Wal-Mart's Bribery in Mexico
Part 1: Notable FCPA Aspects of the NYT Exposé

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You know a corruption story is big when your in-box gets flooded with links to it in a matter of hours. Yesterday's New York Times exposé about Wal-Mart de Mexico's "campaign of bribery to win market dominance" is one of these stories. You can just picture DOJ and SEC regulators reading their Sunday Times over morning coffee, teasing out each detail. It is a made-for-TV movie.

The FCPA issues are so numerous and important that they deserve more than one blog post. FCPAméricas gives them two. Part 1 (below) highlights four of the general FCPA issues worth noting. Part 2 will discuss the specific corruption risks the news report raises.

Remarkable Press Coverage. I am generally wary about press reports on alleged FCPA violations before the actual company or regulators have spoken. I am working for a client right now that has had a compliance issue repeatedly misrepresented in the press, in some of the largest and most respected news sources. Journalists can get the facts wrong. Or they can miss the whole picture.

But, in the case of Wal-Mart, David Barstow of the New York Times takes the reader on a well-researched, well-supported journey of specific wrongdoing at almost every level of the company's operations, from the shady third-party agents in Mexico to the Chief Executive in Bentonville, Ark. A close read of Wal-Mart's public response shows that the company does not deny the allegations. The article is exceptional journalism. Samuel Rubenfeld of the Wall Street Journal's Corruption Currents Blog tweets: "The NYT story on Wal-Mart might be some of best FCPA reporting I've seen since starting to cover it in 11-2010. Wow."

Empowering Compliance Counsel. We learn that Wal-Mart repeatedly sought to undermine compliance efforts. This is not unique to Wal-Mart. The CEO of the global intelligence company Stratfor, a company whose widespread bribery activities have recently been exposed, reportedly told his employees: "We are retaining a law firm to create a policy for Stratfor on the Foreign Corrupt Practices Act. I don't plan to do the perp walk and I don't want anyone here doing it either." FCPAméricas has written about other companies, like Koch Industries, where top management reportedly sought to hush up allegations of bribery.

However, with press reports like the one from the Times, the attitude of "create a paper compliance program, but do not follow its rules" is something of the past. The days are gone when compliance efforts can be half-hearted. Unless management is fully committed, it runs massive risks under the law, and with public relations. No executive wants his or her picture, like those at Wal-Mart, prominently displayed by a bribery headline. Compliance counsel would be wise to send the Times article to their management and boards as a precaution.

Whistleblower Threats Are Real. Someone gave Mr. Barstow access to "hundreds of internal documents," including e-mails, internal investigator reports, and minutes from meetings. How did he get this information? It appears that the source might have been a whistleblower. Under Dodd-Frank, whistleblowers can recover between 10% and 30% of funds collected by enforcement. Since the whistleblower provisions are still new, there are still differing views about their eventual impact on FCPA enforcement. Some say that whistleblower threats are more alarmist than anything. This news report might suggest the opposite. And it could happen to any company. Whistleblowers do not even have to be people out to get rich from a bounty. They might be people with a strong ethical core, or people who are disgruntled. For example, the person at the middle of Wal-Mart's scheme appears to have revealed information because he felt underappreciated and was passed over for a job. This is yet one more reason to take compliance seriously.

Escalating Internal Reviews. As FCPAméricas has written, one of the hardest things for companies to do is weigh allegations of wrongdoing and determine whether or not to escalate the issue. Full-fledged investigations can be expensive, time-consuming, and disruptive.

Wal-Mart management initially chose to forgo a full-scale internal investigation and first handle the matter internally. There was nothing wrong with this decision. As FCPAméricas has written, when there is smoke but not yet fire, companies are wise to do a targeted internal review before committing to a full-blow investigation that includes teams of lawyers and accountants, computer forensics, and extensive document reviews. Efficient and nimble experts can make rapid, preliminary assessments for lower costs. In this case, Wal-Mart's internal audit appears to have done a thorough job.

But, if the Times reporting is true, after the preliminary report came back positive, Wal-Mart's decision should have been an easy one. The allegations were clear and credible, alternative theories were not fully supported, and questions remained. Management should have immediately escalated the matter. Instead, Bentonville sent the investigation back to its Mexican operations, to be handled by the very unit that was implicated. As one company lawyer wrote in her resignation e-mail: "The wisdom of assigning any investigative role to management of the business unit being investigated escapes me."