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## From the Experts: Secret Agents Causing FCPA Violations

Due Diligence to Prevent Bribes by Nigerian Touts

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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

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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.

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