# FCPA Developments: SEC Enters Into First Deferred Prosecution Agreement And DOJ Prosecutes Foreign Nationals

On May 17, 2011, the Securities and Exchange Commission ("SEC") announced that, for the first time in its history, it had entered into to a deferred prosecution agreement ("DPA") with a company that was the target of an SEC investigation.[1] The SEC alleged that the company, Tenaris, S.A. ("Tenaris" or the "Company"), a Luxembourg-based manufacturer and supplier of steel pipe products, violated the Foreign Corrupt Practices Act ("FCPA") by making improper payments to foreign officials, inaccurately accounting for such payments, and failing to maintain sufficient internal controls. Crucial to avoiding prosecution was that Tenaris detected, investigated, and reported the violations, and took steps to significantly enhance its internal controls and compliance program. The SEC's leniency toward the Company demonstrates the importance, in the current regulatory environment, of responding to red flags promptly and aggressively, and proactively cooperating with authorities when serious misconduct is discovered.

## I. Factual Background

Between April 2006 and May 2007, Tenaris bid on a series of contracts with OJSC O'ztashqineftgaz ("OAO"), a subsidiary of the state-owned holding company of Uzbekistan's oil and gas industry, to supply OAO with pipeline for use in the development and production of oil and natural gas in Uzbekistan. In connection with these bids, Tenaris hired an agent (the "Agent"), who provided Tenaris personnel with competitors' confidential bid information that the Agent obtained from OAO officials. Additionally, the Agent arranged for Tenaris to submit revised bids after the Company had seen its competitors' confidential proposals. Tenaris personnel knew that a portion of its payments to the Agent would be used for these purposes. Tenaris submitted initial and revised bids using the confidential information provided by the Agent, and consequently obtained numerous contracts.[2]

In March 2009, a third party notified Tenaris that certain payments made by Tenaris may have improperly benefited employees of the third party.[3] In response, the Audit Committee of Tenaris's Board of Directors hired a law firm to investigate the allegations. In June 2009, the Company filed its Form 20-F with the SEC, which disclosed the third party's allegations, the internal investigation, and that Tenaris had informed the Department of Justice ("DOJ") of the allegations. Beginning in July 2010, Tenaris began to disclose to the DOJ the facts discovered in its internal investigation, including those related to the conduct in Uzbekistan.[4]

Ultimately, Tenaris entered into a DPA with the SEC.[5] In the DPA, the SEC noted that the Company's investigation "included a world-wide investigation of its business operations and controls." Tenaris provided the DOJ with "extensive, thorough, real-time cooperation . . . which included timely, voluntary and complete disclosure of certain conduct, including" the Uzbekistani payments. Additionally, Tenaris "thoroughly reviewed its pre-existing compliance program and undertook steps to update and improve" it. Such steps included the

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1 *See* Tenaris to Pay $5.4 Million in SEC's First-Ever Deferred Prosecution Agreement, SEC Press Release No. 2011-112 (May 17, 2011), available at http://www.sec.gov/news/press/2011/2011-112.htm.

2 Tenaris DPA ¶ 6(f-k).

3 Although not explicitly stated, it appears that these violations were unrelated to the previously discussed payments in Uzbekistan. *See* Tenaris DPA ¶¶ 6(z-aa).

4 *Id.* ¶ 6(bb).

5 In a related action, Tenaris also entered into a non-prosecution agreement with the DOJ and agreed to pay a criminal penalty of $3.5 million. *See* Release No. 2011-112, *supra* note 1.

"adoption of a strengthened Code of Conduct, Business Conduct Policy, and Agent Retention Procedure that addresses anticorruption and compliance with the FCPA, and provide for enhanced due diligence procedures related to the retention of third party agents and review of payments to third party agents."[6]

## II. The SEC's Cooperation Initiative

The Tenaris DPA is the second agreement[7] the SEC has reached with an investigated company since the January 2010 announcement of its cooperation initiative establishing "incentives for individuals and companies to fully and truthfully assist with SEC investigations and enforcement actions."[8] The initiative authorized SEC Staff to use "cooperation tools" not previously available in SEC enforcement matters, but which "have been regularly and successfully used by the Justice Department in its criminal investigations and prosecutions." These new "cooperation tools" include cooperation agreements, deferred prosecution agreements, and non-prosecution agreements.

The Division of Enforcement's 2010 Enforcement Manual states that the SEC will continue to evaluate a company's cooperation, and "whether, and to what extent, it grants leniency to investigated companies," by considering the factors in the SEC's 2001 "Seaboard Report." As the Enforcement Manual notes, the Seaboard Report sets forth "four broad measures of a company's cooperation": (1) self-policing prior to the discovery of the misconduct; (2) self-reporting of misconduct when it is discovered; (3) remediation, including dismissing or disciplining wrongdoers and improving internal controls; and (4) cooperation with law enforcement authorities.[9]

## III. The Tenaris DPA

The Seaboard Report factors clearly support the SEC's decision to offer Tenaris a deferred prosecution agreement, particularly given the Company's swift self-reporting and "thorough internal investigation." Significant provisions of the DPA include:

- Tenaris pays a penalty of $5.4 million in disgorgement and prejudgment interest.
- Tenaris enhances policies, procedures, and controls to strengthen compliance with the FCPA and anti-corruption practices.
- Tenaris implements due diligence requirements related to the retention and payment of agents, provides detailed training on the FCPA and other anti-corruption laws, requires certification of compliance with anti-corruption policies, and notifies the SEC of any complaints, charges, or

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6 Tenaris DPA ¶ 6(bb).

7 The SEC had previously entered into a non-prosecution agreement with Atlanta-based children's clothing marketer Carter's, Inc. with respect to charges relating to financial fraud. *See SEC Resolves Investigation with First Use of Non-Prosecution Agreement*, (February 11, 2011) available at http://www.cahill.com/news/memoranda/100265/_res/id=sa_File1/CGR%20Memo%20-%20SEC%20Non-Prosecution%20Agreement.pdf.

8 SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations, SEC Press Release No. 2010-6 (Jan. 13, 2010), available at http://www.sec.gov/news/press/2010/2010-6.htm.

9 Securities and Exchange Commission Division of Enforcement: Enforcement Manual § 6.1.2, available at http://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

convictions against Tenaris or its employees related to violations of any anti-bribery or securities laws.

- Tenaris continues to cooperate, including:
  - providing the SEC with all non-privileged documents and information the Enforcement Division requests; and
  - making "best efforts" to secure the cooperation of current and former directors, officers, employees and agents of the Company.

Significantly, the DPA does not require Tenaris to make an admission of wrongdoing, or admit to a statement of facts detailing the misconduct, as is common in agreements of this type in the criminal context. Such admissions can be used against a company by criminal authorities or by private plaintiffs, neither of whom are bound by the DPA.

## IV. Significance of the Tenaris DPA

Self-reporting and cooperation have long been effective strategies for a company in the criminal context, and they have now been imported into the regulatory and civil contexts as well. Indeed, the United States Attorney's Manual's Principles of Federal Prosecution of Business Organizations, better known in the latest iteration as the "Filip Memo," and the SEC's cooperation initiative emphasize the same considerations: voluntary and timely disclosure, a willingness to cooperate with the government's investigation, the strength of the company's pre-existing compliance program, and its remedial actions.[10]

The Tenaris case exemplifies how effective such measures can be in minimizing the damage caused by employee misconduct. The lesson of the Tenaris case is that vigilance both before and after the discovery of the misconduct is vitally important. Companies that police themselves effectively, and react swiftly and responsibly to indications of misconduct, will put themselves in the best possible position with respect to both criminal and regulatory authorities.

## V. The Prosecution of Foreign Nationals Under the FCPA

Another noteworthy trend in FCPA enforcement is the DOJ's increasing prosecution of foreign nationals for FCPA violations. On April 28, 2011, Italian citizen Flavio Ricotti, a former executive of California-based valve manufacturer Control Components, Inc. ("CCI"), pled guilty to criminal charges that he conspired to bribe employees of the Saudi Arabian state-owned oil company, Aramco. Ricotti resided in Bientina, Italy and was arrested in Frankfurt, Germany before being extradited to the United States. This comes on the heels of U.K. citizens Wojcieh J. Chodan and Jefrey Tesler—in December 2010 and March 2011, respectively—pleading guilty to charges stemming from a conspiracy to bribe Nigerian officials in order to secure engineering and construction contracts for a Houston-based energy company. All three defendants were prosecuted as "agents of domestic concerns,"[11] a categorization that allows the DOJ to bring FCPA charges against foreign nationals who have tenuous connections to the United States.

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[10] *See* Filip Memo § 9-28.300(A)(4-5), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm.

[11] A "domestic concern" is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which

This is yet another example of the government's aggressive approach to FCPA enforcement. Additionally, it demonstrates that there is international support for arresting and extraditing individuals against whom the DOJ seeks to bring FCPA charges. Thus, foreign nationals should be aware that they are not necessarily outside the DOJ's grasp. Rather, such parties and the companies they work for need to consider whether their actions violate the FCPA, and conduct their business in a manner that minimizes the risk of such violations. Otherwise, they could find themselves facing criminal charges, and the threat of prison, in the United States.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email David N. Kelley at 212.701.3050 or dkelley@cahill.com; Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com.; or Garrett Ross at 212.701.3234 or gross@cahill.com.

has its principal place of business in the United States, or which is organized under the laws of a State of the United States, or a territory, possession, or commonwealth of the United States. *See* 15 U.S.C. § 78dd-2(h)(1).