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Global Anti-Corruption/Foreign Corrupt Practices Act Team
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To: Our Clients and Friends

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First-of-its-kind SEC Deferred Prosecution Agreement May Mark a New Era of FCPA Enforcement

On May 17, 2011, the Securities and Exchange Commission ("SEC") announced its first use of a Deferred Prosecution Agreement ("DPA") as a means to settle an enforcement action against a company. The DPA was used to resolve an investigation of payments to foreign officials alleged to have violated the Foreign Corrupt Practices Act ("FCPA").

Criminal prosecutors have long used DPAs, but the SEC's Division of Enforcement only recently has signaled a willingness to use this method to resolve cases. The SEC expects that the potential to resolve a matter through a DPA will provide an incentive for companies to self-report violations and to otherwise cooperate with its investigations.

The matter involved Tenaris S.A. ("Tenaris"), a supplier of pipes and related services to the oil and gas industry. The SEC alleged that company personnel bribed Uzbekistani government officials to win contracts to supply pipelines for transporting oil and natural gas. Tenaris entered into the DPA and agreed to pay $5.4 million in disgorgement and prejudgment interest. By entering into the DPA, Tenaris avoided being subject to an SEC enforcement action. In addition to the SEC matter, Tenaris agreed to pay a $3.5 million criminal penalty and entered into a non-prosecution agreement with the Department of Justice ("DOJ").

It is telling that the SEC's first use of a DPA occurred in an investigation involving alleged violations of the Foreign Corrupt Practices Act ("FCPA"). Such investigations, which typically require reviews of detailed financial records, e-mails and other documents in numerous jurisdictions, often in languages other than English, present substantial challenges to the SEC and other authorities. In these situations, what the SEC describes as "extraordinary cooperation" on the part of a corporation has particular value.

DPAs are formal written agreements in which the government agrees to forego an enforcement action against an individual or company. The grounds for a DPA typically involve the potential defendant's cooperation in the investigation and subsequent proceedings, payment of compensation to the alleged victims, adoption of remedial measures and evidence of remorse. The DPA lasts for a period of time negotiated by the parties. If the company or individual stops cooperating with the relevant authorities during this period of time or otherwise violates the terms of the DPA, the government may commence an enforcement action. As part of the cooperation agreement, individuals and companies often agree to comply with express prohibitions laid out by the government and to take steps to create internal monitoring procedures to prevent future violations.

The SEC believes that the use of DPAs will expedite the enforcement process by encouraging greater cooperation by individuals and companies under investigation. Thus, the availability of DPAs is best understood as part of a broader SEC program to encourage and reward prompt investigation, reporting and "extraordinary cooperation" by corporations and individuals. Other aspects of this program include (i) the SEC's policies on corporate cooperation articulated in the 2001 "Seaboard Report"; (ii) the SEC's policies on individual cooperation found in 17 C.F.R. § 202.12; (iii) the SEC's use of cooperation and non-prosecution agreements, in addition to DPAs; and (iv) the whistleblower protections found in Section 806 of Sarbanes-Oxley and Section 922 of Dodd-Frank. As Robert Khuzami, Director of the SEC's Division of Enforcement, noted last year, "There is no substitute for the insiders' view into fraud and misconduct that only cooperating witnesses can provide. That type of evidence can expand our ability to conduct our investigations more swiftly."

In this situation, Tenaris discovered possible FCPA violations unrelated to its operations in Uzbekistan from a third party in March 2009. After conducting an initial internal investigation, Tenaris met with SEC and DOJ staff to discuss its initial findings and report that it would be conducting a more thorough, world-wide investigation of its business operations and controls. In July 2010, Tenaris reported the results of its internal investigation to SEC and DOJ personnel. This report included the facts related to the Uzbekistan transactions. Tenaris also thoroughly reviewed its internal compliance programs during its investigation and noted areas in need of improvement. As part of its DPA, Tenaris has agreed to put in place new compliance policies and procedures and update its existing compliance programs to prevent future FCPA violations. These measures include:

- Due diligence requirements related to the retention and payment of agents,
- Detailed training on the FCPA and other anti-corruption laws,
- Certifications by personnel of their compliance with anti-corruption policies, and
- Policies and procedures to handle suspected violations of anti-corruption laws.

These procedures are practices that most international businesses should consider using to monitor their own compliance with the FCPA and other anti-corruption laws.

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If you have any questions about recent FCPA enforcement actions, how to comply with the FCPA, or how to create procedures to implement FCPA compliance policies, please contact one of the authors or a member of Bryan Cave LLP's Global Anti-Corruption/Foreign Corrupt Practices Act Team, the White Collar Defense and Investigations Group, or the Securities Litigation and Enforcement Group.