

The New York Times

“All the News That’s Fit to Print”

THURSDAY, APRIL 26, 2012

Reprinted With Permission

Business Day

With Wal-Mart Claims, Greater Attention on a Law

By CHARLIE SAVAGE

WASHINGTON
A decade ago, the Foreign Corrupt Practices Act, which bars American companies from bribing officials overseas, was rarely enforced or discussed. Today, it strikes fear throughout the executive offices of companies with overseas operations, generating huge fees for law firms and large fines for the federal government.

The transformation of the once-obscure law has been thrown into sharp relief by the allegations that one of the world’s largest companies, Wal-Mart, suppressed an internal inquiry into bribery in Mexico in 2005. After details of the case were reported by The New York Times on Sunday, Wal-Mart’s stock tumbled.

The prominent case is likely to lead to more disclosures, said Paul Pelletier, a former Justice Department prosecutor who worked on Foreign Corrupt Practices Act investigations.

“The impact could be huge,” Mr. Pelletier said. “Wal-Mart’s having lost billions in market capitalization over these last few days is going to make companies in close cases more likely to err on the side of promptly self-reporting” when they uncover evidence of possible overseas bribery. Enacted in 1977 as part of a series of reforms after the Watergate scandal, the law bars companies that operate in the United States from bribing officials overseas to obtain or retain business — though it makes an exception for low-level payments necessary to achieve a ministerial action that confers no unfair advantage. For its first few decades, the law was enforced only rarely.

“It always had teeth,” said Rachel Brewster, who teaches international trade law at Harvard. “The United States government just was never interested in biting.”

That started to change in more recent years as the business world became increasingly globalized and as other coun-



Paul Pelletier, a former Justice Department prosecutor.

tries gradually adopted similar laws, undermining complaints by American corporations that enforcing the law vigorously would give an edge to foreign rivals.

An act barring bribery overseas was rarely enforced for decades.

The collapse of Enron a decade ago also led to tougher financial laws — including requiring top executives at publicly traded companies to certify that their companies’ books were accurate, forcing them to keep track of overseas money flows — and greater energy in enforcing them.

Another factor was that Justice Department prosecutors — led by Mark F. Mendelsohn, who left the department in 2010 — developed more expansive theories of the act’s jurisdiction and the types of graft it

covers. At the same time, they drove up fines by requiring companies to disgorge profits as a condition of settling cases without an indictment through so-called deferred or nonprosecution agreements.

Criminal enforcement under the act has soared, from just two enforcement actions in 2004 to 48 in 2010. The dollar amount of fines imposed by the Justice Department and the Securities and Exchange Commission has increased even more, including a record-setting \$800 million paid by Siemens in 2008. There are currently at least 100 open investigations, specialists estimate.

“It used to be three or four cases a year, and so the F.C.P.A. really wasn’t on the radar: it was a legal backwater, and compliance was a fairly low priority for most companies,” said Richard L. Casin, who specializes in the law and founded one of several blogs on the topic. “It’s interesting to note that all the alleged illegal payments by Wal-Mart happened before the dramatic increase in the enforcement of the F.C.P.A. It may be one of the last big legacy cases” rooted in the earlier era.

The Justice Department enforces the corrupt practices act through its fraud section. Mr. Pelletier, a former principal deputy chief of the unit, said it now had about 15 people dedicated to such matters, up from two in 2004. The S.E.C. and the F.B.I. have also created special units that focus on the act.

Wal-Mart reported the violations to the Justice Department late last year after learning of The Times’s preliminary reporting. It has hired outside firms to conduct an investigation and said it was reporting their findings to the government. It has also stressed that the ostensible graft detailed by The Times took place more than six years ago.

The law has a five-year statute of limitations. Prosecutors could handle the case as a conspiracy, allowing them to pursue older violations, if any event plausibly related to the pattern turns out



JOSH HANER/THE NEW YORK TIMES

A Walmart store in Mexico City. The company is accused of suppressing an internal inquiry into bribery in Mexico in 2005.

to have taken place within the last five years. Wal-Mart has said that last spring it strengthened its policy for making sure its employees complied with the act.

Mike Koehler, a business law professor at Butler University and a founder of another blog focusing on the act, argued that the Justice Department's interpretation of the law had gone too far. But because companies are eager to resolve cases out of court — an indictment could severely damage a company — there is almost no judicial oversight on prosecutors' interpretation of the act.

"As a practical matter, it just doesn't matter whether Wal-Mart's payments in

Mexico violated the F.C.P.A.," he said. "I think that's a sad commentary on how enforcement of this law in many cases has just gone off the rails."

The expanded reach of the law is unpopular with business interests, which have argued that it should apply only to bribes to procure government contracts — not payments for permits and licenses to do business in a country, like in the Wal-Mart case.

But other specialists defended the more expansive approach, noting that the federal appeals court in New Orleans, in a rare case that went to court, backed the notion that the act could cover graft for purposes beyond procurement.

While Wal-Mart may be the most prominent company yet to get into trouble under the act, several specialists voiced doubt that any eventual fine would be nearly as large as some of the figures in other recent cases, which tended to involve huge procurement or oil deals.

Such fines are generally calculated based on the amount of the bribes — the Wal-Mart case involves about \$24 million — as well as the amount of ill-gained profit. That could turn on an analysis of whether the bribes merely sped up the opening of particular stores, or if they would never have been built if not for the graft.

(#72570) Copyright © 2012 by The New York Times Company. Reprinted with permission.

For subscriptions to *The New York Times*, please call 1-800-NYTIMES. Visit us online at www.nytimes.com.

For more information about reprints contact PARS International Corp. at 212-221-9595 x425.

MINTZ LEVIN
Mintz Levin Cohn Ferris Glovsky and Popeo PC