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Nigeria: an FCPA minefield for corporations

David Elesinmogun, Obumname Egwuatu and Marcus Cohen

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Nigeria is a country of extremes. The most populous country in Africa — seventh in the world, with a projected economic growth rate of approximately 7%, far surpassing that of the United States at about 3% — Nigeria is a nation that presents vast financial opportunities.

But international corporations are forced to weigh the potential for hefty profits against the ever-present danger of operating in a country that tops the corruption index. Foreign (i.e., non-Nigerian) companies have reaped billions in profits from investing in Nigeria, and they have also shelled out more than a billion dollars in recent fines for bribing Nigerian government officials. Unfortunately, the words "Nigeria" and "corruption" have become inexorably linked in the collective corporate consciousness.

Historically, U.S. and European companies limited their presence in Nigeria to the petroleum and mineral extractive industries. Rich in natural resources with cheap labor and an expanding middle class, Nigeria is emerging as the economic powerhouse of Africa where the rate of returns for foreign investors can be enormous. However, high profits often come with significant risk — and the risks for doing business in Nigeria can be great.

For all of its benefits, Nigeria is still a developing country and continues to experience growing pains. Providing gratification payments as inducement for acting or forbearing to act (i.e., bribery) is rampant at all levels of government and generally not frowned upon by the Nigerian public. Corruption remains a fact of life in Nigeria — a fact that has not been lost on the U.S. Department of Justice.

Since 2002, DOJ has prosecuted more companies under the Foreign Corrupt Practices Act (FCPA) for bribery occurring in Nigeria than in any other country. In fact, the majority of FCPA prosecutions have been related to corrupt payments to Nigerian government officials. See [DOJ's alphabetical list](#) of FCPA and related enforcement actions. Although many other developing nations are rife with corruption, a recent string of FCPA cases clearly demonstrates that U.S. companies doing business in Nigeria are prime targets for FCPA enforcement actions.

DOUBLE-EDGED SWORD

The anti-bribery provisions of the FCPA make it unlawful for a U.S. person (individual or company) to make a corrupt payment to a foreign government official for the purpose of obtaining or retaining business. The law also applies to foreign persons who take any act in furtherance of such a corrupt payment while in the United States or on behalf of U.S. persons or businesses. Today, most U.S. and international companies understand that conducting business abroad comes with the additional baggage of being FCPA compliant. Yet, ensuring FCPA compliance becomes especially burdensome when the company is doing business in a country where paying bribes is seen as the cost of doing business.

Foreign companies should be on notice that corrupt payments in violation of the FCPA also are likely to run afoul of local Nigerian law. Whether seen as quaint, provincial, unimportant or easily circumvented with a cash payment, many foreign companies simply ignore Nigeria's strict anti-corruption laws.

In January, Nigeria signaled its renewed commitment to rooting out corruption by signing the United Nations agreement on the International Anti-Corruption Academy, the coordinating body in the international fight against corruption. While Nigeria's Corrupt Practices and Other Related Offences Act (ICPC Act), which closely mirrors the FCPA in many respects, was enacted into law more than a decade ago, the Nigerian government has finally recognized the need to tackle the problem of corruption. Under Nigeria's Criminal and Penal Codes, applicable in different parts of the country, Nigerian prosecutors have extremely wide latitude to charge both corporations and individuals accused of violations of the ICPC Act.

Nigerian government agencies, such as the Economic and Financial Crimes Commission, have stepped up anti-bribery enforcement. Unfortunately, Nigeria's anti-corruption laws have been enforced sporadically, often in an arbitrary and capricious manner — and occasionally employed as a tool for political purposes. To compound the problem, most foreign companies fail to obtain adequate (or any) local counsel and instead rely almost exclusively on the representations of their local Nigerian agents for all their business transactions. Irrespective

of the type of business venture, U.S. and other foreign companies are well advised to retain qualified Nigerian counsel to ensure that all expenses — including taxes, customs clearances and payments to Nigeria's Motorized Police for security — are made in accordance with both local law and the FCPA.

Who is a Nigerian government official? What constitutes a bribe in Nigeria? What is the word for "bribe" in Nigeria? Seemingly straightforward questions can be exceedingly difficult to answer.

ROYAL FATHERS

Nigerian civil servants, military officers, members of the judiciary and employees of government agencies are government officials; however, the status of local chiefs and tribal leaders can be very confusing and has to be assessed carefully. The position of kings, emirs, obas, igwes and chiefs (collectively referred to as "royal fathers") in the modern nation of Nigeria has been evolving over time. The number and complicated quasi-political status of such individuals can stagger the imagination of those unfamiliar with West Africa.

Before the British colonization, Nigeria was ruled exclusively by the royal fathers. The British adopted a style of governance called "indirect rule" whereby they ruled through these local and regional chieftains. After independence in 1960, Nigeria retained the royal fathers, paid them salaries and allowed them limited participation in the government. Due in large part to concerns about their influence and power, successive governments have sought to limit their political roles.

Today, the royal fathers maintain no official position within the federal government of Nigeria. However, the status and influence of royal fathers varies by location. In the southern part of Nigeria, royal fathers continue to act in an advisory capacity to the Nigerian government and draw government salaries corresponding to their importance. In the northern portion of the country, the royal fathers have more prominence and recognition because of their dual roles as both traditional and religious leaders.

But not all royal fathers play a role in the affairs of either the federal or local government. Some royal fathers are mere figureheads: anachronisms incarnate with little or no political influence. In fact, titles such as chief and oba often are simply honorific. Thus, determining who is a royal father and whether a particular individual qualifies as a government official in Nigeria requires a case-by-case analysis by local legal practitioners.

LEGAL OR ILLICIT PAYMENT?

The complexity of the Nigerian legal framework cannot be understated. The Nigerian legal system is an amalgamation of English common law, Islamic law and traditional indigenous precepts. The federal government also liberally adopts circulars and portions of statutes from other countries. Some of these borrowed codes and edicts are occasionally in direct conflict with existing Nigerian laws and regulations. In addition, conducting research on Nigerian law from abroad is virtually impossible, as most of Nigeria's statutes, regulations and codes are not yet available online. Navigating this multifaceted, inaccessible and confusing system is often an insurmountable task for even the most seasoned non-Nigerian attorney.

Certain legal principles that are well-established in the United States and Europe do not always find parity in the Nigerian legal system. For example, some tax burdens in Nigeria are negotiable. While Nigerian law strictly prohibits bribing public officials, cash payments to Motorized Police officers detailed to provide security are customary. On the other hand, facilitation payments that are permissible under the FCPA could be a crime under Nigerian law.

The Federal Republic of Nigeria is composed of more than 250 ethnic groups including the Hausa, Fulani, Yoruba, Ibo, Ijaw, Kanuri, Ibibio and Tiv. In addition to English, which serves as the official language, Nigeria has more than 500 indigenous languages and a countless number of dialects and regional variations. Although a formal linguistic survey to determine the number of different words and phrases to denote "bribe" has yet to be undertaken, a rough estimate of the number of variations of bribe-related terms in the most widely spoken languages — English, Hausa, Yoruba, Igbo (Ibo) and Fulani — would likely be in the hundreds, if not thousands.

Invoices, contracts, vouchers, receipts and even conversations with local Nigerians are regularly peppered with a variety of bribe terms. Any non-Nigerian unfamiliar with such terms and the subtle nuances of Nigerian culture may overlook the fact that a bribe has been demanded or that it has been paid. In addition, foreign companies conducting internal compliance audits or law firms investigating their clients' activities often stumble blindly through masses of documents and gigabytes of electronic data failing to recognize the existence of corrupt payments.

Nigeria is open for business. Limited government control and oversight combined with recent legislation designed to attract foreign investors are additional enticements. Nigeria's economic growth and diversity, coupled with the increasing political stability and the desperate need for infrastructure development, have led many international companies with an eye toward expanding into new markets to recognize Nigeria as a new business frontier. However, skeptics argue that, given the current FCPA enforcement landscape, it's too risky to consider entering the Nigerian market.

Risk exists in every business venture, and each new frontier poses its own challenges. Reducing those risks is essential. Obtaining local counsel with a thorough understanding of the dynamics of Nigerian culture and

politics is vital to ensure that companies do not violate either local law or the FCPA. Entrepreneurial companies that retain local counsel experienced in the U.S. and Nigerian legal systems are poised to reap the rewards of this great nation.

David Elesinmogun and Obumneme Egwuatu are founding partners of Elesinmogun & Egwuatu, with offices in Lagos, Nigeria, and Washington. 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. They can be reached, respectively, at de@eandelawyers.com and oe@eandelawyers.com. Marcus Cohen is of counsel to Sandler, Travis & Rosenberg in Washington, where he advises clients on compliance with U.S. and international anti-corruption measures and export controls and sanctions laws. He can be reached at mcohen@strtrade.com.

WEB-ONLY:

Companies should manage impact of FCPA probes on key stakeholders

Doing so may enable them to avoid or successfully defend against collateral government agency inquiries or civil litigation.

New focus on truly foreign entities and foreign officials

Recent prosecutions have targeted these two classes of defendants — thought for years to be beyond the reach of U.S. law enforcement.