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# **Avoiding FCA Litigation:**

## **Compliance Best Practices from Practitioners, Inside Counsel, and Consultants**

**Weil's False Claims Act Institute**

**March 12, 2014**

# Introductory Remarks: What is the FCA, and Why Does Compliance Matter?

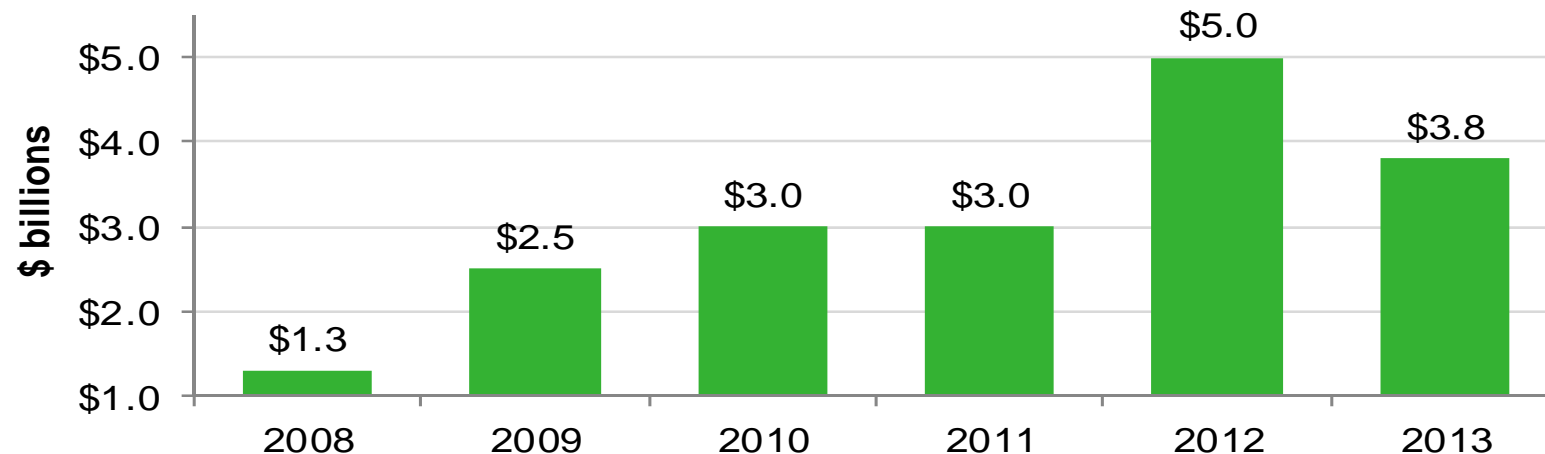
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# FCA CLAIMS ARE BIG BUSINESS

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- Federal government recovered over \$15B since 2008
- FCA recoveries have increased significantly since FERA amendments in 2009
- In 2013 alone, Federal government recovered \$3.8B
  - Does not include \$2.2B J&J settlement announced in late 2013



## The FCA creates liability for any person who:

- Knowingly presents, or causes to be presented, a false or fraudulent claim for payment to the federal government. The “false claim” provision.
- Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim to the federal government. The “false statement” provision.
- Improperly avoids or decreases an obligation to pay money or transmit money or property to the government. The “reverse false claim” provision.
- Conspires to commit a violation of the same.

## To act “knowingly” includes:

- Actual knowledge
- Deliberate ignorance of the truth or falsity of the information
- Act in reckless disregard of the truth or falsity of the information

**No specific intent to defraud is required**

- The U.S. Government
- Private parties, or “Relators” = Whistleblowers
  - Must file civil *qui tam* complaint under seal
  - Relator gets 15-30 percent of a successful judgment or settlement.
  - Relator protected from retaliation.



- Mandatory treble damages
- Mandatory civil penalties of \$5,500 to \$11,000 per false claim
- Costs and attorneys' fees
- Companies also face suspension or debarment
- Can be reduced to double damages and penalties if company engages in self-disclosure
- While the statute is civil, it can be prosecuted jointly on the criminal side

|                                                             |  |  |  |  |  |  |
|-------------------------------------------------------------|--|--|--|--|--|--|
| <h1>Part I: Basic Elements of a<br/>Compliance Program</h1> |  |  |  |  |  |  |
|                                                             |  |  |  |  |  |  |

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# THREE GOALS OF COMPLIANCE

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- Prevention
- Detection
- Remediation



- Do you do business with the government?
- Do your customers to business with the government?
- Do you receive government funding for your business?
- Do you receive reimbursements from the government for services you provide?
- Do your customers receive government assistance to buy your products?
- Do you import products/materials that require payment of customs and duties?
- If you have a contract with the government, are you relying on subcontractors to perform the contract?

- **Identify the Requirements of Doing Business When Government Funding is Involved**
  - What representations have to be made to the government?
  - What does your government contract require you to do?
    - Are there reporting requirements to the government under any contracts?
    - Are there certification requirements?
  - What contact does your sales force have with government officials?
  - What do your warranties provide?
  - What does your sales literature say?

# PREVENTION: CREATE A CULTURE OF COMPLIANCE

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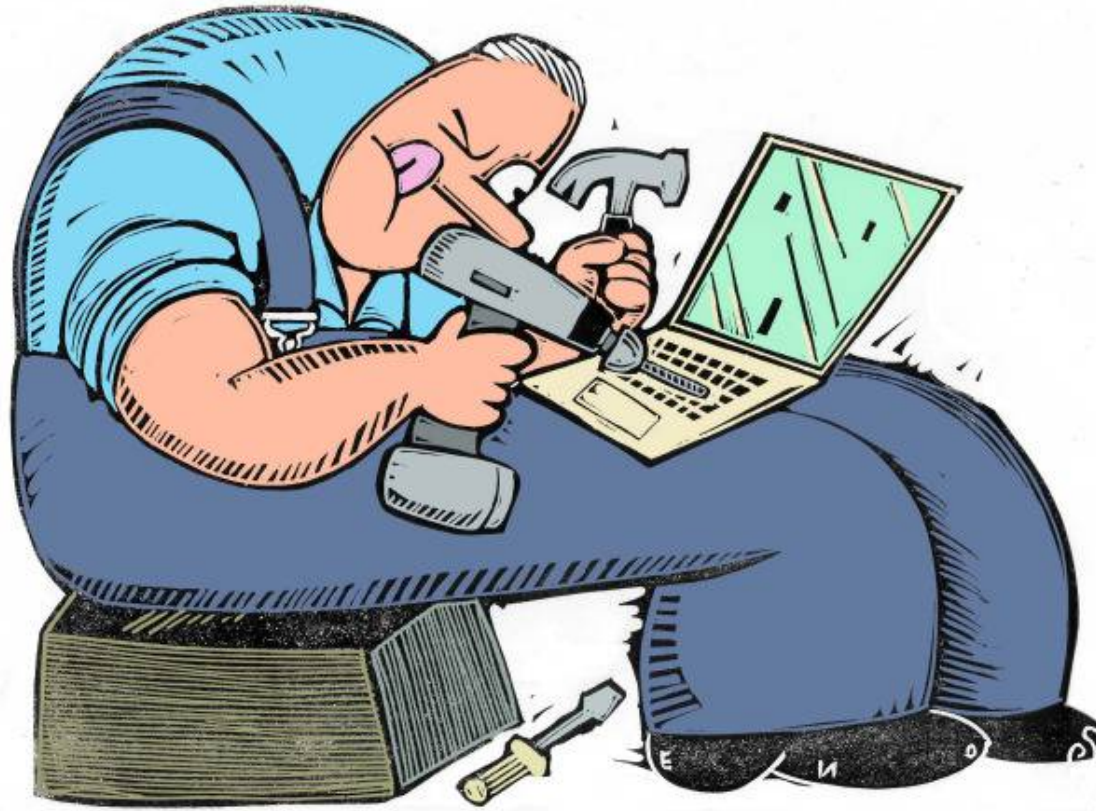
- Establish comprehensive compliance procedures.
  - Formal compliance policy.
  - Employee training.
    - Anti-kickback policies.
  - Compliance audits.
    - Quality control programs.
    - Audits of subcontracts.
    - Product disclaimers.

- Regularly evaluate compliance procedures and keep updated on legislative and regulatory changes.
  - Review procedures for handling overpayments.
  - Understand implications and regularly review Government contractual requirements.
- Establish strong communication channels between corporate leadership.
- Openly communicate with employees and stakeholders.

- Internal reporting is essential.
  - Establish a hotline.
  - Regularly reassure employees that calls will be confidential.
  - Actively investigate.
  - Consider privilege concerns.
  - Do not retaliate against whistleblowers.
- Use exit interviews.



- If you find a potential FCA issue, immediately institute corrective actions.



- **31 U.S.C. § 3729(a)(2) - Damages may be reduced “if the court finds that**
  - (A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;
  - (B) such person fully cooperated with any Government investigation of such violation; and
  - (C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation . . . .”



- May be required (e.g., Federal Acquisitions Regulation, PPACA)
- Could reduce damages.
- Potentially avoid disbarment or suspension.
- Minimize damages to the brand.

|                                                                 |  |  |  |  |  |  |
|-----------------------------------------------------------------|--|--|--|--|--|--|
| <h1>Part II: Legal Implications of<br/>Compliance Programs</h1> |  |  |  |  |  |  |
|                                                                 |  |  |  |  |  |  |

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# POOR COMPLIANCE INCREASES POTENTIAL LIABILITY

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- *United States v. Sci. Applications Int'l Corp.*, CIV.A. 04-1543 RWR, 2013 WL 3791423, at \*12 (D.D.C. July 22, 2013).
- “[A]n FCA plaintiff can . . . establish that a defendant acted knowingly by demonstrating that a corporate defendant’s structures or processes were such that the defendant could not learn that its claims and statements were false.”

# POOR COMPLIANCE = RECKLESSNESS OR DELIBERATE INDIFFERENCE

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- *United States v. Lakeshore Med. Clinic, Ltd.*, No. 11-CV-00892, 2013 WL 1307013, at \*3 (E.D. Wis. Mar. 28, 2013).
  - “Although she does not allege that defendant knew that specific requests for reimbursement for E/M services were false, she claims that defendant ignored audits disclosing a high rate of upcoding and ultimately eliminated audits altogether. These allegations plausibly suggests that defendant acted with reckless disregard for the truth and submitted some false claims. . . .”

# COMPLIANCE PROGRAMS SHOULD FLOW DOWN TO SUBCONTRACTORS

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- Lockheed Martin \$15.85 million settlement with DOJ
  - “[The] settlement resolves allegations that the government was overcharged as a result of a seven-year pricing scheme by Tools & Metals Inc. (TMI), a subcontractor that sold perishable tools to Lockheed Martin for use on military aircraft, including the F-22 and the F-35 fighter jets.”\*

\*Press Release, U.S. Dep’t of Justice, Lockheed Martin Corporation Reaches \$15.85 Million Settlement with U.S. to Resolve False Claims Act Allegations, Press Release No. 12-367 (Mar. 23, 2012), <http://www.justice.gov/opa/pr/2012/March/12-civ-367.html>.

# NEED ADEQUATE SYSTEMS IN PLACE FOR EMPLOYEES AND SUBCONTRACTORS

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<http://what-is-privacy.com/2012/11/social-media-privacy-and-security-tips-part-ii/>.

# GOOD COMPLIANCE POTENTIALLY REDUCES LIABILITY

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- *U.S. ex rel. Williams v. Renal Care Grp., Inc.*, 696 F.3d 518 (6th Cir. 2012).
- “[Defendants] consistently sought clarification on the [regulatory] issue, followed industry practice in trying to sort through ambiguous regulations, and were forthright with government officials over RCGSC's structure. To deem such behavior “reckless disregard” of controlling statutes and regulations imposes a burden on government contractors far higher than what Congress intended when it passed 31 U.S.C. § 3729(b)(1)(A)(iii).”

# GOOD COMPLIANCE CAN DEFEAT KNOWLEDGE REQUIREMENT

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- *U.S. ex rel. Gillespie v. Kaplan Univ.*, 09-20756-CIV, 2013 WL 3762445 (S.D. Fla. July 16, 2013).
- “Kaplan had policies and procedures in place to ensure compliance and there is no evidence that those policies and procedures were not followed. . . . Thus, the evidence does not show that Kaplan ‘buried its head in the sand’ or failed to make basic inquiries to ensure compliance.”



- The U.S. Chamber Institute for Legal Reform proposed reforms to the FCA that would reward comprehensive compliance programs.
- [http://www.instituteforlegalreform.com/uploads/sites/1/Fixing\\_The\\_FCA\\_Pages\\_Web.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/Fixing_The_FCA_Pages_Web.pdf)





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# Part III: Practical Compliance Strategies

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# REALITIES OF THE CURRENT FALSE CLAIMS ACT ENVIRONMENT

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- **Majority of FCA cases are no longer about fraud**
- **Many FCA cases today are:**
  - Billing Errors
  - Incomplete or Inaccurate Certifications
  - Contract and Regulatory Interpretation Disputes
- **Contractors expected to have a “near fiduciary duty” to government and its contract officers**

# EMPLOYEE TRAINING – DON'T JUST CHECK THE BOX

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- **Online training is fine for the general employee base**
- **Employees who work on government accounts need more than that**
  - Annual
  - Live
  - Small groups
  - Educate with a dose of fear

# CONDUCT REGULAR COMPLIANCE SURVEYS AND USE THEM TO IMPROVE YOUR PROGRAM

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- **Regular Compliance Surveys**
  - Give employees a safe way to report concerns
  - Speak to *every* employee that raises a concern
- **Use the Questions and Concerns Raised**
  - Give feedback to lawyers and to managers
  - Add focus in following trainings

- **The C-Suite must understand the financial and reputational risk of doing business with the government.**
- **Staying within the lines of government contracts is expensive and can constrain commercial practices.**
  - Price Reduction Clause / MFN Monitoring & Compliance
  - Adherence to Mandatory Labor, Accounting and Control Standards
  - Fixed Price, Long Term Contracts Constrain Product Replacement, Pricing Changes and Delivery Mechanisms
  - Government Requirements Almost Always Require Customization and Capital Costs

# TAKE STEPS TO ENSURE COMPLIANCE BEFORE A GOVERNMENT CONTRACT AWARD

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- **Submit A Realistic Response**
  - Translate contract terms into operational requirements
  - Can the company do what the RFP response says?
    - Empower presale operations
    - Identify and engage process owners
  - Take exceptions and make clarifications where necessary
  - Make conservative headcount / cost assumptions
- **Standardize your non-standards**
  - The more variables you introduce, the more errors result

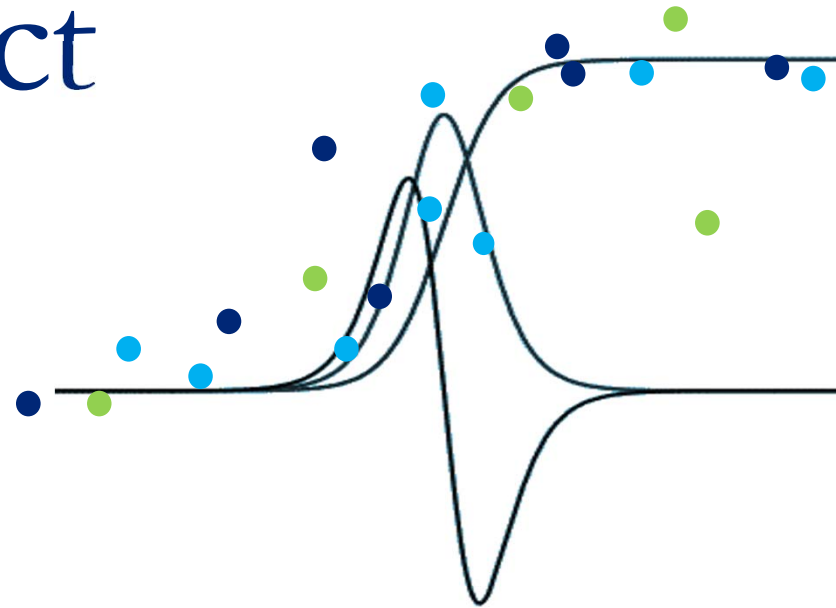
- Review contract requirements with the employees on the ground – the people who will order, install, monitor, service & invoice – **not just managers**
- Establish regular check-ins with these groups
- Note and regularly audit your non-standard requirements
- Conduct regular invoice reviews, internally and with the customer
- Encourage regular and transparent communications with the Contract Officer
- Document, Document, Document





# False Claims Act

## *Analytics*



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March 12, 2014



## Agenda

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1. Characteristics of FCA Assessments
2. Considerations during Data Analytics
3. Key Takeaways

# Characteristics of FCA Reviews

FCA compliance assessments inherently warrant a big data analysis.

## **1. Granular focus.**

- Individual claims quickly amount to high dollars, so it is important to understand which invoices, time logs, and transactions are relevant.
- Important to be mindful of the time and labor necessary to process.

## **2. Long time period of investigation leads to large quantities of varied data.**

- Contracts may cover long periods of time with tremendous amounts of data within a variety of internal, even archived, systems.
- Information could be contained within volumes of data that traditional computer programs are not capable of analyzing.

## **3. Important to leverage external information when needed.**

- Information not immediately available within an internal data system, such as a manufacturer's country of origin, will need to be applied to the analysis.

# Considerations during Data Analysis

Before preparing disclosures, it is important to properly review the underlying data.

## 1. Focus on Data Assembly

- Validate completeness against financial statements and other reports

## 2. Provide Access to Business Team

- Resources internal to the company can often provide key insights into the data

## 3. Recognize Variation in the Data

- Utilize data visualization tools to display findings in a concise manner

## 4. Explore Differences in Buying Patterns

- Different patterns may mask alternative outcomes

## 5. Understand Potential Conclusions

- Consider alternative interpretations of the data, contracts, etc.



# Focus on Data Assembly

Garbage in – Garbage out.

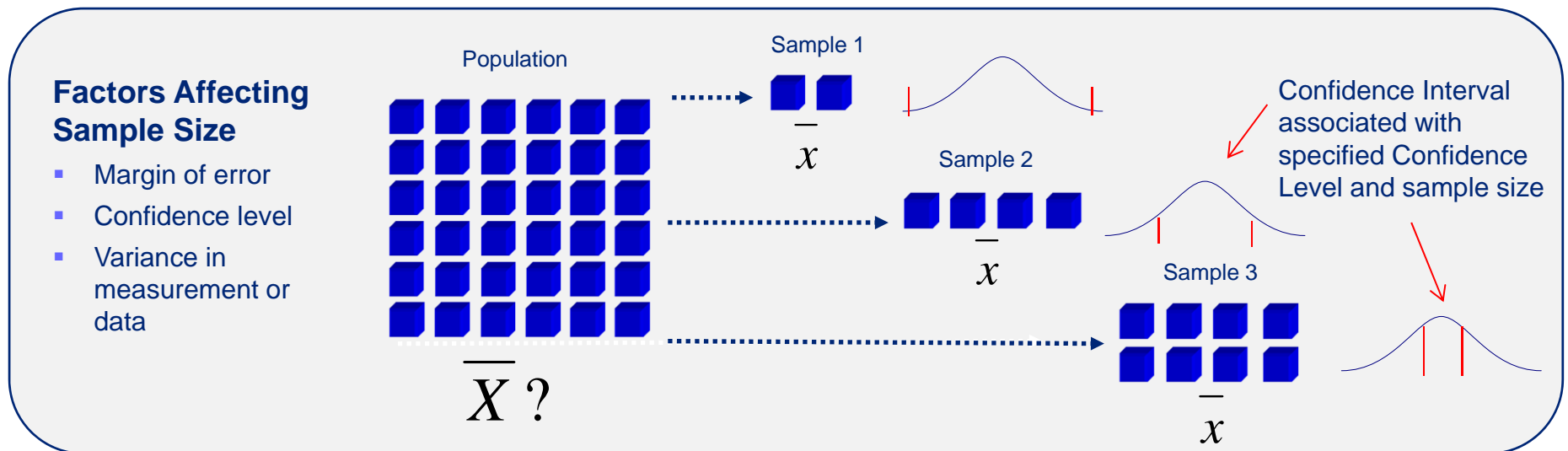
- **Determine the best source of data for analysis.**
  - Consider time period, objectives and cost of assembling.
- **Since these types of projects often span many years it is frequently necessary to combine active with legacy data systems. Important considerations include:**
  - How do these sources align?
  - Will there be a “seam” problem that needs to be explained?
  - Do the comparable data fields capture the comparable information?
- **Where possible, confirm that data ties out to published financial statements, IFF payments, or any previously disclosed analyses.**
- **Statistical sampling of data may be appropriate when data collection is costly, population is very large, and/or there is limited time for analysis. Important considerations include:**
  - Is it necessary to sample or is all the data already available in an electronic source?
  - What is the appropriate unit of observation?
  - What are the costs of evaluating each record?
  - Is it necessary to oversample certain subgroups?

# Focus on Data Assembly (continued)

Garbage in – Garbage out.

## Case: Extrapolation versus Examination

- Large retailer engaged in contract with the General Services Administration.
  - Investigation regarding price disclosures and contract terms.
  - Sales data amasses over 1 terabytes (>1,000 gigabytes).
- DOJ utilizes a small set of invoices, rather than entire sales database, to calculate an error rate and extrapolate overpayment based on sales totals.
  - Analysis on all sales recognized sampling bias, especially in earlier years of contract
  - Analytical method significantly reduces overpayment compared to DOJ model.





## Provide Access to Business Team

You know your data best.

- **Each company is unique in how it handles its data so it is often the case that the company data specialists can be a tremendous resource to outside consultants.**
    - Access to the appropriate business teams is critical.
  - **Government may not have as much access to the business team, and therefore may make good faith assumptions about the data that may not be accurate.**
- 

### Case: Appropriate data exclusions = more focused results

- Retailer engaged in dispute of potential overbillings, provides all sales data to the DOJ.
- Data discussions with company technology and sales personnel reveal an accurate way of identifying government sales and appropriate exclusions to eliminate unrelated orders.
  - Uninvoiced orders
  - Off-contract purchases
  - Internal cost transfers

# Recognize that there is Variation in Data

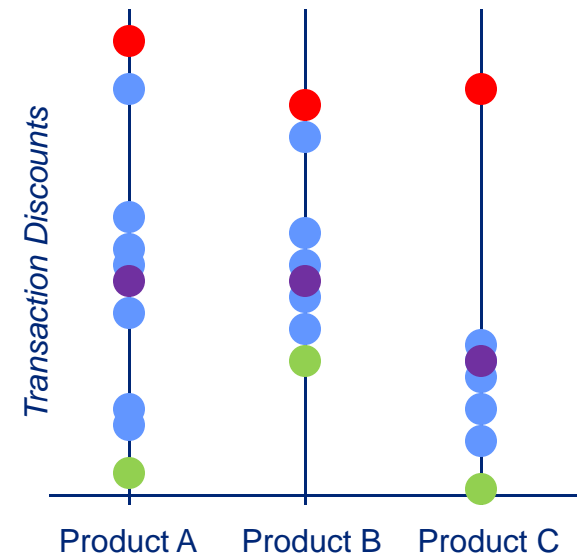
Outliers can ruin your day.

- **Transactional data often has variation in prices, quantities, and discounts.**
  - This is true both within and across customers.
- **Customers' diverse purchase patterns inherently lead to diverse discounts.**
- **The goal in a true “apples-to-apples” test is to normalize for variability and reduce outliers, when possible.**

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## Case: Outliers could bias results

- Retail vendor with > \$500 million in annual sales.
- DOJ overbillings investigation compared the GSA's product and service discounts to the maximum of the commercial sales.
- Maximum heavily biased based on one-off sales.
- Calculated **weighted average discounts** to compare GSA contract to that of other major customers, in order to account for anomalies.







# Explore Differences in Buying Patterns

Mix Matters.

- Customers' diverse purchase patterns inherently lead to diverse discounts.
- Need to understand underlying reasons for aggregate statistics.

## Case: Understanding drivers of aggregate discounts

| Customer     | Product # | Product Description | Quantity Purchased | Price Paid Per Product | List Price Per Product | Customer's Product Discount |
|--------------|-----------|---------------------|--------------------|------------------------|------------------------|-----------------------------|
| Govt. Agency | 1-234     | Laptop computer     | 100                | \$1,200.00             | \$1,300.00             | 7.7%                        |
| Govt. Agency | 5-678     | Office chair        | 10                 | \$100.00               | \$200.00               | 50.0%                       |
| ABC Inc.     | 1-234     | Laptop computer     | 10                 | \$1,200.00             | \$1,300.00             | 7.7%                        |
| ABC Inc.     | 5-678     | Office chair        | 100                | \$100.00               | \$200.00               | 50.0%                       |

| Customer     | Total Price Paid | Total List Price | Customer's Aggregate Discount |
|--------------|------------------|------------------|-------------------------------|
| Govt. Agency | \$121,000.00     | \$132,000.00     | 8.3%                          |
| ABC Inc.     | \$22,000.00      | \$33,000.00      | 33.3%                         |

## What is the hammer that you will be hit with?

- **Prior to making any data disclosures, think hard about the conclusions (right or wrong) that can be reached with the data.**
- **Consider macro- as well as microscopic perspectives on the data.**
- **Consider potential alternatives and their counter arguments.**
- **Detail appropriate exclusions as needed.**

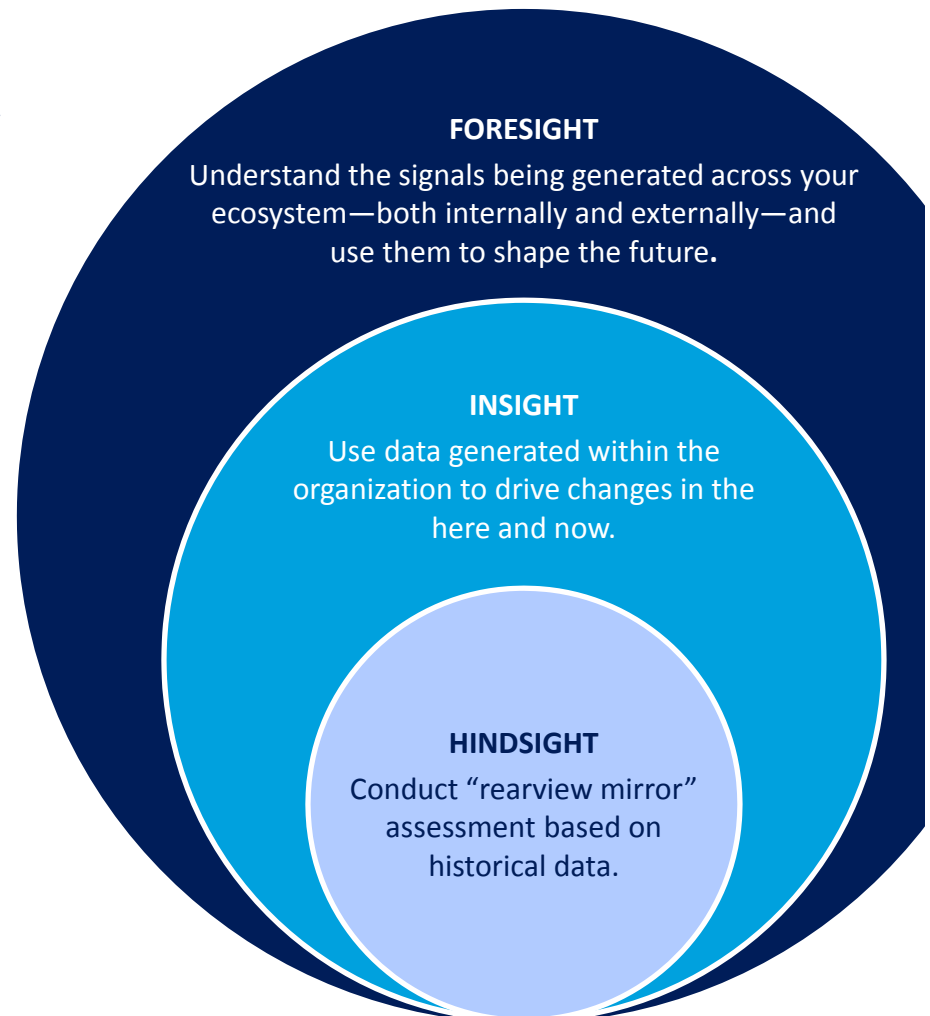


# Key Takeaways – Forensic Analytics

Leverage subject matter expertise with data analytics in assessments.

Forensic analytics is the process of developing a **precise**, **repeatable**, and **defendable** methodology coupled with domain subject matter experience to understand the timely story behind the data.

- Be mindful of any data disclosures to avoid misinterpretations or inaccurate calculations.
- **Represent information visually** to communicate findings.
- Be sure to analyze models **proposed by the DOJ with varying sensitivities** and exclusions.



# Questions?

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