

Antietam Led to the Emancipation Proclamation - Where Will Wal-Mart Lead?

September 17 was the 150th anniversary of the single bloodiest day in American history. On that day the Army of Northern Virginia, led by Robert E. Lee met the Army of the Potomac, led by George McClellan. The battle was fought near a railway junction called Sharpsburg on Antietam Creek. On this day more than 23,000 Americans from both the North and South were casualties. As a Texan, I must note that John Hood's Texas Division had casualties reported at over 90%, the highest ever for any US Division in any war at any time. When asked by a fellow officer where his division was, Hood replied, "Dead on the field."

While the battle was a tactical draw, it ended the first Southern threat of invasion of the North. More importantly it provided Lincoln the political cover to issue the Emancipation Document, which changed the nature and course of the Civil War. I thought about how the horrific battle of Antietam led to something very different, the Emancipation Proclamation, when I read the latest output by the FCPA Professor, in an article entitled "*Foreign Corrupt Practices Act Enforcement As Seen Through Wal-Mart's Potential Exposure*". The Professor used the lens of the allegations of Foreign Corrupt Practices Act (FCPA) violations brought forward against Wal-Mart, as set out in the New York Times (NYT) article of April 21, 2012. The Professor explored five questions:

- whether Congress intended in passing the FCPA to capture the type of payments at issue in Wal-Mart;
- what FCPA case law instructs as to the payments;
- whether what Congress intended or what courts have concluded even matters; and
- the politicization of Wal-Mart's scrutiny and its impact on FCPA reform.

I. Congressional Intent

Here the Professor notes that "The first question, and the easiest, is whether, given the SEC's and DOJ's current enforcement theories, the Mexican payments in connection with permitting, licensing, and inspection issues can expose Wal-Mart to an FCPA enforcement action?" and that the answer to this question is most likely yes; the Professor believes that the "second, and more important question, is whether Congress in passing the FCPA intended to capture pay payments occurring outside the context of foreign government procurement and involving ministerial and clerical acts by foreign governmental officials." After reviewing the Congressional record to try and determine some legislative intent the Professor quoted Rep. Robert C. Eckhardt (D-Texas) - a congressional leader on the foreign payments issue, for the following:

Payments to a [foreign official with ministerial or clerical duties] for instance, to complete a form that ought, in equity, to be completed, to give everybody equal treatment, to move the goods off a dock which he will not move without a tip, a mordida, I think, as they call it in the Spanish language, a facilitating payment, or a grease payment would not constitute a bribe.

Based upon his review, the Professor concludes that “answer from the FCPA’s legislative history is no” and Congress did not intend to make facilitation payments illegal under the FCPA.

II. Case Law

The Professor reviews four cases which he believes touch on the allegations. *US v. Durham*; *US v. Kay* (District Court); *SEC v. Mattson*; and *US v. Kay* (5th Circuit) in asking the question of whether even if the payments made by Wal-Mart payment do not meet the FCPA’s facilitation payments exception, “in order for there to be a violation of the FCPA’s anti-bribery provisions, the “obtain or retain business” element, among others, must also be met.”

After noting that the Department of Justice (DOJ) lost 3 of the 4 cases, he opines that the fourth, *US. v. Kay* in the 5th Circuit was equivocal at best. Therefore, any inquiry must be “a highly fact-dependent question whether a payment to a foreign official outside the context of foreign government procurement is subject to the FCPA. A key portion from the *Kay* ruling logically implicated by Wal-Mart’s alleged payments is the following: “there are bound to be circumstances in which payments outside the context of foreign government procurement merely increase the profitability of an existing profitable company and thus, presumably, does not assist the payer in obtaining or retaining business.”

III. Do These Issues Even Matter?

In this section, the Professor notes that the negotiations between Wal-Mart and the DOJ will most likely be “behind closed doors in Washington DC.” In the air of negotiated Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs), the DOJ will assert its claims of jurisdiction and will not, because it cannot test the DOJ’s theories of liability at a trial. The Professor stated, “It will not matter if Wal-Mart’s payments are the type Congress intended to capture in passing the FCPA, nor will it matter what relevant case law instructs as to the payments.”

IV. The Impact of Wal-Mart’s FCPA Scrutiny

Here the Professor raises four issues: (1) the loss of stock price; (2) the investigative cost; (3) follow on shareholder derivative civil lawsuits; and (4) the effect this matter will have in others in the retail industry.

While Wal-Mart stock initially dropped 4.7 percent and continued a downward trend with an approximately \$20 billion dip in shareholder value, it did rebound. However, the cost for the now worldwide investigation was already up to \$51MM by the end of July. The Professor reports that “at least 12 shareholder lawsuits have been filed against Wal-Mart and/or its officers and directors in the wake of the *Times* article.” Lastly, regarding a retail industry sweep, the Professor noted that “According to a recent Reuters report, other retail companies have also since reported to U.S. agencies suspicions of their own potential violations, which in turn has the Justice Department and SEC considering a sweep of the entire industry.”

V. FCPA Reform

Here the Professor continues his consistent argument that the Wal-Mart matter should encourage, rather than discourage, substantive debate on whether the FCPA should be reformed. However, he does not believe that opponents of FCPA reform “pounced” in heralding that the Wal-Mart matter ended the debate on FCPA reform (including this commentator). He does admit that this case may well have ended Congress’ collective stomach to take FCPA reform head on. He also notes that some Congressmen opened their own separate investigations of Wal-Mart but no person wanted to use the matter to inform the FCPA debate before Congress because as stated by the Chief Counsel of the House Judiciary Committee at a Hanson Wade FCPA conference in Houston, Texas in June of this year, “practical matter, public opinion matters, what happens in the real world matters,” and the atmosphere surrounding FCPA reform after the Times article has made it “harder for different groups to advocate” for FCPA reform.

With all articles published by the FCPA Professor, they are well researched and well written. I have found them to be provocative but in a way that fosters debate. Sort of the role that I think a Professor should have. We know where the bloodiest day in American history led but we do not know at this point, where this Wal-Mart matter will end.

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