

Nortek Settles FCPA Investigation Over Payments to Chinese Government Officials

诺泰克就向中国政府官员支付的 FCPA 调查进行和解

Non-Prosecution Agreement with SEC; Declination Letter from DOJ
与美国证交会达成不起诉协议；获取司法部停止调查函

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 Nortek, Inc., a manufacturer of construction and remodeling products, in connection with an investigation into 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 an indirect wholly-owned Chinese subsidiary to Chinese government officials. Under the NPA, Nortek agreed to pay over \$320,000 in disgorgement and pre-judgment interest, but Nortek 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 Nortek closing its inquiry into the matter.

2016 年 6 月 7 日，美国证券交易委员会（“证交会”）宣布与建筑和重塑产品生产商诺泰克（Nortek Inc.）就其非直接控股的全资中国子公司向中国政府官员进行不正当支付而可能违反美国反海外腐败法（“FCPA”）账簿和记录以及内部会计控制规定的调查而达成一项[不起诉协议](#)。根据该不起诉协议，诺泰克同意支付三十二万美元的不正当收入和判决前利息，但是诺泰克并没有被提起违反 FCPA 的指控，也未支付额外罚金。此外，作为近期生效的[试点项目](#)的实施成果之一，美国司法部（“DOJ”）对诺泰克发出停止调查函，结束对该项事项的调查。

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

Nortek, which issued and maintains a class of publicly traded securities on NASDAQ, operates in China through a wholly owned subsidiary, Linear Electronics (Shenzhen) Ltd. (“Linear China”).

诺泰克是一家在美国纳斯达克上市并持有一支公众交易股票的公司，通过其全资子公司年利亚电子(深圳)有限公司 (Linear Electronics (Shenzhen) Ltd) (“年利亚中国”) 在中国开展运营。

The SEC alleged that from at least 2009 until 2014, various Linear China employees (including a managing director, accounting manager, and customs liaison officer) made or approved more than 400 improper payments and gifts to local government officials in China in order to receive preferential treatment, relaxed regulatory oversight, and/or reduced customs duties, taxes, and fees. These incentives were given to local officials from departments including customs, tax, fire, police, labor, health inspection, environmental protection, and telecommunications, and took the form of cash payments, gift cards, meals, travel, accommodations and entertainment.

美国证交会指控至少在 2009 至 2014 年间，多名年利亚中国员工（包括一名管理董事，会计经理和海关事务联络管理人员）开展或者批准了向中国地方政府官员四百多项不正当支付和礼物以换取优先待遇、放松

监管、以及减免的海关税、税收和其他费用。这些激励性费用通过现金支付、礼品卡、餐饮、旅游、住宿和娱乐等方式给予了当地海关、税收、消防、劳工、卫生监督、环保和电信管理部门的官员。

The SEC alleged that the improper payments were systemic and went undetected for several years. At least one improper payment was made every month during the time in question. In some cases, Linear China's accounting department created entries for these payments and supported them with false or misleading information and documents. As a result, bribes were inaccurately recorded in Linear China's books and records, which were consolidated into the books and records of Nortek.

美国证交会还指控上述不正当支付是系统性的且历经数年都未被察觉。在相关期限内，至少每个月都有一项不正当支付发生。在某些情况下，年利亚中国的会计部门为上述支付建立了会计项目并为其提供了虚假或者误导性的支持性信息和文件。由此，年利亚中国的会计账簿和记录上不准确地记录了多项贿赂交易，该账簿和记录随后被合并到诺泰克的账簿和目录中。

The SEC regarded the improper payments made in the ordinary course of business over several years as evidence that Nortek failed to devise and maintain a system of internal accounting controls at Linear China sufficient to assure that transactions were executed according to management's authorization, and transactions were recorded as necessary to maintain accountability for assets. The SEC also alleged that Nortek failed to review or test the payments made by Linear China from multiple accounts, and failed to notice "obvious red flags," including the number and size of meals and entertainment expenses. The SEC further alleged that Nortek failed to establish procedures to ensure its Linear China employees were trained in anti-corruption compliance.

证交会视这些发生在数年正常经营过程中的不正当支付为诺泰克未能对年利亚中国制定和维持一套内部控制体系以确保交易根据管理层的授权展开以及交易得以充分记录保证资产问责的证据。证交会指控诺泰克未能审阅或者检测到年利亚中国为多项不正当支付，并且没有认识到诸如餐饮和娱乐支付数目和规模等“明显的注意事项”。证交会进一步指称诺泰克未能建立足够的程序确保年利亚中国的员工在反腐败合规领域得到必需的培训。

B. Self-Reporting, Cooperation, and Remediation 自我披露、配合和补救措施

The NPA and DOJ Letter of Declination acknowledge that Nortek timely self-reported the issue after an internal audit team identified questionable payments made to local Chinese officials. Importantly, Nortek provided the SEC and DOJ preliminary findings before completing its investigation. The NPA and DOJ Letter of Declination also credit Nortek's cooperation, including identifying all improper payments and potential improper payments, providing summaries of witness interviews, updating SEC staff on new information, organizing and presenting key documents, translating documents from Chinese to English, making witnesses available for interviews, and conducting a risk assessment of Nortek's other manufacturing sites in China to determine whether similar improper conduct had occurred at those sites.

不起诉协议和司法部的停止调查函承认诺泰克在其内部审计团队发现向中国地方政府官员的不正当支付后，及时披露了该问题。更重要的是，诺泰克在完成公司调查之前主动向证交会和司法部披露了初步调查结果。不起诉协议和司法部的停止调查函还称赞了诺泰克所作出的配合努力，包括识别所有不正当支付和潜在的不正当支付、提供证人面谈的摘要、向证交会工作人员提供新的信息、整理和展示关键文件、将中文文件翻译为英文、安排证人接受面谈、以及在诺泰克中国的其他生产点展开风险评估确定相似的不正当行为是否在这些地点展开。

The SEC and DOJ also praised Nortek's prompt action to end the payments and implement remedial measures. Nortek terminated all five individuals involved in the misconduct after they were interviewed for the internal investigation, including the two senior executives of the China subsidiary. Nortek also revised internal audit testing and protocols, strengthened anti-corruption policies, created a compliance

committee, provided mandatory training on the FCPA and anti-corruption policies to employees worldwide in appropriate languages, and adjusted its internal audit schedules to focus on high-risk geographic areas.

美国证交会和司法部还赞扬了诺泰克为制止这些不正当支付和实施补救措施所开展的迅速行动。诺泰克终止了上述不正当行为中所涉及的五名员工（包括两名在华资深高级管理人员）。诺泰克还修改了内部审计检测和协议，加强了反腐败政策、建立了合规委员会、为全球各地的员工提供了本地语言的FCPA和反腐败政策强制培训，以及调整了内部审计安排表以将重点放在高风险的地理区域。

C. Consequences 相应后果

As part of the NPA with the SEC, Nortek agreed to pay disgorgement in the amount of \$291,403 plus \$30,655 in prejudgment interest.

在与美国证交会达成的不起诉协议中，诺泰克同意缴纳不正当收入二十九万一千四百零三美元并附加三万零六百五十五美元的判决前利息。

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

Pilot Program and NPAs. The DOJ's declination letter to Nortek 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 the bribery by employees of the Company's subsidiary in China," leaves much to be desired as a model of the benefits of participating in the pilot program.

试点项目和不起诉协议。 美国司法部向诺泰克发出的停止调查函是美国司法部为鼓励公司自我披露[试点项目](#)下公开的首例案件。在该一页纸之长的信函中，美国司法部声称尽管公司在华子公司员工实施了贿赂行为，鉴于一系列因素其决定结束该调查。但作为参与试点项目自我披露获取好处的典范案例而言，还有待进一步观察。

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 Nortek from denying the allegations and requires Nortek 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.

证交会对不起诉协议的运用还相对比较新颖，以及尽管其称不起诉协议是主动自我披露的一大好处，不起诉协议仍然禁止诺泰克否认指控，并要求诺泰克在任何时间段内的任何相关调查中予以配合。如我们[之前](#)所指出的，尽管不起诉协议为政府提供了好处，但是不同于延迟起诉协议（Deferred Prosecution Agreement (DPA)）和证交会禁止令(injunctive actions) 的是不起诉协议不必在法院备案从而可以逃离司法审查，其为公司带来的好处并不是很清楚。

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.

但是十分明确的是，司法部和证交会持续地重点关注不正当行为中的个人。司法部停止调查函赞扬了公司及时披露了不正当行为中所涉及的个人以及承诺在调查相关个人环节中加以配合。相似地是，不起诉协议要求公司尽“最大努力”确保现有和离职前董事和员工的合作。

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

获取的教训。 本和解同时还强化了从其他反腐败案件中获取的教训，包括有必要采取下述行动：

- develop and implement effective internal controls and ensure that gifts, meals, entertainment, and travel funds are used appropriately;
开展和实施有效的内部控制并确保礼品、餐饮、娱乐和差旅费用被用于适当目的；
- adopt robust, risk-based control and audit procedures sufficient to prompt timely investigation of red flags, particularly in geographic areas with a high risk of corruption;
实施强有力的风险控制和审计程序充分确保能够及时对问题领域特别是在腐败高风险区域展开调查；
- timely investigate and remediate reports or findings of improper activity;
对不正当行为及时开展调查并补救包括披露及报告调查结果；
- conduct mandatory anti-corruption training worldwide in the local language.
在全球领域使用当地语言开展强制性反腐败培训。

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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