On 28 September 2015, the US Securities and Exchange Commission (SEC) issued a press release stating that the Japanese multinational conglomerate, Hitachi Ltd, had been charged with violating the Foreign Corrupt Practices Act (FCPA).

Hitachi agreed to pay USD 19 million to settle the SEC charges which included the inaccurate recording of improper payments made to South Africa’s ruling political party, the African National Congress (ANC).

**Underlying FCPA Trends**

On the face of it Hitachi’s FCPA violation is nothing new; foreign company with poor internal controls pays politically-connected intermediary to secure contract. According to the SEC’s press release, Hitachi sold a 25% interest in its South African subsidiary to Chancellor House Holdings (Pty) Ltd., a company whose ultimate shareholding was held by the ANC. This allowed profits from power station contracts secured by Hitachi - using Chancellor House’s political influence – to be shared with the ANC backed company. Hitachi also paid a USD 1 million ‘success fee’ to Chancellor House which was inaccurately recorded in the company’s accounts as consulting fees. Despite the familiar pattern, both the nature and target of this SEC investigation indicates a changing regulatory focus.

The last ten years have seen a striking shift in tone from the US regulators who have adopted a more aggressive posture with respect to enforcing the provisions of the FCPA. The US authorities continue to target bribery offences committed outside the US through the use of more stringent investigative tactics and increased cooperation with other enforcement agents worldwide.
The Hitachi case is illustrative of this new stance; often constrained by needing the relevant local governments to cooperate with them, on this occasion the SEC appears to have overcome the hurdle by enlisting the assistance of the African Development Bank’s (AfDB) Integrity and Anti-Corruption Department.

Moreover, this matter indicates the broadening sectorial scope of US regulatory interest. Previous FCPA enforcement actions have fallen within the oil and gas industry with the majority arising from West Africa; the Hitachi case is a first for South Africa and falls outside the extractive sector. Given that Japanese companies are increasingly involved across Africa, this change also represents heightened risks for their regional operations.

Growing Japanese FDI
Japan is one of the world’s leading economies and whilst its progress into Africa has been slow, the country has made remarkable inroads expanding its presence and influence. In 2014, the Japanese government promised USD 32 billion financial assistance to resource-rich African nations as part of its bid to cement relations with the continent. Japan recently signed a bilateral agreement with Mozambique - the first such agreement it has entered into with a sub-Saharan African country – and similar investment frameworks are in the process of being agreed with other African countries. These should all encourage more investment in the region.

This commitment to Africa is matched by Japanese companies. In September 2015, the AfDB and the government of Japan agreed a USD 300 million loan to support private sector business under a joint initiative named the Enhanced Private Sector Assistance (EPSA) for Africa. Several large trading entities, including Sumitomo and Sojitz, are active across the continent. Construction firms, such as Mitsubishi, Mitsui, and Hitachi, are also involved in various capacities in a number of infrastructure projects in Africa. According to Japan’s South African embassy, in 2013 the number of private Japanese companies in South Africa increased to 115. Direct investment from Japan has also increased in the country, and its cumulative total as of 2012 reportedly exceeded USD 26 million.

Notwithstanding the above, the popularity of Africa as a high-growth market is pushing Japanese companies into riskier investment terrains at a time when anti-corruption enforcement and awareness is at an all-time high. Hitachi is not the first Japanese company to face the wrath of the US anti-corruption regulators; Bridgestone, JGC Corporation and Sojitz have all been charged with FCPA violations in Latin America, Nigeria and Bahrain respectively. But as Japanese companies develop their new market strategies and pursue more opportunities in Africa, it is important that they are cognizant of the regulatory risks.

Establishing Proper Internal Controls
International anti-bribery legislation including the FCPA and UK Bribery Act (UKBA) require companies to make independent assessments of the ultimate shareholders and beneficiaries of their potential partners. Specifically, partnering with public or political figures and using their position in order to gain a commercial advantage is considered an offence under these laws. In many African countries, information that may identify both the political affiliations of immediate third parties and also the ultimate shareholders or beneficiaries of a company is not easily accessible. As such, Japanese companies should look to conduct comprehensive due diligence that goes beyond reviewing financial accounts and litigation files to include a less tangible narrative, which provides the story behind the public records.

Once a local partner is identified, it is important to ensure the necessary skills and expertise are in evidence, and that any fees paid are proportionate to the services rendered. Further to engagement, internal controls should ensure that all payments made to third parties are properly documented and regularly audited.

Although Japan is a member of the OECD, commentators note that its enforcement of domestic corruption laws is weak and there is no criminal liability for corporations under local laws. This is reflected in its position in Transparency International’s 2015 Exporting Corruption report; Japan ranked as having made ‘little or no enforcement’ in making bribery in foreign countries a crime for its companies and nationals.

Conclusion
Whilst it may not be immediately obvious why the Hitachi case would fall foul of US regulations, it is important to be aware of the wide territorial reach of the FCPA, UKBA and other anti-corruption legislation. Navigating the complex governance and regulatory environments is essential to international business and a particularly notable factor for Japanese firms establishing business in Africa.