



## Shedding More Light on Its Cooperation Initiative, the SEC Announces Its First Deferred Prosecution Agreement

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In connection with an investigation concerning possible violations of the Foreign Corrupt Practices Act ("FCPA") by Tenaris, S.A., a global steel pipe company, the SEC this week announced its first ever deferred prosecution agreement. According to this agreement, Tenaris violated the FCPA from 2006 through 2008 by bribing government officials in Uzbekistan in connection with a bidding process for oil and gas pipelines. The agreement was entered pursuant to the initiative the SEC unveiled last year to encourage and reward cooperation with SEC investigations and enforcement actions. Like the non-prosecution agreement announced in January 2011 between the SEC and Carter's, Inc., the children's clothing company, this agreement sheds light on how the SEC is implementing an initiative that received widespread attention when it was launched but whose details remained uncertain. Perhaps most significantly, the agreement signals that the SEC will not always require cooperating parties to admit to any wrongdoing, which is often required by criminal authorities in the cooperation context.

### **THE SEC'S EFFORTS TO ENCOURAGE AND REWARD COOPERATION**

In January 2010 the SEC unveiled a program to extend leniency to companies and individuals which report securities law violations and cooperate with regulatory investigations and enforcement actions. To encourage cooperation, the program authorized the SEC's enforcement staff to use various tools that federal criminal prosecutors long had used but that had not been employed in connection with SEC inquiries.

One of these tools is the non-prosecution agreement—an agreement in which the SEC declines to charge a company or individual which, among other things, agrees to fully cooperate with the SEC's efforts and comply with other obligations set out in the agreement. Another one of these tools is the deferred prosecution agreement—an agreement in which the SEC agrees to forego an enforcement action against those who, among other things, also agree to cooperate fully with the SEC's efforts and comply with other obligations during a set period of time.

The SEC's initial announcement lacked many details concerning how and when it would use these agreements and the differences between them. In announcing the Carter's non-prosecution agreement earlier this year, the SEC began to answer these questions. By entering into the deferred prosecution agreement with Tenaris, the SEC has continued to flesh out the contours of its cooperation initiative.

### **THE TENARIS DEFERRED PROSECUTION AGREEMENT**

The deferred prosecution agreement provides some guidance on a question that has been lurking since the SEC announced its cooperation initiative last year: will the SEC require

cooperating entities to agree to admit or not deny wrongdoing in return for the leniency offered by the cooperation program? The Carter's non-prosecution agreement did not require Carter's to admit or not deny any specific facts, but it remained unclear whether the SEC would similarly permit parties to deferred prosecution agreements to avoid explicitly admitting any wrongdoing. In the criminal context, such admissions of wrongdoing are routinely conditions of cooperation agreements. Some practitioners have questioned whether, if the SEC adopted a similar approach, the upside of these agreements might be limited because of the risk that admitted facts could be used by criminal authorities to mount criminal charges or by civil lawyers as a basis for private actions.

The SEC appears to have taken a middle road, at least for now. On the one hand, the Tenaris deferred prosecution agreement includes a detailed statement of facts about Tenaris's wrongdoing, states that the SEC could prove these facts at a trial, and provides that, in the event that the SEC eventually were to file charges against Tenaris, the company would not contest or contradict these facts. However, the agreement does not require Tenaris to admit or not deny any of these facts. Indeed, the agreement states that these recited facts will not be binding against the company in legal proceedings not involving the SEC, although it remains to be seen whether courts will enforce this provision.

Other aspects of the deferred prosecution were somewhat more predictable. As part of the agreement, Tenaris will pay disgorgement in an amount equal to the approximately \$4.7 million in profits it generated from the pipeline contracts that the Uzbekistan government awarded to it in return for the bribes, plus prejudgment interest. The agreement has a two-year term, although some of its terms have no expiration date. Tenaris is obligated to cooperate indefinitely with any SEC investigations or proceedings concerning the alleged bribery in Uzbekistan. As part of this ongoing cooperation obligation, Tenaris is required to turn over all non-privileged documents, information, and other materials requested by the SEC, and to use its best efforts to make its current and former directors, officers, employees, and agents available for interviews and testimony. Importantly, like Carter's in its non-prosecution agreement, Tenaris was apparently not required to waive any applicable privileges in order to obtain this leniency.

For the next two years, Tenaris has also agreed to notify the SEC of any complaints, charges, or convictions against Tenaris or its employees related to violations of any anti-bribery or securities laws; enhance its policies, procedures, and controls to strengthen compliance with the FCPA and anti-corruption practices; and provide detailed training on the FCPA and other anti-corruption laws.

If, during the two year term of the agreement, Tenaris breaches any of its obligations under the agreement, the SEC is permitted to bring charges against the company relating to the conduct at issue. The agreement tolls any applicable statute of limitations. In the event of a breach, the deferred prosecution agreement, like the Carter's non-prosecution agreement, permits the SEC to use any information that Tenaris provided in the course of cooperating as well as any evidence derived from that information. (To the extent these will be standard terms in deferred prosecution agreements, some companies might be better off, depending on the circumstances, pursuing the traditional disposition that the SEC has long offered to settling companies—

payment of a fine and an injunction barring the wrongdoing at issue but with no ongoing cooperation obligations.)

### **LOOKING AHEAD: INSIGHT FROM THE TENARIS DEFERRED PROSECUTION AGREEMENT**

At the very least, the Tenaris deferred prosecution agreement is yet another reminder of how companies can position themselves for leniency in the event of wrongdoing by conducting thorough internal investigations in response to signs of potential wrongdoing, self-reporting to government regulators any misconduct that is identified, and cooperating with the authorities as they conduct their own investigations. The agreement details Tenaris's "extensive, thorough, real-time cooperation" with the SEC and Department of Justice ("DOJ"), including conducting an internal investigation, disclosing certain conduct to the SEC and DOJ, and thoroughly reviewing and taking steps to update and improve its compliance program.

The deferred prosecution agreement shares many features with the non-prosecution agreement that the SEC entered into with Carter's—including the absence of any charges actually filed in court and cooperation obligations for an indefinite period of time. There are some substantial differences, however. Among these differences is that the deferred prosecution agreement contains a statement of facts and requires a disgorgement payment, while the non-prosecution contained no factual recitation or monetary remedy. In addition, the deferred prosecution agreement has a two-year term and tolls the applicable statute of limitations during this period. By contrast, the Carter's non-prosecution agreement contained no term and no tolling provision.

Both the Carter's non-prosecution agreement and the Tenaris deferred prosecution agreement undoubtedly demonstrate the benefit that companies can derive from self-policing for employee misconduct, conducting internal investigations, self-reporting any misconduct that is discovered, cooperating with the authorities, and adopting appropriate remedial measures. One tangible benefit provided by these agreements is that companies entering into them are not subject to either federal court injunctions or administrative orders of the SEC, both of which can have negative collateral consequences. In announcing the agreement with Tenaris, the SEC's director of enforcement cited "[t]he company's immediate self-reporting, thorough internal investigation, full cooperation with SEC staff, enhanced anti-corruption procedures, and enhanced training."

Together with the new whistleblower provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act, which are expected to trigger an increase in the reporting of corporate fraud by third parties, the leniency that the SEC has now extended to Tenaris and Carter's is added incentive for companies to implement and operate robust compliance programs and to consider promptly self-reporting any misconduct that is substantiated. By self-policing and self-reporting, management can reduce the risk that financially-motivated whistleblowers will approach the SEC first and undermine a company's ability to obtain leniency as a reward for having been the first to report the matter.

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