

CLIENT ALERT

# Walmart Pays \$282 Million to End Long-Running FCPA Investigation

## Expensive Reminder About the Importance of Monitoring Foreign Agents

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On June 20, 2019, Walmart Inc. (“Walmart” or the “Company”), the Arkansas-based global retail corporation, settled a long-running corruption investigation by the U.S. Department of Justice (the “DOJ”) and the Securities and Exchange Commission (the “SEC”) (collectively the “Government”), with the Company paying a total of \$282 million in penalties and disgorgement and its Brazilian subsidiary pleading guilty to criminal charges.<sup>1</sup> Under the DOJ settlement, Walmart and its wholly owned Brazilian subsidiary, WMT Brasilia S.a.r.l. (“WMT Brasilia”), agreed to pay a combined criminal penalty of \$137 million to resolve the DOJ’s criminal investigation into violations of the Foreign Corrupt Practices Act (the “FCPA”) and agreed to the appointment of an independent monitor for a two-year period. WMT Brasilia pleaded guilty to criminal charges of knowing and willful violations of the FCPA’s books and records provisions.<sup>2</sup> The parallel SEC settlement involved an administrative order in which Walmart agreed to disgorge approximately \$145 million for violations of the

<sup>1</sup> Walmart first disclosed the Government’s investigation in an SEC filing in 2011, and subsequently disclosed approximately \$910 million in professional fees and compliance enhancement expenses related to the investigation through last year.

<sup>2</sup> Non-Prosecution Agreement with Walmart Inc. (June 20, 2019), available [here](#); Plea Agreement with WMT Brasilia S.a.r.l. (June 20, 2019), available [here](#); Judgement at 4, *United State v. WMT Brasilia S.a.r.l.*, No. 19cr192 (E.D. Va. June 20, 2019), ECF No. 14.

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books and records and internal controls provisions of the FCPA.<sup>3</sup> Although Walmart did not voluntarily self-disclose the conduct, it received credit for cooperation and undertook extensive remediation.

### **Background**

According to the agreed-upon statement of facts in the DOJ settlement documents, as well as allegations in the SEC administrative order, from 2000 until 2011, despite the fact that certain Walmart personnel responsible for implementing and maintaining the Company's internal accounting controls related to anti-corruption were aware of certain controls failures, including failures related to potentially improper payments to government officials by certain Walmart foreign subsidiaries, Walmart failed to implement appropriate internal controls to prevent such improper payments. Specifically, the DOJ alleged that Walmart failed to do the following: (1) conduct sufficient anti-corruption due diligence on third-party intermediaries ("TPIs") who interacted with foreign officials; (2) implement appropriate controls related to payments to TPIs; (3) require proof of services before paying TPIs; (4) require that TPIs had written contracts with anti-corruption compliance provisions; (5) ensure that donations ostensibly made to foreign government agencies were not converted to personal use by foreign officials; and (6) implement appropriate policies covering gifts, travel and entertainment for foreign officials.

As a result of these failures, Walmart's subsidiaries in Mexico, India, Brazil and China hired TPIs without sufficient controls in place to prevent them from making improper payments to government officials in connection with obtaining store permits and licenses. The insufficient internal controls enabled Walmart's foreign subsidiaries in Mexico, India, Brazil and China to accelerate store openings.

In Mexico, a former attorney for Walmart Mexico reported to Walmart in 2005 that, for several years prior, he had personally overseen a scheme in which certain TPIs, called "gestores," 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. Invoices submitted by the gestores included a code that identified the reasons the subsidiary had made the improper payment, including (1) to avoid a requirement; (2) to influence, control or gain knowledge of privileged information known by the government officials; and (3) to eliminate fines. Despite identifying corroborating evidence in a preliminary review of the allegations, and recommendations from Walmart in-house investigators and Internal Audit regarding further investigative steps, Walmart tasked an internal lawyer, whom the former Walmart Mexico attorney had alleged knew about the improper payment scheme, to lead the remainder of the internal investigation. The investigation concluded that the former Walmart Mexico attorney's allegations were unfounded, though it noted that certain of Walmart Mexico's anti-corruption controls were deficient. Walmart failed to implement recommendations related to those weaknesses in controls until 2011.

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<sup>3</sup> Securities and Exchange Commission, *In re Walmart Inc.*, Administrative Proceeding File No. 3-19207 (June 20, 2019).

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The DOJ and the SEC also alleged that in India, Walmart was aware of corruption risks but knowingly failed to take steps to implement appropriate internal controls to address those risks. Between 2008 and early 2011, six internal audit reports identified weaknesses in anti-corruption related internal controls of Walmart's majority-owned joint venture in India. As a result, from 2009 until 2011, Walmart's joint venture in India retained TPIs that made improper payments to government officials in order to obtain store-operating permits and licenses. These improper payments were recorded in the joint venture's books and records with vague descriptions like "misc fees," "miscellaneous," "professional fees," "incidental" and "government fee."

Likewise, in Brazil, beginning as early as 2008 and continuing until 2011, Walmart executives received internal audit reports identifying weaknesses in anti-corruption related internal controls at Walmart Brazil.<sup>4</sup> Despite these repeated findings, Walmart Brazil continued to engage TPIs without conducting the required due diligence. Certain of these TPIs made improper payments to Brazilian government officials, including a construction company that made improper payments to government officials in connection with the construction of two Brazil stores in 2009, without the knowledge of Walmart Brazil. Walmart Brazil also used this construction company to indirectly hire a TPI that Walmart Brazil could not engage directly due to corruption red flags associated with the TPI. The TPI made improper payments to Brazilian government officials in connection with the construction of a Walmart store in Brazil, albeit without the knowledge of Walmart Brazil.

Finally, in China, Walmart's local subsidiary's Internal Audit team flagged anti-corruption controls weaknesses between 2003 and 2011, including those related to small payments or gifts to government officials. From 2007 until early 2010, Walmart and the subsidiary failed to address virtually any anti-corruption related audit concerns.

### **Settlement**

Walmart entered into a three-year non-prosecution agreement with the DOJ and agreed to retain an independent corporate compliance monitor for two years. 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 a 25 percent reduction for the portion applicable to the conduct in Brazil, China and India. Walmart fully cooperated with the investigations in Brazil, China and India, but the DOJ concluded that, with regard to Mexico, the company did not timely provide documents and information to the government and did not "de-conflict" with the government's request to interview a witness before Walmart itself interviewed that witness. In addition, the resolution reflected the fact that Walmart did not voluntarily disclose the conduct in Mexico and only disclosed the conduct in Brazil, China and India only after the DOJ had already begun investigating the conduct in Mexico. The \$137 million penalty includes a forfeiture of \$3.6 million and a fine of \$724,898 from WMT Brasilia.

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<sup>4</sup> WMT Brasilia is a wholly owned subsidiary of Walmart and is a majority-owner of Walmart Brazil, Walmart's wholly owned subsidiary in Brazil, and the majority-owner of retail stores operating as Walmart Brazil.

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The SEC's administrative order mirrors the conduct alleged in the DOJ resolution. Walmart consented to the SEC's order finding that it violated the books and records and internal accounting controls provisions of the FCPA and agreed to pay approximately \$144 million in disgorgement and prejudgment interest.<sup>5</sup>

### **Conclusion**

What is perhaps most notable about Walmart's FCPA settlement is the duration of the investigation and the resulting costs. Walmart first disclosed the FCPA investigation in December 2011, approximately seven and a half years ago. The Company announced a reserve for the settlement in November 2017, more than 18 months ago. In addition to the fines and disgorgement, Walmart has disclosed in securities filings that it spent more than \$900 million in professional fees and compliance enhancement expenses. Notwithstanding the considerable time that has elapsed and the substantial expenses incurred by Walmart, the DOJ stated that "an independent compliance monitor is necessary to ensure that the Company's compliance program is operating effectively and adequately tested . . ." In addition, Walmart also paid \$160 million to settle a shareholder class action related to the FCPA investigation. Although Walmart was able to obtain cooperation and remediation credit in the absence of a voluntary disclosure, consistent with the DOJ's corporate enforcement policy, the case demonstrates the importance of being proactive in response to allegations of wrongdoing and findings of potential weaknesses in anti-corruption internal controls. Companies should be aware that their responses to corruption red flags or internal controls weaknesses may be viewed and judged in hindsight, and should be careful to take reasoned, appropriate measures to address such allegations or findings.

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<sup>5</sup> Notably, although neither the SEC nor the DOJ alleged violations of the FCPA's anti-bribery provisions, the SEC nevertheless obtained disgorgement.

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