

Morgan Lewis

# TECHNOLOGY MARATHON

**Culture Matters: Former Inhouse Counsel  
Perspectives on Measuring Compliance**

Presenters David Howard and Amy E Schuh

**Tuesday, June 6th | 1:00-2:00 pm ET**

# Presenters



**David Howard**



**Amy E. Schuh**

**Morgan Lewis**

# Agenda

- Introductions
- Why measure compliance?
- What are the special challenges?
- How might a company approach the problem?

# Why should you care about measuring compliance?

- Talking the talk v. walking the walk
- Assessing progress over time
- Determining trouble or blind spots – business lines and region
- What the government says



# What the Government Requires

U.S. Department of Justice  
Criminal Division  
Evaluation of Corporate Compliance Programs  
(Updated March 2023)

## Introduction

The “Principles of Federal Prosecution of Business Organizations” in the Justice Manual describe specific factors that prosecutors should consider in conducting an investigation of a corporation, determining whether to bring charges, and negotiating plea or other agreements. JM 9-28.300. These factors include “the adequacy and effectiveness of the corporation’s compliance program at the time of the offense, as well as at the time of a charging decision” and the corporation’s remedial efforts “to implement an adequate and effective corporate compliance program or to improve an existing one.” JM 9-28.300 (citing JM 9-28.800 and JM 9-28.1000). Additionally, the United States Sentencing Guidelines advise that consideration be given to whether the corporation had in place at the time of the misconduct an effective compliance

The Criminal Division’s Pilot Program  
Regarding Compensation Incentives and Clawbacks<sup>1</sup>

March 3, 2023

The Department of Justice (Department) is committed to tackling corporate crime and will continue to investigate and prosecute companies (and responsible individuals) who engage in such misconduct. But the Department’s ultimate goal is to prevent corporate crime before it occurs. Through its policies and enforcement actions, the Department strives to deter criminal conduct, incentivize the development and implementation of effective compliance programs, and promote ethical corporate cultures.

Compensation systems that use affirmative metrics and benchmarks can reward compliance-promoting behavior. Compensation systems that clearly and effectively impose financial penalties for misconduct can also deter risky behavior and foster a culture of compliance. Consistent with the Deputy Attorney General’s September 15, 2022 memorandum setting forth revisions to the Department’s corporate criminal enforcement policies, the Department’s Criminal Division (Division) has considered how to reward corporations that develop solutions to incentivize better compliance through their compensation systems, including the use of clawback policies. Throughout this process, one consideration has been how policies may seek to potentially shift the burden of corporate financial penalties away from shareholders—who in many cases do not have a

# Elements of An Effective Compliance Program

Oversight &  
Governance

Code, Policies &  
Procedures

Training &  
Communication

Risk Assessment,  
Monitoring &  
Auditing

Response &  
Prevention

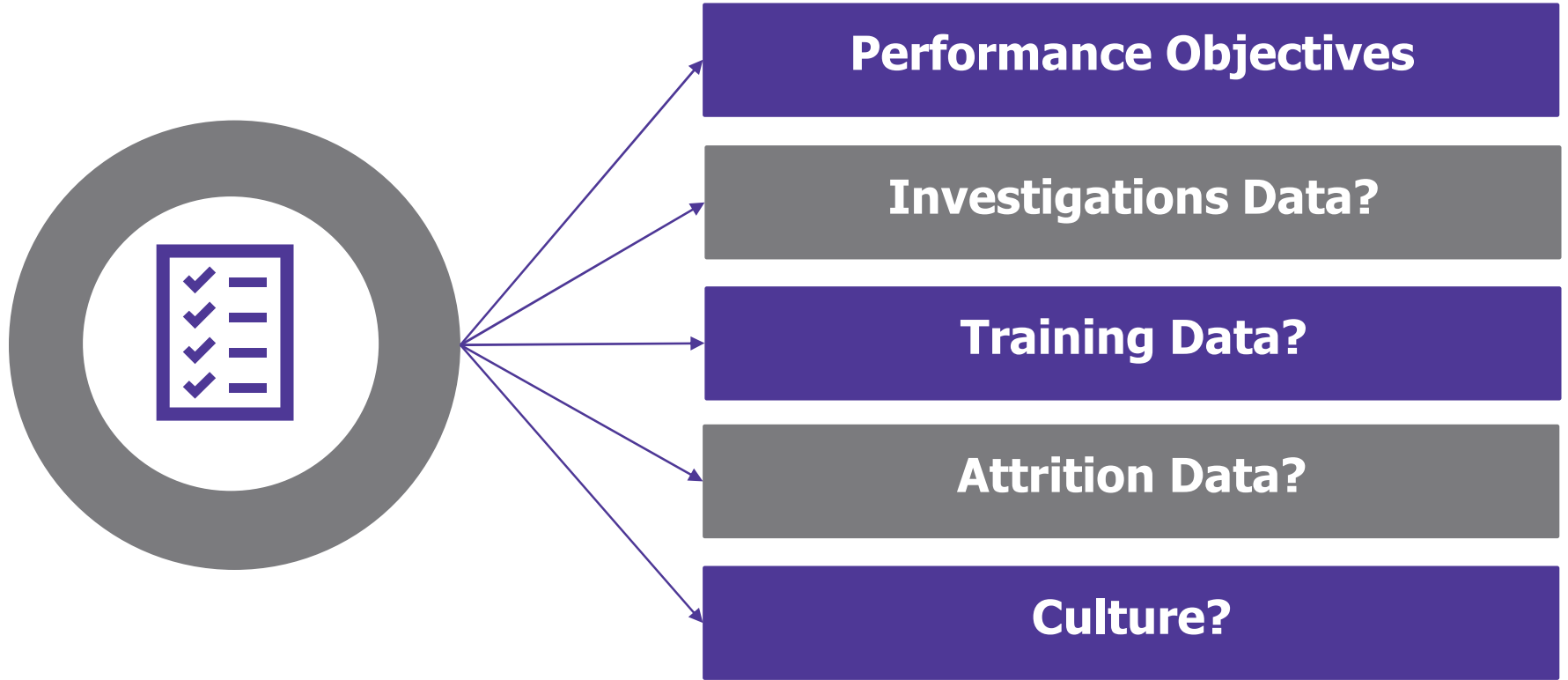
Compensation  
Structures and  
Consequence  
Management

Reporting &  
Investigating

# What Makes Measuring Compliance Dicey

- Are increases in metrics like number of investigations or hotline complaints or disciplinary actions a good sign or a bad sign?
- Does looking at these types of metrics create perverse incentives? (Same problem with clawbacks inartfully done)

# So, What Can You Measure?





# Performance Objectives

- What do your job descriptions say about compliance?
- What compliance performance metrics do you embed in annual goals?
  - Tone at the top metric?
  - Training metric?
  - Other accountability metrics?

# Investigations Data, if you want to go there

- Allegations per 100 employees
- % Allegations raised by anonymous sources
- Median Reports of Retaliation
- Overall Substantiation Rates
- Types and volume of allegations across regions/countries, across BUs

# Training & Attrition Data

## Training Data

- Mandatory ethics and compliance training completion rates
- Timely completion rates

## Attrition Data

- Versus industry data
- Versus enterprise
- Versus other business lines
- Versus other regions
- Versus other countries
- Versus peer managers

# Measuring Key Indicators of Culture

- What do past compliance meltdowns tell us about culture?
  - Autocratic (vs. decisive) leadership style
  - Siloed information
  - “Guardians” (lawyers, auditors, HR, compliance professionals) who have an unduly narrow job interpretation
  - Boards who don’t do their jobs

# Structural Issues

**1**

**Do lawyers within the company report up to the GC, or through the business?**

**2**

**Does the GC attend board meetings?**

**3**

**Do internal audit and CCO report to the Audit Committee?**

**4**

**Does the Audit Committee meet separately with the GC, CCO and head of internal audit?**

**5**

**Is there any special compliance training for lawyers and other guardians?**



# Workforce Culture Survey Data – sample questions

- Do you believe top performers/managers at the company are held to the same standards as everyone else?
- Have you ever felt pressure to violate the code of conduct?
- If you saw a potential violation of the code of conduct, would you report it to someone?
- Do you believe other employees with whom you work regularly would report it to someone?
- Do you speak up in meetings if you disagree with your manager?

# The New Frontier – AI and Machine Learning

- What are the best correlators to compliance violations?
  - HR complaints about particular managers?
  - The absence of complaints?
  - High voluntary or involuntary attrition?
  - What else?
- Determining risky transactions
- Effective predictions v. privacy concerns

# Biography



**David Howard**  
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David Howard's career has involved helping clients successfully navigate some of their most important legal challenges. A litigator, white collar defense lawyer, and former federal prosecutor, David served for almost a decade as corporate vice president and deputy general counsel for Microsoft's Corporate External and Legal Affairs Department. In that role, he was the company's chief litigator and led the company's litigation, corporate compliance, and competition law teams worldwide. David is a trusted advisor to boards and senior corporate executives.

# Biography



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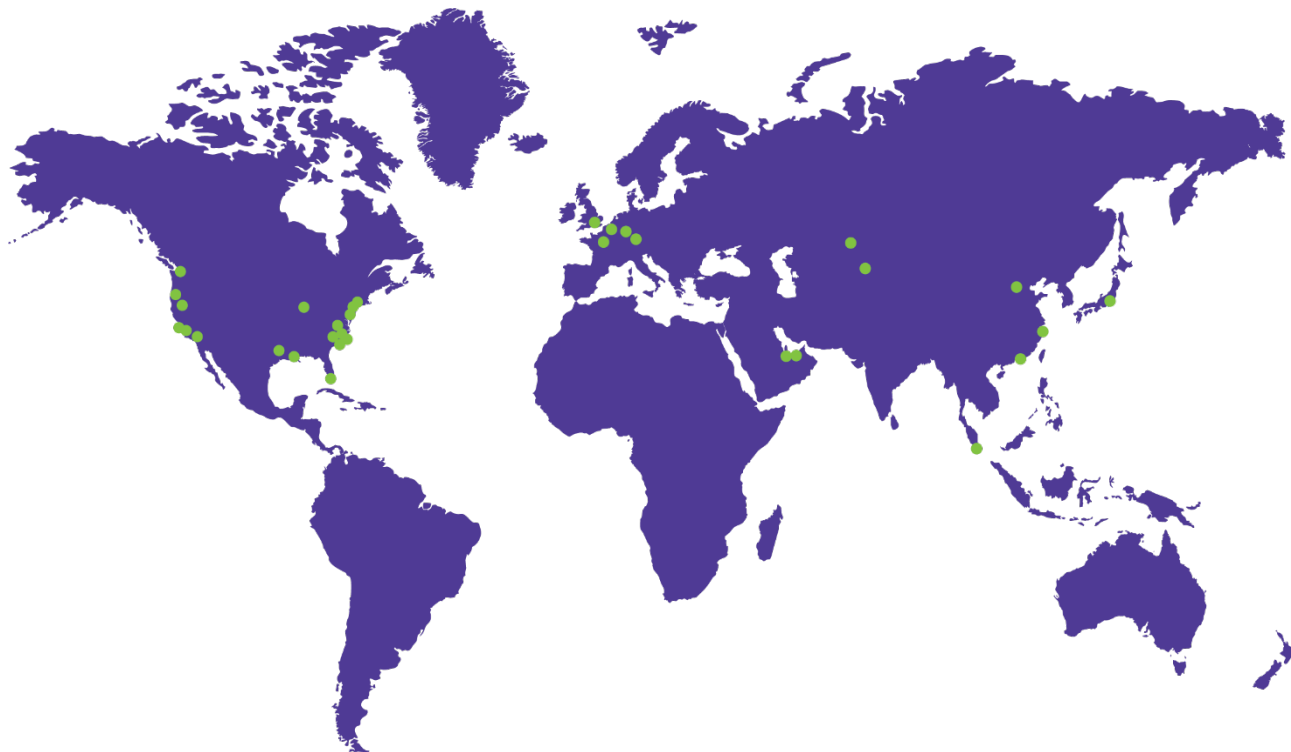
Amy E. Schuh is a litigator turned authority on corporate ethics and compliance programs. She brings almost two decades of in-house experience in various roles in legal and compliance to counseling clients on how to build, enhance, and streamline corporate ethics and compliance programs. Amy provides counseling related to maturity assessments, risk assessments, investigations processes, anti-corruption programs, and ethics and compliance–related mergers and acquisitions due diligence and integration.

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