



TechLaw
 SOLUTIONS | Your
 e-Discovery
 Partner

An ALM Web site

LAW.COM

CORPORATE COUNSEL



This Site | Law.com Network | Legal Web

Search the Legal Web

Go >>

HOME | LITIGATION | IP INSIDER | LABOR & EMPLOYMENT | TRANSACTIONS | GOVERNMENT WATCH | IN-HOUSE TECH |

Font Size: + -

From the Experts: Secret Agents Causing FCPA Violations

Due Diligence to Prevent Bribes by Nigerian Touts

David Elesinmogun, Obumneneme Egwuatu, and Marcus Cohen | [All Articles](#)

Corporate Counsel | October 03, 2011

 Print
 Share
 Email
 Reprints & Permissions
 Post a Comment


To the untrained eye, they often appear as scrubby derelict vagabonds, haunting the steps of administrative offices throughout the developing world. Yet, this unassuming guise belies their predatory importance as quasi-official intermediaries—serving as both roadblocks and essential intercessors. They are “touts,” and if your company has ever obtained official documents in West Africa, touts have likely paid cash to government officials on your behalf. And with or without your knowledge, touts may have caused your company to violate the Foreign Corrupt Practices Act (FCPA).

Jointly enforced by the U.S. Department of Justice's Crime Fraud Division and the U.S. Securities and Exchange Commission, the FCPA prohibits corrupt payments to foreign government officials, either directly or via third parties. The law also requires that standardized and defined accounting practices be maintained by companies listed on any U.S. exchange and by their majority-owned subsidiaries, regardless of whether they are based in the United States. The United Kingdom and other countries have recently followed suit by enacting their own anti-bribery statutes, yet the FCPA remains the preeminent anti-corruption law in terms of enforcement. In recent years, the number of FCPA prosecutions has skyrocketed, with penalties routinely exceeding \$100 million and prison terms as long as seven years.

Since 2002, when the U.S. began bribery prosecutions in earnest, Nigeria has remained the epicenter of FCPA enforcement. To date, the preponderance of FCPA prosecutions has been related to illicit payments to Nigerian government officials. Most of these cases involved the classic suitcase of cash given to a high-ranking dignitary; however, garden-variety bribes in violation of the FCPA are paid by U.S. companies on a daily basis to middling Nigerian civil servants, and almost always by touts.

Touting in Nigeria originated early in the post-independence era when manifest corruption, bribery, and nepotism were the norm. The 1960 transition from British rule to self-government opened up opportunities for indigenes to wield control over national and economic affairs. With 90% of the population forced to rely on the semi-literate 10% to guide them through the newly enacted regulatory hurdles, touts arose from the literate elite and semi-literate lower classes to reap parasitic rewards. Following the discovery of vast natural resources (especially oil), multinational corporations flocked to Nigeria and instantly fell prey to touts. Artificial scarcity, complicated administrative processes, the desire to circumvent government requirements, bureaucratic delays, and bottlenecks all feed the practice of touting.

In Nigeria, the vast majority of touts linger patiently outside the Corporate Affairs Commission, the Nigerian Ports Authority, Federal Airports Authority, Motor Vehicle Administration, police headquarters, courts, as well as federal and state tax offices, seeking out “customers” in need of operational licenses, government certificates, records, or any number of other bureaucratically blessed documents crucial to conducting legitimate commercial transactions.

The methods used by touts to seek clients are marked by brazen, unrefined, defiant, and tactless overtures. More sophisticated and influential touts are seen driving Italian sports cars and hobnobbing with the official elite in Abuja and Victoria Island. These “three-piece-suit touts” have honed their craft and cultivated

Need CLE? ▶

CLECenter.com

ADVERTISEMENT

**When you're serious
about IP...**

USEBRINKS™
Intellectual Property Law Worldwide

BRINKS HOFER GILSON & LIONE®
Intellectual Property Law Worldwide

[usebrinks.com](#)

Find similar content

Companies, agencies mentioned ▶

Key categories ▶

Most viewed stories ▾

1 Prosecutors Are Getting In-House Lawyers' Attention

2 Big Law Salaries: Let's Talk About Value

3 Blackwater Ex-GC Tells All (Fictionally)

4 From the Experts: Secret Agents Causing FCPA Violations

5 Diversity Digest: Cracks in the Glass Ceiling

ADVERTISEMENT

relationships with authorities farther up the official food chain. But whether they don Prada or sandals, all touts serve as shadowy middlemen, circumventing official regulatory processes by paying cash to secure administrative actions while shielding government officials from direct interaction with the bribes' beneficiaries.

When touts serve as an agents' agent, they often pay bribes without a company's actual knowledge. This means that although piercing the local agent/tout veil can be difficult, ensuring that no bribes are paid on your company's behalf is essential. The FCPA is not a strict liability statute, but there have been convictions based on conscious avoidance of knowledge of a "substantial probability" that money would be used by a third party to make bribes. Farther down the slippery slope, the U.K. Bribery Act imposes strict liability on corporations that fail to prevent bribes by those acting on their behalf. Simply trusting agents not to employ touts is a business strategy fraught with peril.

As touts and corrupt agents thrive on corporate ignorance, non-native companies doing business in the Nigerian market should consider arming themselves with local counsel who are well-versed in local law and required procedures. Although local agents often offer assistance with corporate registration, preparation of contract bids, and a host of other issues, Nigerian attorneys are considerably better suited to provide such assistance. Additionally, companies doing business in Nigeria are well advised to adopt heightened due-diligence practices to prevent touts from infiltrating their operations. Often the best procedures to avoid the involvement of touts and the inevitable bribes associated with them are also the most straightforward.

Basic recommended tout-preventative screening measures include the following:

- Ask local agents if they use touts;
- Verify the reputation of the local agents in the business community;
- Ensure that local agents deal directly with government officials and do not employ additional intermediaries;
- Scrutinize invoices from local agents and request official government receipts;
- Review official government websites to understand the applicable fees and appropriate procedural time frames; *and*
- Contact a Nigerian Foreign Mission or the Nigerian Embassy to inquire about various regulatory processes.

The Nigerian government, for its part, has recognized the economic scourge that touts represent and have moved to eradicate touting at the federal, state, and local levels. The Nigerian government recently initiated laws, instituted policies, and revamped existing systems in an effort to curb the contrivances of touts. In August, the Nigeria Customs Service conducted a mass arrest of approximately 200 suspected touts at a port in Lagos.

Notwithstanding these anti-touting initiatives, the problem persists. Touting presents a unique challenge for multinational corporations conducting business in Nigeria, and companies should adopt proactive strategies to avoid violating the FCPA.

David Elesinmogun (de@eandelawyers.com) and Obumneke Egwuatu (oe@eandelawyers.com) are founding partners of Elesinmogun & Egwuatu, with offices in Lagos, Nigeria, and Washington D.C. Elesinmogun's practice focuses on advising both Nigerian and international corporations in cross-border commercial ventures, banking, criminal law, securities regulation, environmental law, and immigration. Egwuatu concentrates his practice on advising multinational corporations on investing in Nigeria and Africa, and compliance with both Nigerian and U.S. law.

Marcus Cohen (mcohen@strrtade.com) is of counsel to Sandler, Travis & Rosenberg in Washington D.C., where he advises clients on compliance with U.S. and international anti-corruption measures and export controls and sanctions laws.

[Subscribe to Corporate Counsel](#)

 Print  Share  Email  Reprints & Permissions  Post a Comment

"IT CAN HELP ANY GENERAL COUNSEL SAVE MONEY."

JENNIFER NICOLITZ
LAW LIBRARIAN
FIDELITY NATIONAL FINANCIAL
JACKSONVILLE



WestlawNext™

Hear what Jennifer and others are saying ►

lawjobs.com

TOP JOBS

Commercial Litigation Attorney
P.G. Prager Search Associates, LTD.
Brooklyn, New York

ASSOCIATE

EINHORN HARRIS ASCHER BARBARITO & F
Denville, NJ

MORE JOBS
POST A JOB

ADVERTISEMENT

Webinar:
E-Discovery Collection
Best Practices

Guidance
SOFTWARE

Avoid major risks and
take the right steps to
ensure proper collections

 Watch Now



From the Law.com Network

Deloitte.

Introducing
the Deloitte
Discovery
Infocenter

Discovery Infocenter

A highly efficient discovery process translates to a high quality response. Access featured discovery articles, whitepapers, interviews, and webcasts to improve your discovery process and performance. [Learn More.](#)

THE RECORDER



Parole Denials a Cause for Second Guessing

Gascon Trails Bock in DA Money Race

dbr
DAILY BUSINESS REVIEW.COM



Fla. Lawyer Files RICO Action Against JPMorgan Chase

Last of Rothstein items to hit auction block

New Jersey Law Journal



Appeals Court Nixes Divorce Lawyer's Bid To Collect Fees Via Charging Lien

3rd Circuit Revives Suit Claiming Residency Rules for City Hires Have Non-White Bias

ALM LEGAL INTELLIGENCE



The 2011 Electronic AmLaw 200

These reports have become industry standard for determining benchmark success within law firms.

the LAW.COM network

[Advertise](#)

LAW.COM

Newswire
Special Reports
International News
Lists, Surveys & Rankings
Legal Blogs
Site Map

ALM NATIONAL
The American Lawyer
The Am Law Litigation Daily
Corporate Counsel
Law Technology News
The National Law Journal

ALM REGIONAL

Connecticut Law Tribune
Daily Business Review (FL)
Delaware Law Weekly
Daily Report (GA)
The Legal Intelligencer (PA)
New Jersey Law Journal
New York Law Journal
GC New York
The Recorder (CA)
Texas Lawyer

DIRECTORIES

ALM Experts
LegalTech® Directory
In-House Law Departments at the Top 500 Companies
New York's Women Leaders in the Law
Corporate Counsel: Best Lawyers® Annual Guides
The American Lawyer: Best Lawyers® Annual Guides
The National Law Journal Leadership Profiles
National Directory of Minority Attorneys

BOOKS & NEWSLETTERS

Best-Selling Books
Publication E-Alerts
Law Journal Newsletters
LawCatalog
Law Journal Press Online

RESEARCH
ALM Legal Intelligence
Court Reporters
MA 3000
Verdict Search
ALM Experts
Legal Dictionary
Smart Litigator

EVENTS & CONFERENCES

ALM Events
LegalTech®
Virtual LegalTech®
Virtual Events
Webinars & Online Events
Insight Information

REPRINTS

Reprints

ONLINE CLE

CLE Center

CAREER

Lawjobs

[About ALM](#) | [About Law.com](#) | [Customer Support](#) | [Reprints](#) | [Privacy Policy](#) | [Terms & Conditions](#)
Copyright 2011. ALM Media Properties, LLC. All rights reserved.

ALM
An Integrated Media Company