated as follows:

Any intended payment was simply for the purpose of hurrying along a bureaucratic process. The purpose of the alleged intended payment was to expedite a routine governmental action. Consequently, no reasonable jury could conclude that the Defendant agreed upon an illegal objective.³⁰

The U.S. District Court for the Southern District of Florida granted the motion.³¹

United States v. Kay (District Court). In 2001, DOJ charged David Kay and Douglas Murphy, the president and vice president of Houston-based American Rice Inc. (ARI), with FCPA anti-bribery violations based on allegations that the defendants made improper payments to Haitian foreign officials for the purpose of reducing customs duties and sales taxes owed by ARI to the Haitian government.³² The indictment, while specific as to other items, merely tracked the FCPA’s “obtain or retain business” language and did not specifically allege how the alleged payments assisted ARI in obtaining or retaining business in Haiti or what business was obtained or retained.³³ As stated by the trial court in the Southern District of Texas: “In other words, the indictment recite[d] no facts that could demonstrate an actual or intended cause-and-effect nexus between reduced taxes and obtaining identified business or retaining identified business opportunities.”³⁴ The court granted the defendants’ motion to dismiss the indictment and held, as a matter of law based on the FCPA’s legislative history, that the alleged payments were not payments made to “obtain or retain business” and thus did not fall within the scope of the FCPA’s anti-bribery provisions.³⁵

SEC v. Mattson. A few months after the district court decision in *Kay*, the Southern District of Texas again considered whether payments made outside the context

²⁶ See Duran’s motion for judgment of acquittal and memorandum of law (S.D. Fla. April 17, 1990), available at <http://www.scribd.com/doc/92621430/USA-v-Pou-Et-Al-Alfredo-Duran-s-Motion-for-Judgment-of-Acquittal>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Judgment of acquittal (S.D. Fla. April 17, 1990), available at <http://www.scribd.com/doc/92621550/USA-v-Pou-Et-Al-Judgment-of-Acquittal-Alfredo-Duran>.

³² *United States v. Kay*, No. 4:01-cr-914 (S.D. Tex. Dec. 12, 2001), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/kayd/03-25-02kay-indict.pdf>.

³³ See *United States v. Kay*, 200 F. Supp. 2d 681 (S.D. Tex. 2002).

³⁴ *Id.*

³⁵ *Id.*

²³ See the FCPA of 1977 (Public Law 95-213).

²⁴ See 15 U.S.C. § 78dd-1(b).

²⁵ See *United States v. Pou*, No. 1:89-cr-00802 (S.D. Fla. Nov. 21, 1989), available at <http://www.scribd.com/doc/92621073/USA-v-Pou-Et-Al-Indictment>.

of foreign government procurement fall under the FCPA's anti-bribery provisions. In a civil enforcement action against Baker Hughes Inc. employees Eric Mattson and James Harris, the SEC claimed that the FCPA captured goodwill payments to an Indonesian tax official for a reduction in a tax assessment.³⁶ The issue before the court was whether the plain language of the FCPA prohibited goodwill payments for the purpose of reducing a tax assessment.³⁷ The court noted that the *Kay* court already found that the plain language of the FCPA does not prohibit goodwill payments to foreign government officials to reduce a tax obligation.

However, the SEC attempted to distinguish the *Kay* ruling by arguing that in the civil enforcement context, the FCPA's language should be construed more liberally than in criminal cases. The court rejected the SEC's argument and followed the trial court's analysis in *Kay* that the payments at issue to the Indonesian tax official did not violate the FCPA because it did not help Mattson's and Harris's employer "obtain or retain business."³⁸

United States v. Kay (Fifth Circuit). DOJ appealed the trial court decision in *Kay*, and one issue on appeal was whether payments to foreign officials to obtain favorable tax and customs treatment can come within the scope of the FCPA's anti-bribery provisions.³⁹

The Fifth Circuit held that making payments to a foreign official to lower taxes and custom duties in a foreign country *can* provide an unfair advantage to the payer over competitors and thereby assist the payer in obtaining and retaining business. The appeals court concluded that there was "little difference" between these type of payments and traditional FCPA violations in which a company makes payments to a foreign official to influence or induce the official to award a government contract.⁴⁰

However, the Fifth Circuit emphatically stated that not all such payments to a foreign official outside the context of directly securing a foreign government contract violate the FCPA; it merely held that such payments "could" violate the FCPA.⁴¹ According to the court, the key question of whether the defendants' alleged payments constituted an FCPA violation depended on whether the payments were intended to lower ARI's costs of doing business in Haiti enough to assist ARI in obtaining or retaining business in Haiti.⁴² The court then listed several hypothetical examples of how a reduction in custom and tax liabilities could assist a company in obtaining or retaining business in a foreign country.

On the other hand, the court also recognized that "there are bound to be circumstances" in which a custom or tax reduction merely increases the profitability of an existing profitable company and thus, presum-

ably, does not assist the payer in obtaining or retaining business.⁴³ The court specifically stated:

[I]f the government is correct that anytime operating costs are reduced the beneficiary of such advantage is assisted in getting or keeping business, the FCPA's language that expresses the necessary element of assisting in obtaining or retaining business would be unnecessary, and thus surplusage—a conclusion that we are forbidden to reach.⁴⁴

In short, the enforcement theory that payments to a foreign official outside the context of foreign government procurement fall under the FCPA's anti-bribery provisions has been subjected to judicial scrutiny four times. The enforcement agencies lost three of those cases and the fourth case—the Fifth Circuit's decision in *Kay*—is equivocal. The decision merely holds that payments to a foreign official outside the context of foreign government procurement can, under appropriate circumstances, fall within the statute.

Given the facts and circumstances the *Kay* court found relevant, it is a highly fact-dependent question whether a payment to a foreign official outside the context of foreign government procurement is subject to the FCPA. A key portion from the *Kay* ruling logically implicated by Wal-Mart's alleged payments is the following: "there are bound to be circumstances in which payments outside the context of foreign government procurement merely increase the profitability of an existing profitable company and thus, presumably, does not assist the payer in obtaining or retaining business."

Do the Issues Even Matter?

In this era of FCPA enforcement when nearly all corporate settlements are negotiated behind closed doors in Washington, D.C., and when nonprosecution and deferred prosecution agreements are used to resolve nearly every instance of corporate FCPA scrutiny in the absence of meaningful judicial scrutiny, it seems a bit old-fashioned to consider congressional intent and relevant caselaw implicated by the Wal-Mart payments. However, the rule of law demands such an analysis.

A logical and practical question thus becomes—does congressional intent and relevant caselaw even matter in this new era of FCPA enforcement when enforcement agencies are not put to their burden of proof in corporate enforcement actions and there is no meaningful judicial scrutiny of such actions? As silly and shocking as it may sound, the answer is no. It will not matter if Wal-Mart's payments are the type Congress intended to capture in passing the FCPA, nor will it matter what relevant case law instructs as to the payments.

Sure, Wal-Mart's counsel can make legal and factual arguments behind closed doors in Washington, D.C. However, to truly challenge DOJ in an instance of FCPA scrutiny, and to put the government to its high burden of proof at trial, the company must first be criminally indicted, something few corporate leaders are willing to let happen. It is simply easier, more cost-efficient, and more certain to resolve FCPA scrutiny, notwithstanding aggressive and dubious enforcement theories or the existence of valid and legitimate defenses. This dynamic is facilitated by the existence of the "carrots" and "sticks"

³⁶ *SEC v. Mattson*, No. 4:01-cv-03106, memorandum and order (S.D. Tex. Sept. 6, 2002), available at <http://www.scribd.com/doc/83019022/SEC-v-Eric-Mattson-and-James-Harris>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

relevant to resolving FCPA enforcement actions. Namely cooperation and acceptance of responsibility are awarded and mounting a legal defense based on the law and facts is not cooperation and acceptance of responsibility and thus punished.

Indeed, in the FCPA's 35-year history, it is believed that only two corporate defendants have put DOJ to its high burden of proof at trial. Even though DOJ's ultimate record in those two instances is 0-2⁴⁵, Wal-Mart will not become the third company in FCPA history to put DOJ to its burden of proof.

Lack of Understanding. In the aftermath of the *Times* article there was extensive commentary, including much criticism that Wal-Mart's conduct would result in FCPA liability. One of the most notable instances was comments made by business mogul Donald Trump, on CNBC's *Squawk Box* program during which he called the FCPA a "horrible law."⁴⁶

However, Trump, like many other commentators following the *Times* article, conflated the issues and failed to understand the two distinct and important questions that can be asked about many instances of FCPA scrutiny, including Wal-Mart's. As to the first question, yes, Wal-Mart's alleged conduct in Mexico can expose the company to an enforcement action given the DOJ's and SEC's current enforcement theories.

As to the second, more important question, the answer is no—Congress did not intend in passing the FCPA to capture payments to foreign officials occurring outside the context of foreign government procurement and involving ministerial and clerical acts and the enforcement agencies have an overall losing record on this enforcement theory when subjected to judicial scrutiny.

The answers to these questions do not make the FCPA a "horrible law." Rather it suggests that FCPA enforcement has, in many cases, gone off the rails and many solutions lie not in the statute itself, but in addressing many of the policies which facilitate such enforcement in this new era.

The Impact of Wal-Mart's FCPA Scrutiny

Notwithstanding the old fashioned issues rooted in the rule of law discussed thus far in this article, the fact remains that Wal-Mart's FCPA scrutiny has already, and will continue, to impact the company and industry peers. In addition, Wal-Mart's FCPA scrutiny has become politicized and will impact FCPA reform. This article concludes with discussion of these topics.

Investor Reaction. Perhaps the most immediate and tangible impact of Wal-Mart's FCPA scrutiny was investor reaction and the decline in its stock price following the *Times* article. On the last trading day before the *Times* article, Wal-Mart's stock closed at \$62.45. The first trading day after the *Times* article, the stock

dropped 4.7 percent and continued a downward trend for a few days, eclipsing approximately \$20 billion in shareholder value. Investors were spooked by the intense media coverage and were likely paranoid by some of the wildly speculative comments, including that Wal-Mart could face approximately \$13 billion in ultimate fines and penalties.⁴⁷ (The largest combined U.S. fine and penalty amount in FCPA history is \$800 million).

However, it did not take long for Wal-Mart's stock to recover all of its value (and outperform the market) after Wal-Mart announced higher-than expected first quarter 2012 earnings. As of this writing, Wal-Mart's stock price was \$73.82 (Sept. 7), and Wal-Mart's FCPA scrutiny once again demonstrates that when a company discloses or is otherwise reported to be under FCPA scrutiny, other than a potential temporary decline in a company's stock often based on misinformed doomsday scenarios, the market cares little about FCPA scrutiny and realizes how diluted FCPA enforcement has become in this current era. Indeed, commenting on the rapid rise in Wal-Mart's stock price after the *Times* induced dip, a *Forbes* commentator stated as follows. "My 30 years of experience in the markets has repeatedly shown to me that whenever a company is accused of violations of FCPA, headlines are always scary, but in the end, the downdraft in the stock invariably becomes a buying opportunity."⁴⁸

Lengthy and Costly Worldwide Review. Although investors ultimately yawned at Wal-Mart's FCPA scrutiny, the facts remain that such scrutiny will result in a gray cloud hanging over the company for several years. Typically, FCPA scrutiny lasts between two and four years from the point of first disclosure to any enforcement action. In some cases, such as Pfizer Inc.'s recent FCPA settlement, this time period can range from six to eight years.⁴⁹ During this pre-enforcement action phase, Wal-Mart is likely to spend hundreds of millions of dollars in professional fees and expenses.⁵⁰

Even though FCPA conduct is often highly localized and results from the actions of specific employees in specific regions facing specific business conditions, the SEC and DOJ will surely be interested in Wal-Mart's conduct in other jurisdiction, not just Mexico. Among other potential areas of inquiry, the enforcement agencies are likely to take a keen interest in how Wal-Mart obtained foreign licenses or permits in other FCPA high-risk jurisdictions. Indeed, in the immediate aftermath of the *Times* article, Wal-Mart itself indicated that it is already conducting a worldwide review of opera-

⁴⁷ See Eric Platt, *How A Walmart Bribery Fine Could Spiral Up Over \$13 Billion*, Business Insider (April 23, 2012), available at http://articles.businessinsider.com/2012-04-23/markets/31385329_1_new-location-international-results-stores.

⁴⁸ Nigam Arora, *Mexican Bribery Gave Me A Chance To Make Money In Wal-Mart*, *Forbes* (May 17, 2012), available at <http://www.forbes.com/sites/greatspeculations/2012/05/17/mexican-bribery-gave-me-a-chance-to-make-money-in-walmart/4/>.

⁴⁹ 07 WCR 623 (8/10/12). See e.g., FCPA Professor, *Of Note From the Pfizer Enforcement Action*, available at <http://www.fcprofessor.com/of-note-from-the-pfizer-enforcement-action> (noting the eight-year time period from Pfizer's disclosure until resolution of the enforcement action).

⁵⁰ For instance, Avon Products Inc. has reportedly spent approximately \$280 million in pre-enforcement action professional fees and expenses since becoming the subject of FCPA scrutiny in 2008.

⁴⁵ FCPA Professor, *One Win, One Loss* (May 16, 2011), available at <http://www.fcprofessor.com/one-win-one-loss>; FCPA Professor, *Milestone Erased . . .* (Dec. 1, 2011), available at <http://www.fcprofessor.com/milestone-erased-judge-matz-dismisses-lindsey-convictions-says-that-dr-lindsey-and-mr-lee-were-put-through-a-severe-ordeal-and-that-lindsey-manufacturing-a-small-once-highly-respected-ente>.

⁴⁶ See CNBC *Squawk Box* (May 15, 2012), available at <http://video.cnbc.com/gallery/?video=3000089630&play=1>.

tions. Companies subject to FCPA scrutiny often initiate such lengthy and costly reviews to demonstrate to the enforcement agencies cooperation and a commitment to compliance, mindful that the agencies themselves will soon ask the “where else” question. Indeed, it was soon learned that Wal-Mart’s review has expanded beyond Mexico to also include Brazil, China, South Africa, and India.⁵¹ Given the expansive enforcement theories discussed above concerning license, permit, and related issues, it is likely that Wal-Mart will learn of additional instances over the past decade in which someone in its organization made payments similar to the Mexican payments giving rise to its initial FCPA scrutiny.

FCPA-Related Civil Lawsuits. Even though courts have held that the FCPA does not contain a private right of action⁵², Wal-Mart’s FCPA scrutiny has resulted in a flood of private shareholder lawsuits that will impact the company. Consistent with the trend in this new era of FCPA enforcement, within days of the *Times* article, various plaintiff law firms announced investigations of Wal-Mart, its board, and executives.⁵³ Approximately 10 days later, civil lawsuits that generally tracked the *Times* article began to pour in as shareholders brought derivative claims against various officers and directors alleging breach of fiduciary duty as well as shareholder class actions lawsuits to recover for loss in company stock (notwithstanding the stock issues discussed above).⁵⁴

At present, at least 12 shareholder lawsuits have been filed against Wal-Mart and/or its officers and directors in the wake of the *Times* article. Even though such lawsuits in the FCPA context rarely survive the motion to dismiss stage, it is not uncommon for companies to settle such claims for millions of dollars (a sum that often represents mere nuisance value for the companies, but a handsome payday for the plaintiff’s firm).

Retail Industry Sweep. During this new era of FCPA enforcement, the term “industry sweep” has become part of the vocabulary. Industries that have been subjected to, or are currently in the midst of, industry sweeps include oil and gas, pharmaceutical and medical devices, and financial services to name a few. “Industry sweeps are investigations that grow out of perceived FCPA violations by one company that enforcement agencies believe may reflect an industry-wide pattern of wrongdoing.”⁵⁵

Wal-Mart is clearly not the only company subject to the FCPA that needs licenses, permits, and the like when doing business in Mexico or other countries. Thus, it is not surprising that its exposure had caused much angst among other retailers and resulted in a

sweep of the retail industry. According to a recent Reuters report, “other retail companies have also since reported to U.S. agencies suspicions of their own potential violations, which in turn has the Justice Department and SEC considering a sweep of the entire industry.”⁵⁶

On one level, industry sweeps represent effective law enforcement. Yet on another level, industry sweeps have the potential to turn into boundless enforcement agency fishing expeditions, the cost of which are borne by the companies subject to the sweep. When the origins of the sweep are based on aggressive enforcement theories that the agencies have an overall losing record on when subjected to judicial scrutiny, the effects of such boundless sweeps raise a host of legal and policy issues.

FCPA Reform

The increase in FCPA enforcement, the many aggressive and often untested enforcement theories, the resolution vehicles used to resolve FCPA scrutiny, and the increased competition U.S. businesses face in the global marketplace have all led to a vibrant FCPA reform debate during the past few years. Both the Senate and House held FCPA hearings and various reforms—such as amending the FCPA to include a compliance defense—have been proposed and debated by commentators and interested participants. However, the conventional wisdom is that DOJ’s announcement of FCPA guidance in November 2011⁵⁷ forestalled introduction of an actual reform bill (as of this writing the guidance has not yet been issued).⁵⁸

Reform Opponents Pounce. Wal-Mart’s FCPA scrutiny has further derailed limited and sensible FCPA reform as reform opponents (who often appear incapable of having a substantive, issue-based discussion concerning a law called the Foreign Corrupt Practices Act) used Wal-Mart’s high-profile scrutiny to further their positions.

Indeed, much of the FCPA reform discussion in the aftermath of the *Times* article has focused less on substantive issues, but merely on one voice in the FCPA reform debate, that of the U.S. Chamber of Commerce.⁵⁹ It was suggested that “while Wal-Mart’s largest subsidiary spent millions of dollars systematically bribing Mexican officials, the company back home has been working, through big business groups like the U.S. Chamber of Commerce, to weaken the Foreign Corrupt Practices Act.”⁶⁰

Such statements wholly ignore the fact that the Mexican conduct at issue in Wal-Mart occurred approximately seven years ago, appears to have been concealed

⁵¹ See http://democrats.energycommerce.house.gov/sites/default/files/documents/Letter_Walmart_06.12.12_0.pdf.

⁵² See *Lamb v. Phillip Morris Inc.*, 915 F.2d 1024 (6th Cir. 1990).

⁵³ See e.g., *Kendall Law Group Investigates Wal-Mart Stores, Inc.*, EON: Enhanced Online News (April 23, 2012), available at <http://eon.businesswire.com/news/eon/20120423005443/en/wal-mart/walmart/wmt>.

⁵⁴ See e.g., Stephanie Clifford, *Pension Plan Sues Wal-Mart Officials Over Failures*, New York Times (May 3, 2012), available at http://www.nytimes.com/2012/05/04/business/pension-plan-sues-wal-mart-over-bribery-case.html?_r=2.

⁵⁵ See FCPA Professor, *Industry Sweeps* (guest post by Homer Moyer, Miller & Chevalier) (Jan. 25, 2010), available at <http://www.fcprofessor.com/industry-sweeps>.

⁵⁶ See Aruna Viswanatha, *Exclusive: U.S. weighs retail sweep after Wal-Mart bribery scandal*, Reuters (July 26, 2012), available at <http://www.reuters.com/article/2012/07/27/us-usa-retail-bribery-idUSBRE86P1TZ20120727>.

⁵⁷ See FCPA Professor, *DOJ Guidance—Better Late Than Never, But Will It Matter?* (Nov. 10, 2011), available at <http://www.fcprofessor.com/doj-guidance-better-late-than-never-but-will-it-matter>.

⁵⁸ 07 WCR 487 (6/15/12).

⁵⁹ 07 WCR 292 (4/6/12).

⁶⁰ See *After its Subsidiary Bribed Mexican Officials, Wal-Mart Lobbies to Weaken Anti-Bribery Laws*, Republic Report (April 23, 2012), available at <http://www.republicreport.org/2012/wal-mart-bribed-mexicans-lobbied-fcpa/>.

from corporate headquarters, and for the reasons stated above, is unlikely to actually violate the FCPA.

Congress Gets Involved. Nevertheless, politicians jumped on the bandwagon and seized the opportunity to score political points.⁶¹ Reps. Henry Waxman (D-Calif.) and Elijah Cummings (D-Md.) sent letters to the chairman of the board of directors of the Retail Industry Leaders Association and the president of the U.S. Chamber of Commerce stating as follows:

We are concerned about the role that Wal-Mart officials may have played in the Chamber's Institute for Legal Reform ("ILR"). It would appear to be a conflict of interest for Wal-Mart officials to advise on ways to weaken the Foreign Corrupt Practices Act at a time when the leadership of the company was apparently aware of corporate conduct that may have violated the law.⁶²

Soon thereafter, the congressmen again put pen to paper, sending a letter to the president of the Chamber of Commerce stating as follows:

A new analysis by our staff reveals that Wal-Mart is not the only company represented on the ILR's board that has faced allegations that it violated the Foreign Corrupt Practices Act. Our review of ILR's tax filings from 2007 to 2010, member companies' filings with the U.S. Securities and Exchange Commission (SEC), and other documents reveals that 14 out of 55 ILR board members—almost one in four—were affiliated with companies that were reportedly under investigation for violations or had settled allegations that they violated the Foreign Corrupt Practices Act.⁶³

Instead of focusing on the big-picture issue of why more than 100 companies across various industry sectors are the subject of FCPA scrutiny, including many companies that have been designated "World's Most Ethical Companies", the reality is that it is more politically expedient to exploit tangential issues rather than focus on substantive issues relevant to FCPA reform.

The impact of Wal-Mart's scrutiny on FCPA reform is all the more curious given that its scrutiny was first disclosed in December 2011 and given that Wal-Mart's story is mostly a corporate governance story. However, perceptions matter on Capitol Hill.

At an industry conference in June, the chief counsel for the House Energy and Commerce Subcommittee for Oversight and Investigations, stated that the *Times* article "changed the tide and mood [of FCPA reform] en-

tirely."⁶⁴ When asked why Wal-Mart should impact FCPA reform, given that the company is merely one of approximately 100 companies the subject of FCPA scrutiny and given that the Wal-Mart payments may not even violate the FCPA, the chief counsel stated that as a "practical matter, public opinion matters, what happens in the real world matters," and the atmosphere surrounding FCPA reform after the *Times* article has made it "harder for different groups to advocate" for FCPA reform.⁶⁵

Honest Debate Has Always Been Political Hot Potato.

Such comments underscore the point that honestly debating and considering changes to a statute called the Foreign Corrupt Practices Act has always been a political hot potato. Indeed, several reform bills in the 1980s sought to change the name of the law to the "Business Accounting and Foreign Trade Simplification Act" so that an honest and considered debate could occur.

Wal-Mart's FCPA scrutiny should not derail FCPA reform, but the reality is that it, along with the Justice Department's promise of FCPA guidance, has caused FCPA reform to take a long vacation. When reform discussions resume, and I predict with time they will, guiding words can be found from key participants during the last substantive FCPA reform debate in the 1980s. For instance, during Senate hearings in the '80s, Sen. John Heinz (R-Pa.) stated as follows:

... There are many people that are extremist, and there are others who get carried away by their enthusiasm who are going to argue that even if we change the provisions in the [FCPA] ... that even though we are not doing so, we are legalizing bribery. That strikes me as the worst kind of demagoguery, because it implies that everything that Congress has done in the past is perfect. And does anybody believe that?

U.S. Trade Representative William Brock similarly observed, during a 1982 FCPA reform hearing, as follows:

Just because the Foreign Corrupt Practices Act spotlights a sensitive subject, some people wish to turn a "blind eye" to its shortcomings rather than risk being accused of being "soft on bribery." That is too easy a way out. Retreating from controversy will not cure the law's deficiencies. [...] Is there any U.S. law that ought to be above such review and clarification—especially one as complex as the FCPA.

The answer, of course, is no. Wal-Mart's potential FCPA scrutiny should facilitate, not diminish, the analysis of many critical questions highlighted by the current era of FCPA enforcement.

⁶¹ 07 WCR 346 (5/4/12).

⁶² 07 WCR 347 (5/4/12); See http://democrats.energycommerce.house.gov/sites/default/files/documents/Letter_Donohue_04.25.12.pdf.

⁶³ 07 WCR 433 (6/1/12); See http://democrats.energycommerce.house.gov/sites/default/files/documents/Letter_Donohue_05.22.12.pdf.

⁶⁴ See FCPA Professor, *The FCPA—A View From the Hill* (June 28, 2012), available at <http://www.fcprofessor.com/the-fcpa-a-view-from-the-hill>.

⁶⁵ *Id.*