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SEC Executes First Non-Prosecution Agreement

This week, the Securities and Exchange Commission (SEC) announced that it entered into its first ever non-prosecution agreement. In our *Client Alert on January 22, 2010*, we noted that the SEC announced a cooperation initiative that would enhance incentives for companies and individuals to cooperate with SEC investigations. Non-prosecution agreements were one of the tools that the SEC planned to implement as part of this initiative. On December 20, 2010, the SEC filed a Complaint in the U.S. District Court for the Northern District of Georgia charging Joseph M. Elles, a former executive of Atlanta-based clothing store Carter's, Inc., with financial fraud and insider trading. The SEC alleged that Elles' misconduct caused an understatement of Carter's expenses and a material overstatement of its net income in several reporting periods.

Under the terms of the agreement, which was announced simultaneously with the filing of the Complaint, Carter's will not be charged with any violations of the federal securities laws relating to Elles's unlawful conduct.

Significant terms of the agreement include:

- No admission of liability by Carter's;
- Carter's agreement to fully cooperate with the SEC's continuing probe. The contemplated cooperation includes: (1) using its best efforts to secure the full cooperation of its current and former officers, directors and employees; (2) providing voluntary and truthful testimony—both before and during trial—at the SEC's request and, presumably, without requiring the issuance of a subpoena; and (3) providing non-privileged documents in a responsive and timely manner;
- A tolling of the statute of limitations for all potential claims against Carter's during the term of the agreement; and
- Carter's agreement not to deny the underlying conduct except in legal proceedings to which the SEC is not a party.

In exchange for its cooperation, the SEC agreed not to institute an enforcement action against Carter's. If Carter's commits a material violation of the agreement, however, the SEC can elect to bring an enforcement action for any substantive conduct which was not time-barred at the time the agreement was executed.

The non-prosecution agreement appears to have been motivated by (1) the fact that Carter's promptly self-reported the conduct upon discovery and (2) the SEC's conclusion, as contained in its public statements, that the unlawful conduct attributable to Carter's was "relatively isolated." As the agreement is the first of its kind, it is difficult to predict whether they will be used only in cases of isolated and proactively-corrected misconduct, or other contexts as well. Nonetheless, the agreement represents a significant addition to the possible outcomes from an SEC investigation, and should be thoroughly explored as a possible resolution to SEC inquiries.

Locke Lord's White Collar Criminal Defense and Securities attorneys have extensive experience in representing individuals and companies in investigations and litigation with the SEC and various state and federal agencies. If you are contacted by the SEC about an investigation, please do not hesitate to call upon us for advice and assistance.

About the Authors

Paul E. Coggins is a partner at Locke Lord. He is the head of Locke Lord's national White Collar Criminal Defense and Internal Investigations practice. Mr. Coggins was the United States District Attorney for the Northern District of Texas from 1993-2001.

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