

Akamai Settles FCPA Investigation Into Payments to Employees of State-Owned Entities in China

Non-Prosecution Agreement with SEC; Declination Letter from DOJ

Akamai 和解其在中国向国有企业员工支付费用的 《反海外腐败法》调查

美国证交会不予起诉协议；司法部拒绝起诉函

June 13, 2016 2016年6月13日

Anti-Corruption 反腐败

On June 7, 2016, the Securities and Exchange Commission (“SEC”) announced a [non-prosecution agreement](#) (“NPA”) with Akamai, Inc., an internet cloud services company, in connection with an investigation of possible violations of the books and records and internal accounting controls provisions of the US Foreign Corrupt Practices Act (“FCPA”) based on payments by its China subsidiary to employees of state-owned entities (“SOEs”) in China. Under the NPA, Akamai agreed to pay over \$670,000 in disgorgement and pre-judgment interest, but Akamai was not charged with violating the FCPA and did not have to pay additional penalties. Additionally, as part of its recently announced enforcement [pilot program](#), the US Department of Justice (“DOJ”) issued a letter of declination to Akamai closing its inquiry into the matter.

2016年6月7日，证券交易委员会（“证交会”）宣布与 Akamai 公司（“Akamai”）达成一项不予起诉协议。Akamai 是一家互联网云服务公司，其中国子公司向中国国有企业的雇员支付费用的行为涉嫌违反了美国《反海外腐败法》的账簿与记录和内部会计控制条款。该不予起诉协议是基于证交会对 Akamai 该等行为的调查的结果。基于该[不予起诉协议](#)，Akamai 同意支付超过 67 万美元的非法所得与判决前利息，但 Akamai 并没有被控诉违反《反海外腐败法》且 Akamai 不需要支付额外的罚金。同时，作为其最近宣布的执法[试点方案](#)的一部分，美国司法部（“司法部”）向 Akamai 发出了拒绝起诉函并结束对 Akamai 的问询。

A. Background and Alleged Misconduct 背景及被指控的不当行为

Akamai, based in Massachusetts, issued and maintains a class of publicly traded securities on NASDAQ, and operates in China through a wholly owned subsidiary, Akamai (Beijing) Technologies Co., Ltd (“Akamai-China”). Akamai-China provides technical and sales support to local Chinese channel partners for content delivery services, which are then resold by the channel partner.

Akamai 是一家马萨诸塞州公司，其在纳斯达克发行维护一支公开交易的股票，并通过一家全资子公司——Akamai（北京）科技有限公司（“Akamai 中国”）在中国运营业务。Akamai 中国向中国当地的渠道伙伴提供内容交付服务的技术和销售支持，渠道伙伴再将内容交付服务转售。

The SEC alleged that from at least 2013 through 2015, Akamai-China schemed with a channel partner to bribe employees of three end customers, including two SOEs, to induce them to purchase up to 100 times more network capacity from the channel partner than the SOEs actually needed. Specifically, the channel partner would pay money into accounts owned by the Akamai-China Regional Manager or his

designees, and then the Regional Manager paid a portion of these funds and provided expensive gifts to the employees of the three end customers. In total, the Regional Manager paid approximately \$155,500 to employees of end customers, including approximately \$38,500 in cash to employees of the SOEs.

证交会指控称，最晚从 2013 年至 2015 年间，Akamai 中国与一家渠道伙伴合作策划向三个终端用户的雇员行贿，其中包括两个国有企业，以诱导其向该渠道伙伴购买超过其实际所需 100 倍的网络容量。具体而言，该渠道伙伴先向 Akamai 中国的大区经理或该大区经理指定的收款人的账户汇入款项，该大区经理再将部分款项支付给这三个终端用户的雇员并向他们提供昂贵的礼物。该大区经理总共向这些终端用户的雇员支付了约 155,500 美元，其中包括向国有企业的雇员支付的约 38,500 美元的现金。

The SEC also alleged that during this same time period, other employees of Akamai-China provided improper gifts and entertainment to SOE employees totaling approximately \$32,000. These gifts and entertainment were allegedly provided in violation of Akamai's corporate governance and internal accounting controls policies, and were improperly recorded as legitimate business expenses. As a result, Akamai-China's books and records were inaccurate, and when consolidated with Akamai's, rendered the latter inaccurate.

同时，证交会指控称，于同一时期，其他 Akamai 中国的雇员向国有企业的雇员提供了总值约 32,000 美元的不当礼物和款待。指控称该等礼物及款待违反了 Akamai 的公司管理及内部会计控制政策，并被不当地记录为正当的商业支出。其结果是 Akamai 中国的账簿与记录不准确，且当其于 Akamai 的财报合并时，导致后者的账簿与记录不准确。

According to the SEC, these improper payments also evidenced a failure by Akamai to devise and maintain an adequate system of internal accounting controls sufficient to provide reasonable assurances that, among other things transactions were executed in accordance with management authorization, and recorded as necessary to maintain accountability. The SEC alleged that Akamai's internal accounting control failures included not only a lack of effective procedures for approval of business entertainment, but also a lack of formal due diligence on the channel partners, failure to exercise audit rights, failure to monitor customer usage in high-risk regions, and failure to translate anti-bribery and anti-corruption policies into Mandarin, and inadequate employee training.

根据证交会的指控，该等不当支付同时表明 Akamai 未能制定及维护一个适当的内部会计控制系统，该系统应足够充分以对包含在管理层授权下进行交易并记录以满足问责需要在内的行为提供合理的保证。证交会指控称 Akamai 的内部会计控制不仅缺乏有效的批准商业款待的程序、缺乏对渠道伙伴的正式的尽职调查，亦未能行使审计权利、未能监督高风险地区顾客的操作惯例、未能将反贿赂及反腐败政策翻译成中文，以及未能向雇员提供足够的培训。

B. Self-Reporting, Cooperation, and Remediation 自我报告、合作、及补救

The NPA and DOJ Letter of Declination acknowledge that Akamai voluntarily disclosed its investigation to the SEC and the DOJ promptly--within weeks of having begun an internal investigation into a complaint from one of its sales representatives about the Regional Sales Manager's activities. The NPA and DOJ Letter of Declination also credit Akamai's cooperation, including by sharing its findings of its internal investigation, translating relevant documents, and identifying all individuals involved in or responsible for the conduct and making witnesses available.

该不予起诉协议及司法部的拒绝起诉函注意到 Akamai 及时主动地向证交会及司法部披露其调查——在其对一名销售代表对该大区销售经理的行为的投诉启动内部调查的数周之内。该不予起诉协议及司法部的拒绝起诉函同时奖励了 Akamai 的合作，包括分享其内部调查的结果、翻译相关的文件，以及鉴别所有参与或对该行为负责的个人并提供相关证人。

The SEC and DOJ also praised Akamai's remedial measures. Akamai promptly suspended the Regional Sales Manager involved in the misconduct, who subsequently resigned; terminated its relationship with the channel partner, and disciplined five other employees who should have prevented other violations of the Company's policies.

证监会及司法部亦赞扬了 Akamai 的补救措施。Akamai 迅速地：对参与该不当行为的大区销售经理做停职处理——该大区经理事后已经辞职；终止其与该渠道伙伴的关系，并处罚了本应能防止其他违反公司政策的行为的另五名雇员。

Akamai also reviewed and enhanced its compliance and training program globally. Akamai implemented a due diligence process for its channel partners, including engaging an outside consultant to conduct channel partner risk assessments; strengthened its anti-corruption policies and staffed a global team of compliance professionals in Europe, United States, and Asia; provided mandatory in-person and online training on the FCPA and anti-corruption policies in appropriate languages; and enhanced its expense control requirements, including adding review and approval by someone with Chinese-language capability.

Akamai 亦重审并加强了其全球合规及培训方案。Akamai：实施了一个针对其渠道伙伴的尽职调查的流程，包括聘请一名外部顾问对渠道伙伴进行风险评估；加强了其反腐败政策并在欧洲、美国及亚洲增设了一个全球合规专职小组；提供了当地语言的、强制的《反海外腐败法》及反腐败政策的面对面与网上培训；以及加强了其对支出控制的要求，包括增加由具有中文语言能力的人员进行的审核与批准。

C. Consequences 后果

As part of the NPA with the SEC, Akamai agreed to pay disgorgement in the amount of \$652,452 plus \$19,433 in prejudgment interest.

作为证监会不予起诉协议的一部分，Akamai 同意支付 652,452 美元的不当所得及 19,433 美元判决前利息。

D. Observations and Lessons Learned 观察及经验教训

Pilot Program and NPAs. The DOJ's declination letter to Akamai was one of the first issued under the DOJ's [pilot program](#) to encourage self-reporting. However, the one-page letter in which DOJ claimed to rely on a variety of factors in closing its inquiry "despite bribery by an employee of the Company's subsidiary in China and one of that subsidiary's channel partners," leaves much to be desired as a model of the benefits of participating in the pilot program.

试点方案及不予起诉协议。 司法部给予 Akamai 的拒绝起诉函是司法部在鼓励自我报告的[试点方案](#)下最早发出的拒绝起诉函之一。但是，在这封一页纸长度的信函中，司法部称其基于一系列因素决定终止问询，“尽管公司在中国的子公司的一名雇员及该子公司的一个渠道伙伴有贿赂行为”——司法部的说法使得将其对 Akamai 的决定作为参与试点方案的好处的范例仍显出许多不足之处。

The SEC's use of an NPA also is relatively novel, and, although cited as a benefit to voluntary self-disclosure, the NPA still prohibits Akamai from denying the allegations and requires Akamai to cooperate in any related investigation regardless of the time period. As noted [before](#), although NPAs provide clear benefits to the government -- unlike deferred prosecution agreements and SEC injunctive actions, NPAs are not filed with any court, escaping judicial scrutiny -- the benefits to companies who voluntarily disclose are less clear.

证监会使用不予起诉协议的情形仍然较为新颖，并且，尽管被引用为自我披露的好处之一，不予起诉协议仍然禁止 Akamai 否认相关指控并要求 Akamai 在任何相关的调查中予以配合，且调查的时间范围不予限

制。如之前所提到的，尽管不予起诉协议对政府有明显的好处——不同于延迟起诉协议以及证交会的司法禁令程序，不予起诉协议不会被提交至任何法院，从而逃避了司法审查——其对公司自我披露的好处并不明晰。

What is clear, however, is the DOJ's and the SEC's continued emphasis on individuals involved in the misconduct. The declination letter credits the company's disclosure of the individuals involved as well as the company's commitment to cooperate in the investigation of these individuals. Similarly, the NPA requires the company to use "best efforts" to secure the cooperation of current and former directors and employees.

然而，清晰的是，司法部及证交会对参与不当行为的个人的持续强调。司法部的拒绝起诉函奖励了公司自我披露涉及的个人及公司配合调查该等个人的作为。相似地，不予起诉协议要求公司尽“最大的努力”以确保现在及过往董事及雇员的合作。

Lessons Learned. This settlement also reinforces lessons learned from other anti-corruption cases, including the need to:

吸取到的教训。 本次和解亦加强了从其他反腐败案中学习到的教训，包括下列需求：

- develop and implement effective internal controls to ensure that gifts, meals, entertainment, and travel funds are used appropriately;

制定并实施有效的内部控制以确保礼物、用餐、款待以及旅游资金的恰当使用；

- conduct due diligence on third parties interacting with government officials and exercise third party audit rights;

对与政府官员互动的第三方进行尽职调查并行使第三方的审计权利；

- timely investigate and remediate reports or findings of improper activity;

及时调查及补救被举报的或发现的不当行为；

- ensure local language capabilities are an integral part of compliance programs, including in the provision of training and materials, and in the review and approval of expenses; and

确保熟知当地语言成为合规方案不可或缺的一部分，包括在提供的培训与材料，以及在审核及批准支出方面；以及

- conduct mandatory training on the FCPA and compliance policies worldwide.

在全球范围内提供《反海外腐败法》及合规政策的强制性的培训。

If you have any questions concerning the material discussed in this client alert, please contact the following China-focused members of our [Global Anti-Corruption practice group](#):

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