

June 7, 2016

Akamai Technologies, Inc. and Nortek, Inc. Receive First Declinations Under the DOJ's FCPA Pilot Program and Rare NPAs from the SEC with No Fine Imposed

On June 7, 2016, the U.S. Department of Justice (“DOJ”) issued the first public declinations of a criminal enforcement action since implementing its new enforcement plan for the Criminal Division – Fraud Section’s Foreign Corrupt Practices Act (“FCPA”) Unit (the “Pilot Program”).¹ The DOJ has declined any prosecution of U.S.-based cloud computing and content delivery network company, Akamai Technologies, Inc. (“Akamai”) and U.S.-based residential and commercial building products manufacturer Nortek, Inc. (“Nortek”) for unrelated FCPA violations by their respective Chinese subsidiaries. On the same day, both companies separately entered into non-prosecution agreements (“NPA”) with the U.S. Securities and Exchange Commission (“SEC”)—representing only the second and third FCPA NPAs from the SEC—for violations of the books and records and internal controls provisions of the FCPA.²

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DOJ's First Declinations Under the FCPA Enforcement Pilot Program

The DOJ's FCPA Pilot Program, announced in April 2016, is a year-long initiative designed to promote corporate self-disclosure and cooperation in FCPA matters. The Pilot Program offers corporations a number of incentives if they meet certain standards for voluntary self-disclosure, full cooperation, and timely and appropriate remediation.³ Although both cases pre-dated the start of the Pilot Program, the DOJ stated that Akamai and Nortek had met the Pilot Program's requirements through their prompt voluntary self-disclosure of the misconduct, internal investigation, and fulsome cooperation and remediation. The DOJ specifically acknowledged Akamai's identification of all individuals involved in the misconduct, sharing all the relevant facts, enhancing its compliance program and internal accounting controls, taking appropriate remedial action against the individuals and entities involved in the misconduct, and disgorging relevant profits through Akamai's coordinated resolution with the SEC.

SEC's Rare FCPA Non-Prosecution Agreements

Since the SEC announced its own enforcement cooperation program on January 13, 2010,⁴ the SEC had entered into only one other FCPA NPA before today.⁵ The SEC's enforcement cooperation program grants NPAs to corporations in limited circumstances where the company has cooperated fully and complied with express undertakings.

Today's NPAs acknowledge Akamai's and Nortek's timely self-disclosure of the conduct, their comprehensive cooperation with the SEC, and their significant remedial measures. The SEC declined to impose any civil penalty against both companies in the NPAs. Akamai and Nortek agreed to pay disgorgement and prejudgment interest (\$671,885 and \$322,058, respectively).

¹ [Criminal Division Launches New FCPA Pilot Program](#) (April 5, 2016).

² [“SEC Announces Two Non-Prosecution Agreements in FCPA Cases”](#) (June 7, 2016). Akamai was represented by Ropes & Gray in connection with this matter.

³ For a summary of the Pilot Program, see [“DOJ Announces Bigger Stick, Carrot, in FCPA Enforcement”](#) (April 6, 2016).

⁴ See SEC's spotlight on its [Enforcement Cooperation Program](#).

⁵ See [“SEC Announces Non-Prosecution Agreement With Ralph Lauren Corporation Involving FCPA Misconduct”](#) (April 22, 2013).

Akamai's NPA

According to Akamai's NPA, from 2013 to 2015, Akamai's Chinese subsidiary (Beijing) Technologies, Co. Ltd.'s ("Akamai Beijing") former regional sales manager agreed with Akamai Beijing's former channel partner—a reseller of cloud computing services—to provide cash totaling \$38,500 to employees at two Chinese state-owned end customers, in exchange for the end customers entering into service contracts with the channel partner and purchasing services that exceeded the amount of network capacity that the end customers actually needed. Separate from the payment scheme, Akamai Beijing's employees provided certain gifts and entertainment (totaling approximately \$32,000) to employees at Akamai Beijing's end customers, including Chinese state-owned end customers, in violation of Akamai's policies. Notably, during the relevant time, Akamai Beijing amounted to less than 1% of Akamai's global revenue, according to Akamai's latest annual report.

The SEC concluded that Akamai's internal controls were insufficient at that time to prevent or detect the conduct. The SEC noted a lack of formalized due diligence for China-based channel partners, not proactively exercising audit rights over channel partners, the need for more employee compliance training, not translating anti-corruption policies into Chinese, not reviewing and monitoring end customer network usage in China, and insufficient procedures for reviewing and approving business entertainment expenses. In addition, the SEC found that Akamai China's books and records were inaccurate because the improper gifts and entertainment were recorded as legitimate business expenses.

The SEC recognized Akamai's significant remedial measures, which included terminating the involved business partner, taking appropriate action against relevant employees, implementing comprehensive due diligence processes for channel partners, strengthening anti-corruption policies, enhancing its compliance infrastructure, providing additional training to employees, and enhancing its expense and travel control requirements in China.

Nortek's NPA

According to Nortek's NPA, from 2009 to 2014, employees at Nortek's Chinese subsidiary Linear Electronics (Shenzhen) Co. Ltd. ("Linear China") gave improper payments and gifts (such as cash payments, gift cards, meals, travel, accommodations, and entertainment) to Chinese officials in order to receive preferential treatment, relaxed regulatory oversight, or reduced customs duties, taxes, and fees. In all, Linear China made more than 400 payments totaling approximately \$290,000. Furthermore, Linear China's accounting department disguised some of the improper payments in various accounts with falsified or misleading information and supporting documentation.

The SEC also found that Linear China's internal controls were inadequate. Linear China failed to review or test payments, identify obvious red flags in its financial records (such as the number and size of meal and entertainment expenses), and establish anti-corruption training procedures for Linear China employees. In addition, Linear China inaccurately recorded bribes in its books, records, and accounts.

In response to the findings, Nortek undertook extensive remediation measures, such as terminating implicated employees, revising internal audit testing and protocols to focus on identifying FCPA-related irregularities, developing a Compliance Committee to oversee compliance at its subsidiaries, providing mandatory anti-corruption trainings, translating anti-corruption policies in local languages, and adjusting the internal audit schedule to prioritize facilities located in high-risk geographies.

Takeaways

Companies faced with a potential FCPA issue must weigh their options with respect to appropriately investigating, remediating, and potentially reporting any related activity. Akamai's and Nortek's resolutions with DOJ and SEC demonstrate the significant credit companies can receive from making a voluntary and timely self-disclosure, conducting a targeted and efficient investigation, fully cooperating with the enforcement agencies, and taking appropriate remedial actions. Companies must carefully navigate these matters with DOJ, SEC, and often other enforcement agencies.

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