

Wal-Mart's Bribery in Mexico Part 2: Insights into Specific Corruption Risks

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A lot has been discussed about Wal-Mart over the last three days since the [New York Times' bribery story](#) broke. FCPAméricas offered its initial thoughts in [Part 1](#) of this series. The story will no doubt continue. Enforcement officials will eventually act. The ways in which the New York Times obtained such detailed information will hopefully emerge. A plaintiff's law firm has already purchased the Google advertising search terms "FCPA Attorneys Wal-Mart," and shareholder derivative suits are sure to follow.

What is the anti-corruption compliance professional to make of all of this? Below, FCPAméricas lists eight risk indicators suggested by the Wal-Mart de Mexico matter.

Considerations of Mexican Culture. The Times article suggests that one of the reasons why Wal-Mart executives in Bentonville did not respond more forcefully to the allegations was that they felt bribery was just part of Mexican culture: "It's a Mexican issue; it's better to let it be a Mexican response." There was a prevailing sense that those who thought the issue should be aggressively investigated and remediated were "naïve about the moral ambiguities of doing business abroad." This attitude, if true, was arrogance masquerading as sophistication. Aside from the disregard it shows for Mexican law, which prohibits bribery, it ignores the vast majority of Mexicans who consider bribery unethical and unacceptable. It also fails to understand that cultural considerations [are irrelevant to FCPA enforcement](#). (Note, however, that cultural considerations [are vital to crafting effective FCPA compliance mechanisms](#).)

Risks in Rapid Growth. Enforcement has warned of the corruption risks associated with a company's quick international growth. Diageo was a company that pursued rapid global expansion through aggressive acquisitions. In its \$16.4 million FCPA [settlement](#), the SEC stated, "Diageo's history of rapid multinational expansion through mergers and acquisitions contributed to defects in its FCPA compliance programs." It appears that Wal-Mart de Mexico's bribery program was rooted in a strategy of building business so quickly that it would crowd out the competition. When this strategy proved successful, Wal-Mart de Mexico became the company's shining star and its executives were tapped for advancement. While companies are understandably hesitant to disturb successes (whether that means a star division, salesperson, or agent), it is vital that companies be willing to scrutinize questionable business practices whenever and wherever they appear. As noted by the Times, "top Wal-Mart officials focused more on damage control than on rooting out wrongdoing." In doing so, those officials appear to have created massive problems for the company. In areas like growth, caution is required.

Understanding Facilitating Payments. The Times article describes millions spent on "facilitating payments" and authorizations of up to \$280,000 for a single "facilitating payment." This indicates an abuse of the concept. Facilitating payments are a permissible exception to the FCPA's anti-bribery provisions. The exception covers small, routine payments to get an official to do what he or she is already obligated to do. It appears from the Times report that the payments by Wal-Mart de Mexico were neither routine nor small. They also might not have been made to cause an official to fulfill an obligation but

instead to use his or her own discretion. Thus, Wal-Mart appears to have incorrectly labeled a wide array of illicit payments “facilitating payments.” Compliance officers should note this temptation and ensure that any “facilitating payments” are subject to strict oversight and high-level approval and are properly recorded in the company’s books and records.

Lawyers as Third Party Intermediaries. Use of lawyers to pay bribes might not be a typical red flag. Officers of the court do not usually conjure up the same imagines of shady, backroom business deals as other third parties might – though I admit my possible personal bias. In Latin America, however, using lawyers to make improper payments is not uncommon. FCPAméricas has [previously cited](#) their use as a common red flag. In the case of Wal-Mart de Mexico, it appears that lawyers were one of the primary vehicles through which bribes were paid. Two lawyers alone received more than \$8 million over the span of just a couple of years. In return, the company received permits within weeks, or even days, allowing it to quickly build stores and crowd out any competition. Take note, a company’s lawyers should be subject to the same level of due diligence as other third parties.

Corruption Risks in Retail. Big-Box retailers might not be obvious companies to face FCPA risk. Retail is not a classic “high risk industry”, like oil and gas, telecommunications, or aerospace. But, as the Times article shows, retail does have frequent government interactions in high-risk environments. It appears that Wal-Mart paid millions in bribes for things like obtaining construction permits and zoning approvals and reducing environmental impact fees. This case serves as a reminder of the importance of a clear-eyed risk assessment. For more on the corruption risks in retail, see [Tom Fox, Aaron Murphy](#), and others.

Bribes to Low-Level Bureaucrats. The bribes described in the Times article generally went to low-level bureaucrats. Wal-Mart representatives reportedly gave envelopes of cash to Mexican mayors, city council members, urban planners, and others at the local level. These bribes apparently bought “zoning approvals, reductions in environmental impact fees and the allegiance of neighborhood leaders.” The FCPA does not differentiate between a bribe paid to the Minister of Finance and one paid to an official at a municipal water district. Companies should be alert to such risks.

Gestores. Third party consultants used to navigate opaque bureaucracies and process day-to-day paperwork are common in parts of Latin America. They have different names depending where you are: in Brazil, they are known as *despachantes*; in Mexico, *gestores*. While their use can be legitimate, FCPAméricas [has written](#) previously about the significant corruption risks they create. They are a product of [poor regulatory systems](#). Wal-Mart’s gestores appear to have kept 6% of the bribes they paid for compensation. I have seen such percentages range from 5% to 15%. Did Wal-Mart get a volume discount? While these agents can at times be necessary, they should be considered high risk and subject to the most vigilant due diligence and oversight.

Systematic Accounting Manipulation. The Times report shows how Wal-Mart de Mexico used a system of secret accounting codes to track bribe payments and facilitate an efficient corruption scheme. The codes marked specific destinations of payments in categories like “Speed of applications,” “Elimination of a requirement,” “Donations in cash without receipts,” and “Government agencies discretionary authority.” All entries were then falsely recorded as legal fees. The FCPA’s books and records and internal controls provisions are just as important as its anti-bribery provisions themselves. FCPA cases are

regularly built on accounting and controls violations alone, not anti-bribery violations. The Times article highlights the need for adequate financial controls to address such liability. Had adequate controls been in place, records (e.g., written authorizations and payment receipts) would have been kept, the accounts would have been reviewed, and this pattern would likely have been detected.

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