## *Does the FCPA Apply to Retailers? Ask Wal-Mart (or Aaron Murphy)*

I am often asked the question by representatives of retailing companies of whether the Foreign Corrupt Practices Act (FCPA) applies to their businesses. While I have always answered in the affirmative, this question was succinctly answered this week with an announcement by Wal-Mart that it had initiated an internal investigation related to possible violations of the FCPA. Further, as reported by the FCPA Professor, Wal-Mart announced in a December 8, 2011 10K filing that "The Company has voluntarily disclosed its internal investigation to the U.S. Department of Justice [DOJ] and the Securities and Exchange Commission [SEC]."

So what risks can put a retailer under FCPA scrutiny? In a book entitled "***Foreign Corrupt Practices Act – A Practical Resource for Managers and Executives***" author Aaron Murphy, a partner at the firm of Latham and Watkins, explored the question of what are "the most common problems areas where managers get themselves into FCPA trouble." In a chapter entitled "*You Do More With the Government Than You Think"* Murphy gives several examples of how any US company doing business overseas will come into contact with a foreign governmental official and, thereby, create a risk for possible FCPA liability. The following interactions would certainly apply to a retailer:

- ***Interactions with Customs Officials.*** Every time your company sends raw materials into, or brings them out of, a country there is an interaction with a foreign governmental official in the form of a Customs Official. Every customs transaction involves a payment to a foreign government and every transaction involves some form of a foreign governmental regulatory process. While the individual payment per transaction can be small, the amount of total transactions can be quite high, if a large volume of goods are being imported into a foreign country.
- ***Interaction with Tax Officials.*** While noting that interacting with international tax authorities can present problems similar to those with customs officials, Murphy observes that the stakes can often be much higher since tax transactions may be less in frequency but higher in financial risk. These types of risks include the valuation of raw materials for VAT purposes before such materials are incorporated into a final product, or the lack of segregation between goods to be sold on the foreign country's domestic market as opposed to those which may be shipped through a free trade zone for sale outside that country's domestic market.
- ***Licensing and Permits.*** If your company is a retail seller of clothes, cosmetics etc., every physical location that you sell your goods in will require some type of license to operate your business. It could require multiple licenses such as a national license, state license and local municipal license, additionally you will need a building permit if you intend to build out or modify your retail stores.
- ***Work Permits and Visas.*** If your company does any business overseas it will have to send someone from the home office to operate in-country at some point. In the post-9/11

world this probably means that, at a minimum, your company will have to obtain a visa for each employee who enters the foreign country and perhaps a work permit as well. The visa process can start in the United States with a trip to foreign government consulate or even the embassy and at that point you are dealing with a foreign governmental official. The work permit process can also begin in the United States but often may continue in the foreign country.

- ***Inspections and Certifications.*** We recently wrote about franchising overseas and the impact of the FCPA on such businesses. Consider the Tex-Mex restaurant chain which desires to take this cuisine across the world. In any city in the world there will be some type of certification process to enable to the business to set up and start operating and then there will be the need for ongoing inspections for sanitary conditions. Such inspections may be rare but if there is "*slime in the ice machine*" it may be grounds to close the restaurant.

Wal-Mart has not specified the FCPA violations it may have been involved in, or the countries which are currently the subject of its internal investigation, or notification to the DOJ and SEC. However, the New York Times (NYT) reported on December 10, 2011, that Wal-Mart did say that the internal investigation included several matters, including, "permitting, licensing, and inspection." Wal-Mart's inquiry makes Aaron Murphy sound like the Nostradamus of FCPA prognosticators about now. The NYT article reported that international business now makes up 30% of Wal-Mart's overall sales in the most recent quarter and that the biggest sales jumps came in "China, Mexico and Argentina." For those of you keeping score at home, those countries have 2011 Transparency International-Corruption Perceptions Index ratings of 3.6, 3.0 and 3.0 for rankings of 75 for China and 100 for both Mexico and Argentina. In other words, they are all countries where you keep your FCPA guard up.

The greater lesson for any US retailer doing business overseas is that the Wal-Mart matter is a stark reminder of the scope and application of the FCPA for any company operating overseas. Retailers which do not have a FCPA compliance program in place would be well served to put one in place sooner rather than later. For retailers which have a FCPA compliance program in place, they should use this public announcement to re-assess their risks and re-visit their FCPA compliance program to determine what, if any, additional steps they need to take. I would also suggest that you call Aaron Murphy, as in yesterday.