

June 25, 2019

Walmart Agrees to Pay \$282 Million to Resolve DOJ and SEC FCPA Charges

On June 20, 2019, the Department of Justice and the Securities and Exchange Commission announced long-awaited resolutions with Walmart, Inc. for violations of the books and records and internal accounting provisions of the Foreign Corrupt Practices Act (FCPA). In addition to entering into a three-year non-prosecution agreement, and agreeing to the imposition of a compliance monitor for two years, Walmart agreed to pay \$137 million to settle the DOJ's criminal charges and a further \$144 million to resolve parallel civil charges brought by the SEC. Additionally, Walmart consented to the SEC's finding that it violated the books and records and internal accounting provisions of the FCPA. Relatedly, WMT Brasilia, S.a.r.l. ("WMT"), Walmart's wholly owned Brazilian subsidiary, pleaded guilty in connection with the resolution.

Specifically, the DOJ and the SEC alleged that from 2000 until 2011, Walmart personnel responsible for implementing and maintaining the company's internal accounting controls were aware of certain compliance failures, including relating to potentially improper payments to government officials. The internal controls failures allowed Walmart's foreign subsidiaries in Brazil, China, Mexico and India to hire third-party intermediaries without establishing sufficient controls to prevent those intermediaries from making improper payments to government officials in return for store permits and licenses. In a number of instances, insufficiencies in Walmart's internal accounting controls in these foreign subsidiaries were reported to senior Walmart employees and executives. The internal control failures allowed the foreign subsidiaries to open stores faster than they would have been able to otherwise, enabling Walmart to earn additional and improper profits through these subsidiaries.

According to the DOJ, these violations were attributable, at least in part, to a policy that favored rapid international expansion over compliance. As Assistant Attorney General Brian A. Benczkowski observed, "Walmart profited from rapid international expansion, but in doing so chose not to take necessary steps to avoid corruption."¹ That policy precipitated an eight-year internal investigation and extensive remediation, as well as numerous lawsuits, generating legal fees and other expenses nearing \$1 billion, excluding the \$282 million settlement. Indeed, in fiscal years 2016 through 2018 alone, the company spent more than \$269 million in investigations and compliance enhancements.²

¹ Press Release, Dep't of Justice, *Walmart Inc. and Brazil-Based Subsidiary Agree to Pay \$137 Million to Resolve Foreign Corrupt Practices Act Case* (June 20, 2019) (hereinafter "DOJ Press Release"), available [here](#).

² Walmart, Annual Report, 80 (Mar. 30, 2018), available [here](#).

Factual Allegations

According to the DOJ and the SEC, the Walmart personnel responsible for implementing and maintaining the company's internal accounting controls relating to anti-corruption, including certain executives at the company's foreign subsidiaries, were aware of the failures in these controls, but they failed to investigate sufficiently or mitigate certain anti-corruption risks.³ Instead, they allowed subsidiaries in Brazil, China, India and Mexico to employ third-party intermediaries who made payments to foreign government officials without adequate assurances that they complied with the FCPA. The payments were made to obtain or accelerate the issuance of building permits and other licenses. In their respective filings, the DOJ and the SEC detail instances in which Walmart, or its subsidiaries, planned to but delayed implementing proper compliance and training and allowed deficient internal accounting controls to persist despite red flags and corruption allegations.

According to the DOJ, had Walmart instituted adequate internal accounting controls, they would have ensured that, among other things: (a) sufficient anti-corruption-related due diligence was conducted on all third-party intermediaries who interacted with foreign officials; (b) sufficient anti-corruption-related internal accounting controls concerning payments to third-party intermediaries existed; (c) that proof was required that third-party intermediaries had performed services before Walmart paid them; (d) that third-party intermediaries had written contracts that included anti-corruption clauses; (e) that donations ostensibly made to foreign government agencies were not converted to personal use by foreign officials; and (f) that policies covering gifts, travel and entertainment sufficiently addressed giving things of value to foreign officials and were implemented.⁴ Even though senior Walmart personnel responsible for implementing and maintaining the company's internal accounting controls related to anti-corruption knew of these issues, Walmart did not begin to change its internal accounting controls related to anti-corruption to comply with U.S. criminal laws until 2011.⁵

In Brazil, despite repeated findings in internal audit reports that such internal anti-corruption controls were lacking, WMT continued to retain and renew contracts with third-party intermediaries without conducting the due diligence required by Walmart's internal policies. Improper payments were paid by some of these intermediaries, without the knowledge of WMT, including by a construction company that made improper payments to government officials in connection with the construction of two stores in Brazil. According to the DOJ, despite red flags, WMT indirectly hired an intermediary whose ability to obtain licenses and permits quickly earned her the nickname "sorceress" or "genie" within the Brazilian subsidiary.⁶ WMT

³ See DOJ Press Release; Press Release, SEC, *Walmart Charged with FCPA Violations* (June 20, 2019), available [here](#).

⁴ See DOJ Press Release.

⁵ See *id.*

⁶ See *In the Matter of Walmart, Inc.*, Exchange Act Release No. 86159, ¶¶ 48-51 (June 20, 2019), available [here](#) (hereinafter "Release No. 86159"); *U.S. v. WMT Brasilia S.a.r.l.*, No 1:19-cr-192, Plea Agreement (E.D. Va. June 20, 2019) (hereinafter

pleaded guilty to a one-count criminal information charging the subsidiary with causing of a violation of the books and records provisions of the FCPA.⁷

In China, between 2003 and 2011, Walmart's local subsidiary's internal audit team identified weaknesses in internal accounting controls, but, from 2007 until early 2010, Walmart and the subsidiary failed to address nearly all of the anti-corruption-related internal controls audit findings.⁸

In India, from 2009 until 2011, Walmart's operations retained intermediaries that made improper payments to government officials to obtain store operating permits and licenses. These improper payments were then falsely recorded in Walmart's joint venture's books and records⁹ with vague descriptions like "misc fees," "miscellaneous," "professional fees," "incidental" and "government fee."¹⁰

Similarly, in Mexico, in 2005 a former attorney for Walmart's local subsidiary reported to Walmart that he had overseen a scheme for several years prior in which third-party intermediaries made improper payments to government officials to obtain permits and licenses for the subsidiary and that several executives at the subsidiary knew of and approved of the scheme.¹¹ According to *The New York Times*, which first broke the story in 2012, Walmart unearthed evidence of bribery totaling more than \$24 million.¹²

Although certain Walmart executives discussed revising the company's anti-corruption policy and procedures shortly after they were first promulgated in March 2005, it took the company two years to announce the launch of a "new and enhanced" anti-corruption program. Walmart published the revised anti-corruption program in December 2008, but according to the SEC, it was insufficiently implemented at the time.¹³ Then, in April 2009, Walmart informed its foreign subsidiaries that it would produce anti-corruption standards before circulating a one-page document that summarized the FCPA, acknowledged that gifts and other things of value could be given to government officials in certain circumstances, noted that the standards applied to third-party intermediaries, and provided contact information for the company's global ethics office.¹⁴ In 2011, in recognition that its existing anti-corruption compliance

"WMT Plea"), Ex. 2, [available here](#); Robert Zink to Karen P. Hewitt (June 20, 2019) (hereinafter "NPA"), Ex. A, ¶¶ 51-59, [available here](#).

⁷ WMT Plea at ¶ 1.

⁸ See Release No. 86159 at ¶¶ 23-25, 39; NPA, Ex. A, ¶¶ 60-63.

⁹ See Release No. 86159 at ¶¶ 40-47; NPA, Ex. A, ¶¶ 42-50.

¹⁰ See NPA at ¶ 48; DOJ Press Release.

¹¹ See Release No. 86159 at ¶¶ 28-38; NPA, Ex. A, ¶¶ 27-41.

¹² David Barstow, "Wal-Mart Hushed Up a Vast Mexican Bribery Case," *THE NEW YORK TIMES* (Apr. 21, 2012), [available here](#).

¹³ See Release No. 86159 at ¶ 53.

¹⁴ See *id.* at ¶ 54; NPA, Ex. A, ¶¶ 21-26.

program was deficient, Walmart retained outside counsel and consultants to conduct a worldwide anti-corruption compliance review.¹⁵

Walmart entered into a three-year non-prosecution agreement and agreed to retain an independent corporate compliance monitor for two years.¹⁶ In keeping with new guidance announced last October, the DOJ determined that an independent compliance monitor was “necessary to ensure that the Company’s compliance program is operating effectively and [is] adequately tested.”¹⁷ The \$137 million penalty reflects a 20 percent reduction off the bottom of the applicable U.S. Sentencing Guidelines fine range for the portion of the penalty applicable to conduct in Mexico and 25 percent for the portion applicable to the conduct in Brazil, China and India.¹⁸ The \$137 million penalty includes forfeiture of \$3.6 million and a fine of \$724,898 from WMT Brasilia.¹⁹ According to the DOJ, Walmart fully cooperated with the investigation in Brazil, China and India, but, in connection with the conduct in Mexico, it did not timely provide documents and information to the government and did not fully assist with the government’s request to interview one witness before Walmart interviewed that witness.²⁰ Walmart did not voluntarily disclose the conduct in Mexico and only disclosed the conduct in Brazil, China and India after the government had already begun investigating the Mexico conduct.²¹

Analysis

The settlements with Walmart are further examples of the DOJ and the SEC using the FCPA’s accounting provisions in cases in which they believe an issuer’s compliance program creates the potential for bribery.²² Notwithstanding the numerous allegations of improper payments to foreign officials, of knowledge, across multiple subsidiaries and to some degree at the parent company, of deficient controls and awareness that Walmart was expanding internationally at an expedited rate, neither the DOJ nor the SEC concluded there was actual knowledge or even willful blindness of actual bribery, and thus they did not bring any anti-bribery charges.

¹⁵ See Release No. 86159 at ¶ 56.

¹⁶ See NPA at 3-4.

¹⁷ NPA at 3.

¹⁸ See *id.*

¹⁹ See WMT Plea at ¶ 19(b).

²⁰ See NPA at 3-4.

²¹ See NPA at 1-2.

²² See Paul, Weiss Client Memorandum, “SEC Fines Telefônica Brasil S.A. \$4.125 Million Relating to World Cup Tickets Given to Government Officials” (May 13, 2019), available [here](#).

Seen in this light, the cost to Walmart of pursuing international expansion without adequate regard to robust compliance measures has been significant. Although the dollar amount of Walmart's settlements with the DOJ and SEC may seem small compared with recent large settlements, such as Mobile Telesystems PJSC (\$850 million),²³ the SEC settlement alone is substantial when compared with other "risk of bribery" cases, such as the SEC's recent settlement with Telefônica Brasil S.A. (\$4.125 million).²⁴ Even so, the \$282 global settlement amount is considerably less than the \$600 million that federal prosecutors and regulators sought toward the end of the Obama administration,²⁵ which may be partly attributable to the \$900 million that the company has reportedly spent on its own internal investigation and internal compliance upgrades since it initially disclosed its FCPA investigation in 2011.²⁶ Indeed, the DOJ recognized that the company had "engaged in significant remedial measures" and that Walmart enhanced and was "committed to continuing to enhance its compliance program and internal accounting controls."²⁷ Even so, the DOJ still imposed a compliance monitor and the \$900 million does not include expenses the company incurred defending a stock-drop class action and a consolidated derivative suit, both brought as a result of the FCPA violations.²⁸ The significant expenditures the company has incurred as a result of the misconduct serve as an important reminder of the value of having a clear and well-established compliance program in place before expanding abroad, and especially in countries in which FCPA exposure is substantial.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

²³ See Paul, Weiss Client Memorandum, "Mobile TeleSystems PJSC Reaches \$850 Million Resolutions with DOJ and SEC Over FCPA Violations" (Mar. 12, 2019), available [here](#).

²⁴ See Paul, Weiss Client Memorandum, "SEC Fines Telefônica Brasil S.A. \$4.125 Million Relating to World Cup Tickets Given to Government Officials" (May 13, 2019), available [here](#).

²⁵ See Michael Corkery, "A 'Sorceress' in Brazil, a 'Wink' in India: Walmart Pleads Guilty After a Decade of Bribes," THE NEW YORK TIMES (June 20, 2019), available [here](#).

²⁶ See "Walmart to Pay \$282 Million to Settle Claims of Corrupt Payments Abroad, SEC Says," BARRON'S (Jun. 20, 2019), available [here](#).

²⁷ NPA at 2; see also Release No. 86159 at ¶ 63.

²⁸ See *In re: Wal-Mart Stores Inc.*, C.A. No. 7455-CB (Del. Ch. May 13, 2016) and *City of Pontiac General Employees' Retirement System v. Walmart Stores Inc. et al.*, No. 5:12-cv-5162 (W.D. Ark. July 26, 2012)

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