

ORGANIZE AND AUTOMATE YOUR LEGAL HOLDS!

TECHLAW SOLUTIONS LEGAL HOLD MANAGEMENT
KEEPS YOU IN COMPLIANCE AND HELPS AVOID SANCTIONS.



TechLaw Your e-Discovery Partner
SOLUTIONS

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, Obumneme 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 ▼

- Prosecutors Are Getting In-House Lawyers' Attention
- Big Law Salaries: Let's Talk About Value
- Blackwater Ex-GC Tells All (Fictionally)
- From the Experts: Secret Agents Causing FCPA Violations
- 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 Obumneme 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 ▶



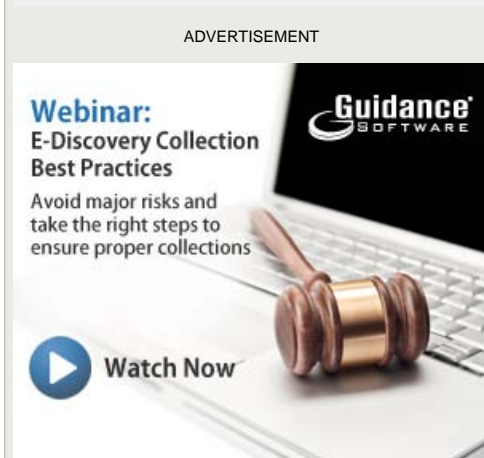
lawjobs.com
TOP JOBS

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

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

Watch Now

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 an industry standard for determining benchmark success within law firms.

the LAW.COM network

Advertise

LAW.COM

- News wire
- 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.

