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ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION

# Practical Tips for International Procurement - Performing Overseas

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# Speakers

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# Agenda

1. Working With the US Government Abroad: Changes to the Enforcement Landscape
2. Challenges When Doing Business Internationally
3. Key Takeaways
4. Resources
5. Questions

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# Working With the US Government Abroad: Changes to the Enforcement Landscape

# US False Claims Act: Extra-Territorial Jurisdiction

## False Claims Act applies to:

**Any corporation or individual, located domestically or in a foreign jurisdiction.**

- Who either breaches a direct contractual provision with the US government
- Violates a US law or regulation
- Or causes another to commit such a breach or violation of the law
- That is material to the government's decision to appropriate funding or impacts the value of the services the government has received.

# Offenses Under the False Claims Act (FCA)

Knowingly presenting, or causing to be presented, a false or fraudulent claim for payment (31 USC § 3729(a)(1)(A)).

Knowingly making, using, or causing to be made or used, a false record or statement material to a false or fraudulent claim (31 USC § 3729(a)(1)(B)).

Improper conduct to avoid paying the government or improper retention of an overpayment by the government (31 USC § 3729(a)(1)(G)).

Conspiring to commit a violation of any of the other liability provisions (31 USC § 3729(a)(1)(C)).

# False Claims Act Liability

- *United States, ex rel. Gregory Caputo and Global Tungsten & Powders Corporation v. Tungsten Heavy Powder, Inc., d/b/a Tungsten Heavy Powder & Parts, Inc.*
  - Tungsten Heavy Powder, Inc. ("THP") provided weapons systems manufacturing articles and services to United States Department of Defense agencies and to the Government of Israel.
  - The United States contended that THP knowingly submitted false certifications to the United States regarding the origin and manufacture of defense articles procured by the government of Israel that were financed with United States' grant funds paid by the Foreign Military Financing (FMF) program.
  - The United States alleged that THP falsely certified that tungsten had been sourced in the United States where it was actually sourced in China.
  - THP agreed to pay $5,641,114 to resolve the allegations.

# False Claims Act Liability

- *United States v. International Rescue Committee*
  - A New York nongovernmental organization ("NGO") received U.S. Agency for International Development ("USAID") funding to provide humanitarian assistance to refugees in Syria.
  - The government alleged that the NGO's staff participated in a collusion and kickback scheme with a foreign supplier to rig bids for goods and services contracts used in its humanitarian relief efforts. The government alleged that this conduct led to the procurement of goods at unreasonably high prices, which were then invoiced to USAID.
  - The NGO agreed to pay $6.9 million to settle allegations that it violated the FCA in relation to programming funded by the USAID.

# Procurement Collusion

- In November 2019, the Department of Justice announced the formation of the Procurement Collusion Strike Force (PCSF).
- The objectives of the PCSF are to deter, detect, investigate, and prosecute antitrust crimes, such as bid-rigging conspiracies, related fraudulent schemes, and collusion affecting government contracting.
- The PCSF seeks to leverage interagency collaboration to ensure that bidding and award processes are fair, open, and competitive; and to eliminate potential entry barriers in public procurement.
- There has been significant expansion of the PCSF since its inception in 2019, including a wider reach through the launch of PCSF: Global.
- The goal of PCSF Global is to build connections with enforcement counterparts and tackle potential collusion in bids for the staggering amount of U.S. funds spent abroad.

# Procurement Collusion

- Since its launch, the PCSF has had significant positive enforcement results, including:
  - Prosecuting collusion in the Belgian security market related to US and NATO military installations, with Belgian security firm G4S Secure Solutions NV (G4S) pleading guilty on 25 June 2021; and
  - Two former directors pleading guilty on 18 October 2021 for their roles in a conspiracy to rig bids, fix prices, and allocate customers for security services contracts.
  - G4S agreed to pay a USD 15 million criminal fine.
  - Days after G4S's guilty plea, on 29 June 2021, a federal grand jury returned an indictment charging a second Belgian security services company, Seris Security NV (Seris), and three former executives at G4S and Seris for their roles in the conspiracy.

# Civil Cyber Fraud Initiative

- In October 2021, the Department of Justice announced the launch of the Department's Civil Cyber-Fraud Initiative.
- The initiative combines the Department's expertise in civil fraud enforcement, government procurement and cybersecurity to combat new and emerging cyber threats to the security of sensitive information and critical systems.
- The Civil Cyber-Fraud Initiative utilizes the False Claims Act to pursue cybersecurity related fraud by government contractors and grant recipients.
- The creation of the Initiative, which is led by the Civil Division's Commercial Litigation Branch, Fraud Section, is a direct result of the department's ongoing comprehensive cyber review, ordered by Deputy Attorney General Monaco this past May.
    - The review is aimed at developing actionable recommendations to enhance and expand the Justice Department's efforts against cyber threats.

# Civil Cyber Fraud Initiative

- *United States ex rel. Lawler v. Comprehensive Health Servs., Inc. et al., Case No. 20-cv-698 (E.D.N.Y.) and United States ex rel. Watkins et al. v. CHS Middle East, LLC, Case No. 17-cv-4319 (E.D.N.Y.)*
  - Comprehensive Health Services, LLC (CHS) is a provider of global medical services that contracted to provide medical support services at government-run facilities in Iraq and Afghanistan.
  - Under one of the contracts, CHS submitted claims to State Department for the cost of a secure electronic medical record (EMR) system to store patients' medical records, including confidential identifying information of US officials.
  - The United States alleged that CHS failed to disclose to the State Department that it had not consistently stored patients' medical records on a secure EMR system. When CHS staff scanned medical records for the EMR system, CHS staff saved and left scanned copies of some records on an internal network drive, which was accessible to non-clinical staff.
  - The State Department and Air Force contracts also required CHS to provide medical supplies, including controlled substances, that were approved by the US Food and Drug Administration (FDA) or European Medicines Agency (EMA) and manufactured in accordance with federal quality standards.
  - The United States alleged that CHS falsely represented to the State Department and Air Force that certain substances provided under those contracts were approved by the FDA or EMA.
  - This is the Department of Justice's first resolution of a False Claims Act case involving cyber fraud since the launch of the Department's Civil Cyber-Fraud Initiative.
  - CHS agreed to pay $930,000 to resolve the allegations.


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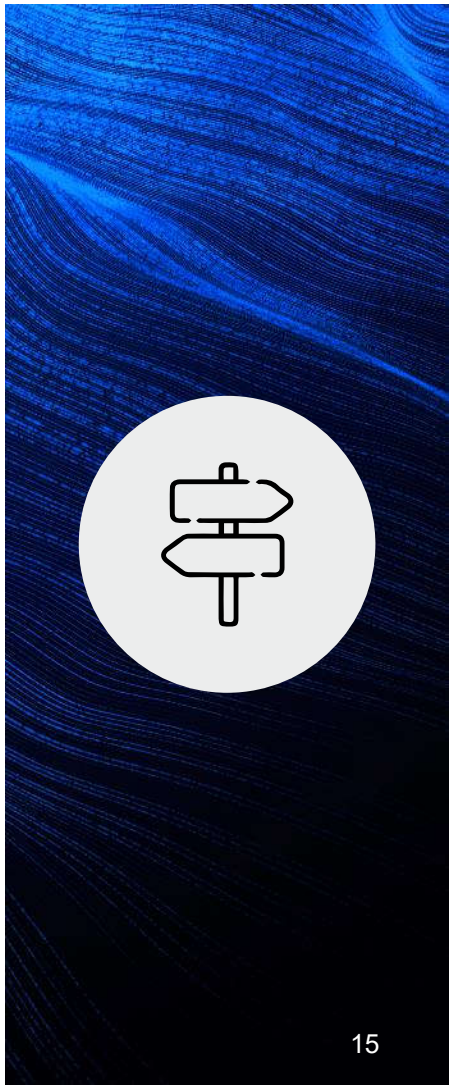
Challenges When Doing
Business Internationally

# Common Risks When Doing Business Internationally

- Dealing with inadequate information sources and uncertain legal regimes
- Knowing and navigating laws related to local content or workforce
- Navigating infrastructure, customs and immigration matters
- Knowing and navigating procurement requirements
- Managing Foreign Corrupt Practices Act (FCPA) risk

# Dealing With Uncertainty

- Poor sources of accurate information.
  - Impacts ability to conduct effective due diligence, or even know partners, channel partners, or customers.
- Uncertain legal regimes can make knowing (and following) local law a challenge.
  - Challenges in determining whether single sourcing procurement process is appropriate.
  - Challenges in understanding requirements for visas/work permits for workers (e.g., "emergency" or "offshore" visas).

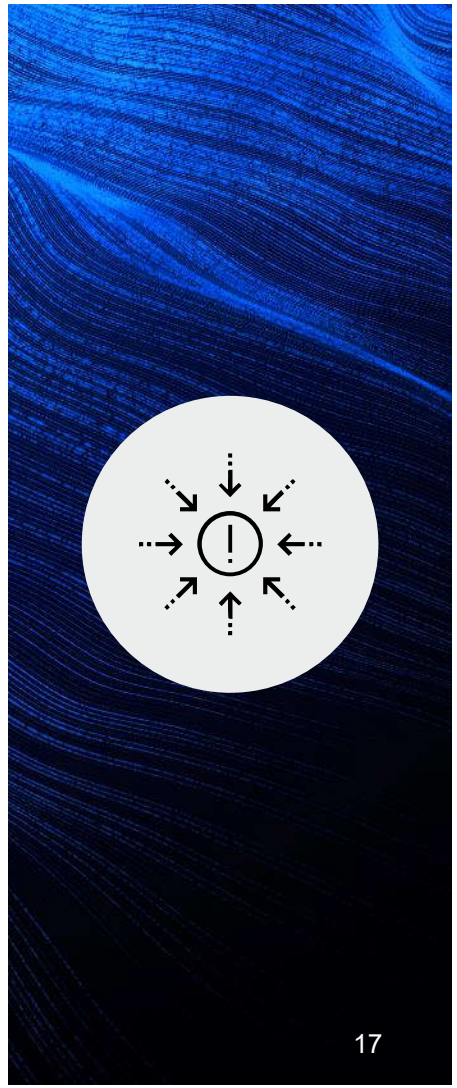


# Local Content Laws

- Certain jurisdictions have robust "local content" laws that require forced partnerships.
- Partners often play limited or no operational role, which can pose legal and compliance challenges.
- Often local partners have connections to the government, or are even suggested/proposed by local state-owned companies.
- Such partnerships can usually be managed with thorough documentation of the role, compensation, and structure of the relationship, as well as diligence, local counsel advice, and monitoring.

# FCPA Areas of Risk

- Third parties, business partners & contractors
- Interactions with government agencies
- Sales to government entities
- Corporate hospitality, gifts, entertainment and travel
- Marketing & sponsorships
- Charitable contributions
- Lobbying
- Licenses and permits



# Red Flags – Third Parties

- If relying on third parties, such as consultants, agents and intermediaries, look for:
  - Connections to a government official
  - Recommendation from the government
  - Lack of relevant expertise or professional reputation
  - Unclear ownership, control, credit terms
  - No physical (or Internet) presence
  - Lack of commission, retainer or expense reimbursement records
  - No written agreements or agreements lack economic sense
  - Irregular contractual provisions that cannot be satisfactorily explained

# Red Flags – Payments

- Commissions or similar payments appear higher than market benchmarks
- Unconventional payment terms such as cash, to other third parties, to accounts in tax havens
- Inflated or unsupported invoices
- Questionable financial statements
- Unexplained expenditures
- Undocumented payments or transactions
- Excessive advance payments
- Rents paid for real estate owned by government official

# 5 Tips for Third Party Due Diligence

1. Integrate compliance diligence processes to avoid duplication and multiple channels to address various risks
2. Analyze the third party's business model and associated risk factors
3. Assess the level of risk in the countries of operation
4. Ensure risk-based due diligence is conducted and properly documented
5. Thoroughly investigate all red flags

# 10 Tips for Managing Third Parties

1. Keep up to date on distributor/third party licensing and operating status to ensure ongoing compliance
2. Provide training to raise awareness and ensure that employees and third parties understand red flags
3. Have robust audit and termination rights
4. Conduct risk-based audits of key third parties
5. Ensure proper compliance safeguards are in place
6. Any employees you have on the ground are key to risk management – hire them well
7. Make sure your people in the field communicate regularly with your third parties and know the services they provide and the method by which they provide it
8. Ensure someone owns each relationship from a compliance standpoint – responsibility and accountability
9. Regularly review and test whistleblower program
10. Properly staff and supervise investigations

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# Key Takeaways

# Maintain a Uniform Culture and Process

# Guide to 5 Essential Elements of Corporate Compliance

Distilled from various sources:

- US Sentencing Guidelines.
- Guidance to the UK Bribery Act.
- Guidelines for compliance programs under Brazil's Clean Company Act.
- Compliance obligations contained in France's Law on Transparency.
- Good Practice Guidelines by the Organization for Economic Cooperation and Development.


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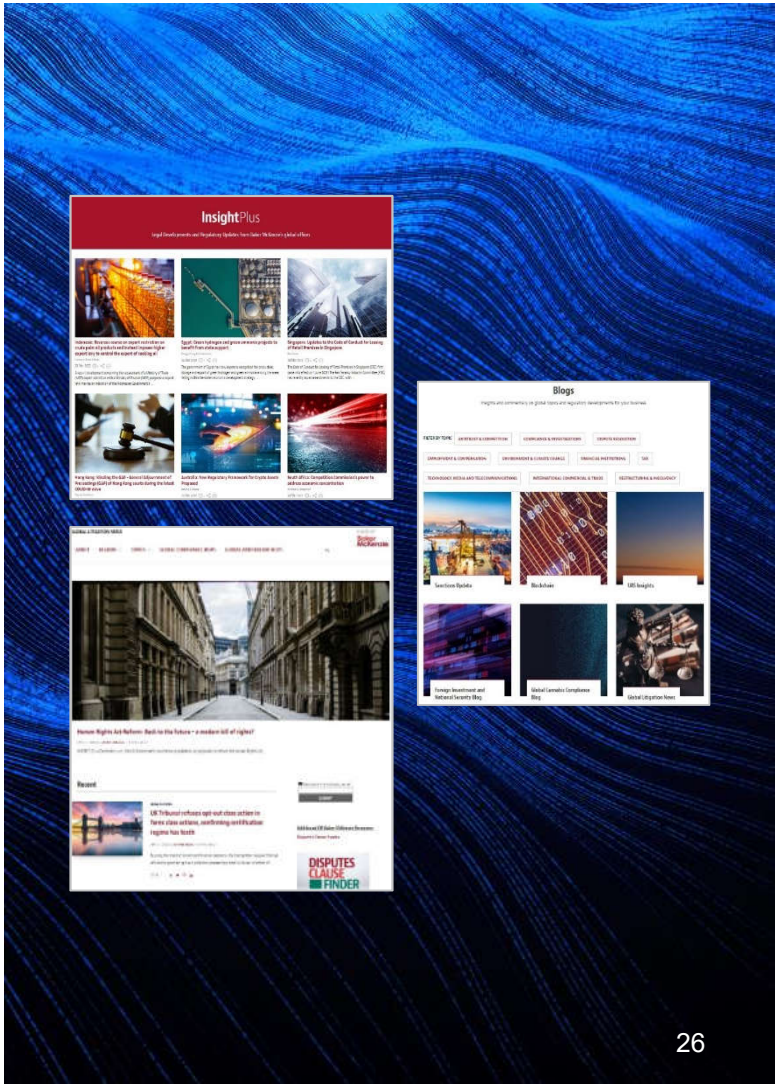
Resources

# Resources

- Global Supply Chain Compliance
  https://supplychaincompliance.bakermckenzie.com/
- Global Compliance News
  https://www.globalcompliancenews.com/
- Global Litigation News
  https://globallitigationnews.bakermckenzie.com/
- Government Procurement Update
  https://www.bakermckenzie.com/en/insight/publications/resources/government-procurement-update
- Insight Plus
  https://insightplus.bakermckenzie.com/bm/dashboard/baker-mckenzie-insightplus
- Insight Blogs
  https://www.bakermckenzie.com/en/insight/blogs
- Global Newsroom
  https://www.bakermckenzie.com/en/newsroom



# Questions