Wal-Mart and the Foreign Corrupt Practices Act

Here in the United States, news outlets (and investors) are abuzz in reponse to a blockbuster article this weekend in the New York Times regarding allegations of bribery in Mexico by a foreign subsidiary of Wal-Mart Stores, Inc. If the allegations are true, Wal-Mart officials may have violated the Foreign Corrupt Practices Act, a U.S. statute that makes it unlawful for U.S. persons and foreign issuers, as well as foreign firms whose actions have an impact in the United States, to, among other things, bribe foreign government officials to assist in obtaining or retaining business. FCPA investigations are exploding and corporations are thus being required to spend significant resources on in-house counsel and outside law firms to ensure compliance.

For the purposes of this blog's subject, one issue that should not be missed is the fact that in this case U.S. law will ostensibly be applied to conduct occurring in whole or in part in a foreign country. Regardless of whether or not the alleged conduct violates Mexican law, we see a real potential here for regulatory conflict–a species of the conflict of laws–between U.S. interests and foreign interests and arguably no doctrinal way to negotiate such a conflict, except the discretion of U.S. government officials to exercise their authority in ways that are senstive to international relations and foreign regulatory authority. As such, this case brings to the forefront yet again the question of the extraterritorial application of U.S. law that has recently become a steady diet of recent Supreme Court caselaw, as illustrated by the recent Morrison and Kiobel cases.

As the Wal-Mart investigation develops, it will be interesting to see how forcefully the U.S. pushes to regulate such conduct and whether foreign governments will resist that regulation or basically defer to the United States. It will also be interesting to see what reactions Wal-Mart and other U.S. corporations, and their lawyer-advisors, take in response to these allegations. And, of course, how will Mexico react?