
June 20, 2016

DOJ Publicly Releases First Declination Letters Since Launching Its FCPA Pilot Program

The Department of Justice has publicly released its first declination letters since the launch of its FCPA Pilot Program two months ago.ⁱ The letters were sent to two companies, home-security and thermostat systems-maker Nortek, Inc. and internet-services provider Akamai Technologies, Inc., respectively, on June 3 and June 6.ⁱⁱ Each company had been under investigation by the DOJ and SEC after voluntarily self-disclosing FCPA-related misconduct connected to corrupt payments to Chinese officials by their wholly-owned Chinese subsidiaries. Although it is clear that these two matters were self-reported prior to the effective date of the Pilot Program, the letters nonetheless offer an early window into the DOJ's view as to when declination to prosecute is appropriate and presumably consistent with the goals of the FCPA Pilot Program.

Under the FCPA Pilot Program, there are four factors that the DOJ will consider in determining not only whether to reduce the amount of any monetary penalties imposed in a resolution with a company, but also in connection with considering whether declining to prosecute would be appropriate: (1) the company's voluntary self-disclosure, (2) the company's cooperation with the DOJ, (3) the company's remediation, and (4) the company's disgorgement of ill-gotten profits.ⁱⁱⁱ The letters, sent on behalf of Daniel Kahn, Deputy Chief of the Fraud Section and head of its FCPA Unit, outline how the DOJ's decisions not to prosecute Nortek and Akamai were consistent with these factors and purport to demonstrate that the DOJ is serious about rewarding voluntary self-disclosure, cooperation, and remediation. The letters further emphasize the "full remediation" the respective companies undertook to correct the misconduct at issue and prevent future misconduct. The declinations are consistent with remarks made recently by Assistant Attorney General Leslie Caldwell: "[t]he conventional wisdom of many investigations was to get to the bottom of what happened, take remedial actions and then put it on a shelf in case the government comes calling, and then if the government does come calling, cooperate. We wanted there to be an incentive for companies to come forward."^{iv}

Nortek reported in an SEC filing in January 2015 that it had uncovered questionable hospitality, gift and payment practices, and other questionable expenses at its Shenzhen, China-based subsidiary as part of a routine audit.^v The investigation into the conduct revealed that from at least 2009 to 2014, the subsidiary's managing director, accounting manager, customs liaison officer, and other employees made or approved some 400 improper payments and gifts to local officials in order to receive preferential treatment, relaxed regulatory oversight, and reduced customs duties, taxes, and fees. During this period, employees of Nortek's subsidiary inaccurately recorded the payments and gifts in Nortek's books and

records, which Nortek's internal accounting controls failed to identify. Nortek also failed to establish procedures to ensure anti-corruption compliance training for its subsidiary's employees.^{vi}

The DOJ's letter to Nortek specifically identified the following facts in support of declination:

- Nortek's internal audit function identified the misconduct;
- Nortek promptly and voluntarily self-disclosed the misconduct;
- Nortek undertook a thorough investigation, cooperated with the DOJ (including by identifying all individuals involved in or responsible for the misconduct and by providing all facts relating to that misconduct), and agreed to continue to cooperate in any ongoing investigations of individuals;
- Nortek undertook steps to enhance its compliance program and its internal accounting controls;
- Nortek fully remediated (including terminating the employment of all five individuals involved in the China-based misconduct, which included the subsidiary's managing director and chief financial officer; undertaking significant corrective action to enhance its compliance program and ensure adequate training of all employees; revising anti-corruption policies and internal audit protocols; mandating extensive mandatory in-person and online FCPA and anti-corruption trainings; and developing a Compliance Committee comprised of representatives of management and Nortek's subsidiaries); and
- Nortek will be disgorging profits to the SEC in an amount determined by the SEC.

Akamai similarly disclosed in a March 2015 SEC filing an internal probe regarding potential bribery by a subsidiary in an unidentified country.^{vii} The investigation into the conduct revealed that from at least 2013 through 2015, a regional sales manager schemed with a channel partner to bribe employees of three end customers, including two Chinese state-owned entities, to obtain and retain business. The scheme involved the provision of gifts and entertainment to Chinese government officials, with expenditures improperly recorded as legitimate business expenses. Akamai's internal accounting controls failed to prevent the bribes by, among other things, lacking formal due diligence of China-based channel partners, failing to monitor or review customer internet usage in high-risk regions, failing to translate anti-bribery and anti-corruption policies into Mandarin, and lacking adequate employee training on compliance and anti-bribery policies. Akamai undertook significant remedial action, including placing an involved regional sales manager on leave immediately; terminating its relationship with the involved channel partner, implementing a comprehensive due diligence process for channel partners; strengthening anti-corruption polices; developing enhanced compliance monitoring functions; providing extensive mandatory in-person and online FCPA and anti-corruption trainings; and enhancing travel and expense

control requirements in China.^{viii} The DOJ's letter to Akamai identified factors largely similar to those identified in its letter to Nortek as underlying its decision not to prosecute.

The letters also gave the standard cautionary warning that the DOJ could reopen its inquiries into the companies if it learns of additional information or evidence at a later point warranting such action.

Both companies separately reached non-prosecution agreements with the SEC, which entailed disgorgement of profits connected to corrupt payments to Chinese officials by their respective foreign subsidiaries. Nortek agreed to disgorge \$322,058 in profits and Akamai agreed to disgorge \$671,885 in profits.^{ix}

The DOJ letters and the SEC non-prosecution agreements may shed some light on the type of remediation the DOJ believes favors declination. The SEC non-prosecution agreements with both companies provide extensive details about the nature of each company's remediation, which included disciplinary measures, expanded anti-corruption training, enhanced internal accounting controls, and strengthened anti-corruption polices. In addition, the letters may also underscore different FCPA enforcement priorities for the DOJ and the SEC. Although the conduct involved numerous payments totaling hundreds of thousands of dollars, it appears that no senior level executives were involved. The involvement of senior personnel is no doubt a fact which makes declination less likely under the Pilot Program.^x Although self-reporting can lead to a declination to prosecute by the DOJ under its Pilot Program, the risk of being sanctioned by the SEC for the same conduct nevertheless remains. Finally, it is not clear from the available record whether there was a sufficient nexus to the U.S. to support bringing a prosecution consistent with DOJ prior practice, at least raising a question as to whether the DOJ would have brought a case anyway, even absent the factors cited in the letter as supporting declinations. Additional DOJ declinations and SEC enforcement actions may shed further light on these topics.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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ⁱ The DOJ announced its one-year FCPA Pilot Program on April 5, 2016 in its FCPA “Enforcement Plan and Guidance” Memorandum. *See* Paul Weiss Client Memorandum, DOJ Announces a Pilot Program to Encourage Companies to Self-Report FCPA Violation (Apr. 6, 2016), <https://www.paulweiss.com/practices/litigation/anti-corruption-fcpa/publications/doj%E2%80%99s-fraud-section-announces-a-pilot-program.aspx?id=21706>. The program applies to business organizations only and is designed to encourage full disclosure of FCPA-related misconduct by such business organizations.

ⁱⁱ *See* U.S. DEP’T OF JUSTICE, Re: Nortek, Inc., (June 3, 2016), <https://www.justice.gov/criminal-fraud/file/865406/download> (DOJ Declination Letter to Nortek); Re: Akamai Technologies, Inc. (June 6, 2016), <https://www.justice.gov/criminal-fraud/file/865411/download> (DOJ Declination Letter to Akamai).

ⁱⁱⁱ *See generally* U.S. DEP’T OF JUSTICE, The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance (the “Memorandum”) (Apr. 5, 2016), <https://www.justice.gov/opa/file/838386/download>.

^{iv} *See* Michael Macagnone, DOJ Crime Chief Defends Voluntary Disclosures Program, LAW360 (Apr. 28, 2016), <http://www.law360.com/articles/790474/doj-crime-chief-defends-voluntary-disclosures-program>.

^v *See* Nortek, Inc., Form 8-K: Report of Unscheduled Material Events or Corporate Event (Jan 15, 2015), available [here](#).

^{vi} *See* U.S. SEC. & EXCHANGE COMM’N, Nortek Non-Prosecution Agreement, Exhibit A – Statement of Facts (June 7, 2016), <http://www.sec.gov/news/press/2016/2016-109-npa-nortek.pdf>.

vii *See* Akamai Tech. Inc., Form 10-K, Annual Report Which Provides a Comprehensive Overview of the Company for the Past Year (Mar. 2, 2015), available [here](#).

viii *See* U.S. SEC. & EXCHANGE COMM'N, Akamai Technologies, Inc. Non-Prosecution Agreement, Exhibit A – Statement of Facts (June 7, 2016), <http://www.sec.gov/news/press/2016/2016-109-mpa-akamai.pdf>.

ix *See* Nortek Non-Prosecution Agreement, *supra* note vi; Akamai Non-Prosecution Agreement, *supra* note viii.

x *See* Memorandum, *supra* note iii at 9.