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Wal-Mart May Face FCPA Charges Over Mexican Bribery Plot

By **Melissa Lipman**

Law360, New York (April 23, 2012, 9:40 PM ET) -- Wal-Mart Stores Inc. and some of its executives may face criminal charges and millions of dollars' worth of civil penalties in the wake of a report that the retail giant paid \$24 million in bribes to facilitate the breakneck expansion of its Mexican operations and shut down internal investigations into the matter, experts say.

Given the U.S. Department of Justice's push to pursue tough penalties against companies in Foreign Corrupt Practices Act cases, detailed allegations in the New York Times on Sunday that some of the retailer's highest-ranking executives refused to conduct a comprehensive investigation into the company's fastest-growing foreign subsidiary — and instead promoted Wal-Mart de Mexico SAB's CEO to vice chairman of the U.S. business — could cause big problems for the company, attorneys say.

"Assuming what the Times says is accurate and that it's widespread, continuing, [involving] serious amounts of money and a significant advantage gained by Wal-Mart through this activity that went to the highest levels of the company, I think the Justice Department will have a field day with this one," said Logan Robinson, a University of Detroit Mercy School of Law professor specializing in corporate governance.

A former executive at the Mexican unit claims to have orchestrated millions of dollars' worth of payments to help speed zoning changes, building permits and environmental assessments to facilitate rapid growth at the behest of Eduardo Castro-Wright, who was head of the Mexican unit from 2002 until 2005 when, in the midst of internal investigations into the allegations, he was promoted to be head of the company's U.S. stores, according to the newspaper.

In a December regulatory filing, Wal-Mart disclosed that it was investigating whether its internal policies and procedures complied with the FCPA and had alerted the Justice Department and the U.S. Securities and Exchange Commission.

Spokeswomen for the Justice Department and the SEC declined to comment on the matter Monday.

At the time of the filing, the company did not link the probe to its Mexican unit, saying it had begun a worldwide review of its anti-corruption programs that led to the internal investigation as part of regular changes to make its FCPA compliance programs more effective in recent years. Spokesman David Tovar said in December that the company did "not believe that these matters will have a material adverse effect" on its business or finances.

But experts warned Monday that if the allegations are true, both the company and some of its executives could find themselves facing substantial criminal and civil penalties.

"Charges will likely be brought against the company and against any U.S. individuals or residents who participated in the bribes," Robinson said. "It's going to be a serious case ... the Justice Department, this is the kind of stuff they just love."

The department will likely begin by looking into the company's own report on the case, ask Wal-Mart to waive any privilege protections and may dig deeper into the company's activities if it thinks Wal-Mart's findings are inadequate, according to Robinson.

The retail giant originally turned to Willkie Farr & Gallagher LLP in 2005 to look into the allegations of a bribery scheme, but balked at the firm's suggestion of a rigorous probe, deciding to pursue a more in-depth investigation only if a smaller internal probe indicated that there was substance to the corruption claims, according to the Times. But the company may have put itself into a more difficult position in the process, according to Hughes Hubbard & Reed LLP's Kevin T. Abikoff, who chairs the firm's anti-corruption and internal investigations group.

"If Willkie Farr or any law firm recommends a detailed review and the company says, 'That's expensive, let's see if there's even a modicum of reality to any of this' — and they do it, use people who are skilled at conducting internal reviews and not inherently biased ... and come to some reasoned position that more is not required — under some circumstances, that's OK," Abikoff said. "If, on the other hand, they turn it over to somebody who has some structural bias because they're implicated even indirectly in the conduct, that doesn't tend to go very well."

Under the U.S. sentencing guidelines, a company can get its penalty reduced by handing FCPA investigations over to independent, outside professionals, so initially turning to Willkie Farr was a good first step, according to Abikoff.

"They started down the right path, so that gives them points in favor [under the guidelines], but then they took a big detour and that probably puts them in an even worse place," Abikoff said. "This is what you always tell clients: You may think that when there's no spotlight on you, that doing it yourself is OK, [but] the problem is, if anything comes to light later ... it's going to look awful."

Even if the company can successfully argue the defense that it put a stop to the bribes once it found out about the payment, it will still likely face problems under the so-called "books and records" section of the FCPA, especially if any of the U.S. executives knowingly allowed false records to be filed, attorneys said. And at a public company like Wal-Mart, those kinds of violations often carry SEC penalties as well.

"It's almost impossible to factually segregate the regulatory component from the criminal component when prosecutors are dealing with a publicly traded company," Mintz Levin Cohn Ferris Glovsky & Popeo PC member Paul E. Pelletier said. "When they wrote the books and records component into the FCPA ... the purpose was to make sure there would be a regulatory requirement that they provide books and records that accurately reflect the dispositions of money, and if they're not recording the payments as bribes, there'd be a potential regulatory problem."

It's not just the company, however, that faces potential criminal charges in the matter, attorneys said, especially given the Justice Department's growing interest in executives in FCPA cases.

"[The Justice Department] has been more aggressive in recent years in terms of pursuing individuals and not just companies," Hinshaw & Culbertson LLP partner Sergio E. Acosta

said.

Then there's also the question of how much the executives knew or should have known about the alleged bribery, according to Acosta.

"Someone who perhaps should be aware of it and intentionally does not ask questions and kind of looks the other way — there are a number of federal statutes where that degree of so-called knowledge is enough to form criminal liability [and] knowledge is defined pretty broadly under the FCPA," he said.

A number of top executives at the Mexican unit have been accused of facilitating and even encouraging the bribes, according to the Times. And Castro-Wright, the former CEO of Wal-Mart de Mexico and current Wal-Mart vice chairman, could be at risk under the FCPA, according to Robinson.

Whether U.S. executives — such as then-CEO H. Lee Scott Jr. and former vice chairman and current CEO Michael T. Duke, who both reportedly were informed about the allegations — end up facing criminal charges will likely turn on just how much they knew and how strong of a position they were in to stop the conduct, attorneys said.

"If, for example, the CEO of Wal-Mart learned that it was going on and ... allowed the continuing bribery of officials in Mexico, absolutely, he's got a huge FCPA problem," Robinson said. "The Justice Department will decide whether it warrants criminal charges, but people have gone to jail for these things."

For its part, Wal-Mart said in a statement Saturday that it "will not tolerate noncompliance with FCPA anywhere or at any level of the company," and that it now has an FCPA compliance director in Mexico who reports directly to the company's Arkansas headquarters. Tovar added that the company's outside advisers were continuing to meet with the Justice Department and the SEC about the investigation, but declined to go into specifics of what its investigation has turned up so far.

"Many of the alleged activities in The New York Times article are more than six years old," Tovar said. "If these allegations are true, it is not a reflection of who we are or what we stand for."

But legally speaking, Wal-Mart shouldn't take too much comfort in the fact that most of the alleged illegal payments took place in 2004 and 2005, despite the FCPA's five-year statute of limitations, attorneys said.

In particular, the government can also bring its claims as conspiracy charges and use more recent conduct — like a false financial statement — to target the older activities, even if the bribes themselves ended nearly seven years ago, according to experts.

"Any time you're dealing with a publicly traded company filing annual financial reports that admits that bribery has taken place, prosecutors rarely would perceive the expiration of the statute of limitations as a viable defense," Pelletier said.

Now that Wal-Mart has alerted the agencies to the matter, the company also runs the risk that their investigation could turn up FCPA violations beyond the Mexican bribe scheme, attorneys said.

"There's always the question, whenever you're in one of these situations, about whether the conduct at issue is isolated or systemic, or something in between," Abikoff said.

Often, the government will require the company to come up with some sort of measure to show that the alleged violation is an isolated event, whether by looking at other activities

in the same territory or checking whether the company also has a history of getting unusually speedy permits in other regions as well, according to Abikoff.

"One of the critical things that the Department of Justice and the SEC look at is what is the tone at the top regarding compliance," he said. "Where somebody is known at the company to have flouted the law and then gets promoted, it seriously deteriorates the company's ability to argue it has the proper tone."

While the FCPA technically caps penalties at \$2 million, the Alternative Fines Act allows the government to seek penalties of up to twice the benefit the company sought to attain, which, from the Justice Department's perspective, could be based on the profits of Wal-Mart's Mexican unit, Robinson said.

"It's probably a very big number," Robinson said. "It's really speculative but ... that idea of ... twice the profits that they obtained by bribing and getting the stores open that they otherwise wouldn't have obtained — it's probably what the prosecution would put forward as the right standard."

Beyond any Justice Department or SEC penalties, Wal-Mart could also end up being sued by private plaintiffs, either by shareholders dismayed by the company's falling stock price — which dropped nearly 5 percent Monday — or by rivals bringing Racketeer Influenced and Corrupt Organizations Act actions claiming they suffered because of the competitive advantage Wal-Mart won by being able to open new stores so quickly, attorneys said.

The company also can't write off the possibility of legal action from the Mexican government, as bribery, while common in Mexico, is still illegal under the country's own corruption laws, experts said.

"When you're dealing with non-U.S. regulators, the general enforcement status is that they're spotty, but you take a country like Nigeria which is viewed as fairly corrupt ... and you look then at the fact that Nigeria came hard against Halliburton and [others] following their settlements with the [Justice Department]," Abikoff said. "If Nigeria can do it, anybody can do it."

--Additional reporting by Carolina Bolado. Editing by Jocelyn Allison and Elizabeth Bowen.

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