

INSIGHTS

DOJ Announces First Declinations After Implementing FCPA Pilot Program

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The U.S. Department of Justice (DOJ) issued its first set of public declinations since its April unveiling of a new self-reporting Foreign Corrupt Practices Act (FCPA) pilot program. On June 7, 2016, Akamai Technologies, Inc., a Massachusetts-based internet services provider, and Nortek, Inc., a Rhode Island-based residential and commercial building products manufacturer, both avoided criminal prosecution for illicit payments the companies paid to Chinese officials in independent bribery schemes conducted through Chinese subsidiaries. In connection with the declination announcements, the U.S. Securities and Exchange Commission (SEC) entered into rare non-prosecution agreements (NPAs) with the companies, stipulating that the companies are not charged with violations of the FCPA and do not face additional monetary penalties.

Pursuant to the terms of its NPA with the SEC, Akamai Technologies has agreed to pay \$652,452 in disgorgement plus \$19,433 in interest. According to the SEC's NPA, Akamai's foreign subsidiary arranged \$40,000 in payments to induce government-owned entities to purchase more services than they actually needed. Employees at the foreign subsidiary violated the company's written policies by providing improper gift cards, meals, and entertainment to officials at these state-owned entities to build business relationships. Akamai Technologies does not face criminal charges.

Nortek Inc. has agreed to pay \$291,403 in disgorgement plus \$30,655 in interest. According to the SEC's NPA, approximately \$290,000 in improper payments and gifts were made to Chinese officials by Nortek's subsidiary in order to receive preferential treatment, relaxed regulatory oversight, or reduced customs duties, taxes, and fees. These included cash payments, gift cards, meals, travel, accommodations, and entertainment. Nortek Inc. does not face criminal charges.

The resolutions come on the heels of some white collar industry leaders' criticisms regarding the relative lack of anything "new" about the FCPA pilot program, as well as questions as to whether self-reporting under the pilot program would lead to any truly substantive benefits or mitigations. When DOJ initially reported implementation of the one-year pilot program on April 12, 2016, it encouraged companies to "voluntarily self-disclose FCPA-related misconduct, fully cooperate with the Fraud Section, and, where appropriate, remediate flaws in their controls and compliance programs." In return for self-disclosure, the DOJ promised companies "the full range of potential mitigation credit," including a prosecution declination.

The DOJ held true to its word on Tuesday, announcing that both Akamai Technologies and Nortek Inc. had met the pilot program's requirements of prompt voluntary disclosure, full and

proactive cooperation with government investigations, and timely and appropriate remediation. In return, both companies received declinations.

Similarly, in its press release, the SEC noted that both Akamai Technologies and Nortek Inc. “self-reported the misconduct promptly, and they cooperated extensively with the ensuing SEC investigations,” as well as tightened their internal controls after discovering the illicit payments. The NPAs outlined specific actions each company took that persuaded the SEC to reach an agreement, such as reporting to the SEC in the early stages of internal investigations and strengthening anti-corruption policies with a focus on bolstering internal audit procedures and testing protocols.

After Tuesday’s reported resolutions, companies who conduct business in foreign markets – particularly in the tech services and construction industries, as seen here – may want to give more substantial consideration to the relative pros and cons to self-reporting a budding FCPA issue in an internal investigation. The FCPA pilot program requires that companies voluntarily disclose “prior to an imminent threat of disclosure or government investigation,” and “within a reasonably prompt time after becoming aware of the offense.” It also asks that companies proactively disclose all facts relevant to internal investigations, bolster and audit compliance programs, and discipline employee misconduct. If a company is willing to engage in these measures, the benefits could be substantial. Both the DOJ and the SEC have now demonstrated a willingness to play ball. The prospect of companies receiving significant benefits from the government in return for appropriately investigating, reporting, and remediating FCPA issues appears more promising, but the jury is still out.