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# Foreign Corrupt Practices Act Alert

## Hitachi Agrees to Pay $19 Million to Settle SEC FCPA Charges Arising Out of Improper Payments to South African Political Party to Obtain Power Station Contracts

### SUMMARY

The U.S. Securities & Exchange Commission (SEC) announced yesterday that Hitachi, Ltd. (Hitachi) has agreed to pay a $19 million civil penalty to settle charges that the company violated the books and records and internal control provisions of the Foreign Corrupt Practices Act (FCPA). The SEC alleged that Hitachi entered into an improper arrangement with a local South African company that Hitachi knew was affiliated with South Africa's ruling political party, the African National Congress (ANC). According to the SEC, Hitachi made, and improperly recorded, payments to the local company in exchange for the local company's exercise of political influence to steer power station construction contracts to Hitachi.

### BACKGROUND

The SEC alleged that, in 2005, Hitachi sold a 25% equity stake in a South African subsidiary to Chancellor House Holdings (Pty) Ltd. (Chancellor), a South African investment firm with ties to the ANC. Hitachi allegedly was aware of Chancellor's political connections at the time of the sale and agreed to sell Chancellor the 25% stake in the subsidiary at a below-market price and after conducting minimal due diligence, in order to benefit from Chancellor's influence with the ANC. The SEC further alleged that in 2006, Chancellor was exposed by the South African press as a front for, and the alter ego of, the ANC, and that Hitachi was aware of this development but nevertheless maintained its relationship with Chancellor.

As part of Hitachi's arrangement with Chancellor, Hitachi allegedly agreed in a side contract to pay Chancellor "success fees" for using Chancellor's influence with the ANC to aid Hitachi in obtaining government contracts. The SEC further alleged that as a result of Chancellor's efforts, Hitachi was

awarded two substantial contracts for the construction of power stations in South Africa, with a combined value of approximately $5.6 billion. According to the SEC, Hitachi paid Chancellor success fees of approximately $1.12 million in connection with obtaining these contracts, and improperly recorded those fees as "consulting fees" in Hitachi's books and records. Hitachi allegedly also paid Chancellor more than $5 million in dividends in connection with Chancellor's 25% share in the Hitachi subsidiary. The SEC alleged that Hitachi improperly recorded these dividend payments on its books and records because those records did not indicate that the dividend payments were made to foreign officials to cause them to use their influence to assist Hitachi in obtaining government contracts. In total, Hitachi allegedly paid Chancellor approximately $10.5 million during the course of the relationship, which was terminated in February 2014 when Hitachi repurchased Chancellor's shares in the subsidiary.

At the time of the alleged violations Hitachi had ADRs listed on the New York Stock Exchange, but delisted those securities in April 2012, after which the ADRs continued to trade in the over-the-counter market. The SEC further alleged that, despite having a code of conduct in place during the relevant period that proscribed bribery, Hitachi failed to implement adequate internal controls to prevent the payment and improper recording of the payments made to Chancellor, including by failing to conduct adequate FCPA compliance training.

## DISCUSSION

The resolution of the action underscores again the importance of ensuring that compliance policies are more than "paper" policies, but instead are fully and meaningfully implemented and enforced throughout the company, with special focus on subsidiaries and affiliates located in regions at special risk for corruption. From a due diligence perspective, the enforcement action presents a somewhat unique set of circumstances, in which the motivation for Hitachi's sale of an equity stake in the subsidiary to Chancellor appears to have included efforts to influence the awarding of government contracts (and thus the company appears to have intentionally avoided conducting extensive due diligence of Chancellor in connection with the sale). The settlement nevertheless serves as a reminder for the need for robust due diligence in all corporate mergers and acquisitions, including FCPA-related due diligence, especially with respect to mergers and acquisitions involving foreign counterparties in at-risk jurisdictions. In that regard, the SEC action demonstrates again the significance that the U.S. authorities ascribe, and, therefore, companies should devote, to agreements to pay "success fees" to consultants and to undisclosed side arrangements. The resolution of the action also reconfirms that the SEC will aggressively pursue wholly foreign conduct with no apparent nexus to the United States (thus depriving the SEC of jurisdiction to assert claims under the FCPA's substantive anti-bribery provisions) through the books and records and internal controls provisions of the FCPA (which do not require any United States nexus, as long as the defendant is an issuer of securities registered with the SEC). The penalties for such violations can be as or more severe than penalties for violations of the FCPA's anti-bribery provisions. In addition, the SEC

action demonstrates that an issuer's delisting of securities from U.S. exchanges will not preclude exposure to FCPA liability for conduct allegedly occurring while the securities were listed in the U.S.

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