



Robert Weissman, President

October 11, 2016

Attorney General Loretta Lynch
950 Pennsylvania Ave., NW
Washington, DC 20530

Mary Jo White, Chair
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Attorney General Lynch and Chair White,

This letter regards the investigation by the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) into violations of the Foreign Corrupt Practices Act (FCPA) by Wal-Mart de Mexico (Walmex) and Walmex's parent company Wal-Mart Stores Inc. (Wal-Mart). News reports suggest that the many-years investigation into the Wal-Mart bribery allegation is now winding down, with the government seeking hundreds of millions of dollars in potential fines.¹

The extensive, Pulitzer Prize-winning reporting by the New York Times on the matter,² assuming confirmed by governmental investigation, counsels for vigorous prosecution of both the companies and individuals involved in the alleged bribery and cover-up. The misconduct was intentional and systemic, according to the Times's extraordinarily detailed reporting, reaching the highest levels of Walmex³ and Wal-Mart⁴ Both companies, as well as their top officers and directors, allegedly benefited substantially from the violations, while stakeholders, including shareholders, were harmed. According to the Times reporting, Wal-Mart not only failed to self-

¹ Tom Schoenberg and Matt Robinson, "Wal-Mart Balks at Paying \$600-Million-Plus in Bribery Case," Bloomberg, October 6, 2016, available at: <https://www.bloomberg.com/news/articles/2016-10-06/wal-mart-said-to-balk-at-paying-600-million-plus-in-bribe-case>.

² See <http://www.nytimes.com/interactive/business/walmart-bribery-abroad-series.html>.

³ Wal-Mart investigators "found documents showing that Wal-Mart de Mexico's top executives not only knew about the payments, but had taken steps to conceal them from Wal-Mart's headquarters in Bentonville, Ark." David Barstow, "Wal-Mart Hushed Up a Vast Mexican Bribery Case," New York Times, April 21, 2012, available at: <http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html>.

⁴ "When Wal-Mart's director of corporate investigations – a former top F.B.I. official – read the general counsel's report, his appraisal was scathing. 'Truly lacking,' he wrote in an e-mail to his boss. The report was nonetheless accepted by Wal-Mart's leaders as the last word on the matter." David Barstow, "Wal-Mart Hushed Up a Vast Mexican Bribery Case," New York Times, April 21, 2012, available at: <http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html>.

report the corruption⁵ when it was brought to light; the Times reported that senior management, and possibly directors, actively concealed the misconduct from both regulators and shareholders for over five years, reporting it only when faced with imminent disclosure in the national media.⁶ News media reports suggest that government investigators have also uncovered illegal payments by Wal-Mart or its affiliates in India and Brazil. All of these factors, again assuming confirmation by governmental investigation, counsel against leniency.

With reason, the American people have grown deeply cynical about corporate criminal enforcement. They believe there is a two-tier standard of justice, with corporations and the powerful escaping criminal accountability for their wrongdoing. This perception is corrosive to our justice system and democracy. The problem is not just one of perception, however. The failure to hold corporations and top executives accountable for a wide range of wrongs – foremost among them, the conduct leading to the Great Recession – betrays the punitive and direct accountability functions of the criminal law. Most seriously, it eviscerates the criminal law's crucial deterrent effect in the precise area where deterrence should work best: with rational, calculating, economic actors such as corporations and corporate executives.

Assuming the New York Times reporting was validated by governmental investigation, and/or that the government has discovered a global pattern of misconduct, it is vital that the Wal-Mart enforcement action not reinforce the perception and reality that corporate criminals can escape serious accountability.⁷ A settlement with Wal-Mart should be measured against these criteria:

1. Does the settlement disclose what the government found? In contrast to recent civil settlements with large banks, the settlement should provide a detailed description of the facts of Wal-Mart's wrongdoing, as determined by government investigators.
2. Does Wal-Mart admit to its wrongdoing? If the facts as reported by the New York Times are found to be correct or roughly so, or if a global pattern of misconduct is found, then what occurred was neither an accident or oversight. Wal-Mart should be required to acknowledge wrongdoing.
3. Is the penalty sufficient to achieve deterrence? Reports of relatively large sums sought by the federal government from Wal-Mart suggest it aims to disgorge Wal-Mart's wrongful gains as a result of the alleged bribery. Mere disgorgement, however, is likely to under-deter future wrongdoing, as other companies may rationally calculate that it is worth violating the law,

⁵ "Confronted with evidence of corruption in Mexico, top Wal-Mart executives focused more on damage control than on rooting out wrongdoing." David Barstow, "Wal-Mart Hushed Up a Vast Mexican Bribery Case," New York Times, April 21, 2012, available at: <http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html>.

⁶ "In December, after learning of The Times's reporting in Mexico, Wal-Mart informed the Justice Department that it had begun an internal investigation into possible violations of the Foreign Corrupt Practices Act, a federal law that makes it a crime for American corporations and their subsidiaries to bribe foreign officials. Wal-Mart said the company had learned of possible problems with how it obtained permits, but stressed that the issues were limited to "discrete" cases." David Barstow, "Wal-Mart Hushed Up a Vast Mexican Bribery Case," New York Times, April 21, 2012.

⁷ Of course, if the government concluded that the Times reporting was inaccurate, then Wal-Mart and the public are entitled to a clear statement to such effect.

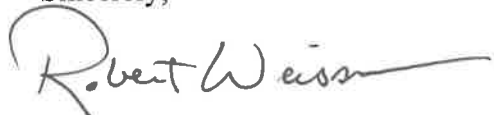
collecting the gains if they are able to avoid getting caught and paying back only their ill-gotten gains if they are.

4. Is Wal-Mart required to enter a guilty plea? The Department of Justice has made frequent use of deferred and non-prosecution agreements over the last decade, including recently in its settlement with Och-Ziff in an FCPA case. These deals amount to a free chance to violate the law without facing criminal penalty. They are bad policy for corporate wrongdoers. Whatever Wal-Mart may have done in recent years to advance compliance policy, deferred and non-prosecution are especially misguided approaches in a case where the violator engaged in systematic and extended wrongdoing involving top company officials, with active concealment of the wrongdoing over a period of years, or where a global pattern of misconduct is found.

5. Will individuals face criminal prosecution? The allegations in the New York Times story seem to suggest that top officials in both Mexico and the United States should be prosecuted. As reported by the Times, this does *not* appear to be a case where there was willful blindness or subordinates acting with a wink-and-a-nod – the classically difficult fact pattern for prosecution of top officials. Here, top executives were allegedly involved directly in the bribery, or affirmatively knew about the wrongdoing and failed to report or take corrective action. It is hard to see how the Yates Memo, which signaled the central importance of prosecution of executives for corporate criminal wrongdoing, has any meaning if individuals are able to escape prosecution in this case.

This is an important moment for law enforcement. The allegations of wrongdoing in this case are serious and connected to allegations of considerable harm in Mexico, and potentially in other nations, with victims entitled to accountability from the criminal justice system. But also at stake are far-reaching standards of corporate accountability for criminal wrongdoing and the American people's trust in basic norms of equal justice.

Sincerely,

A handwritten signature in cursive script that reads "Robert Weissman". The signature is written in dark ink and is positioned below the word "Sincerely,".

Robert Weissman,
President