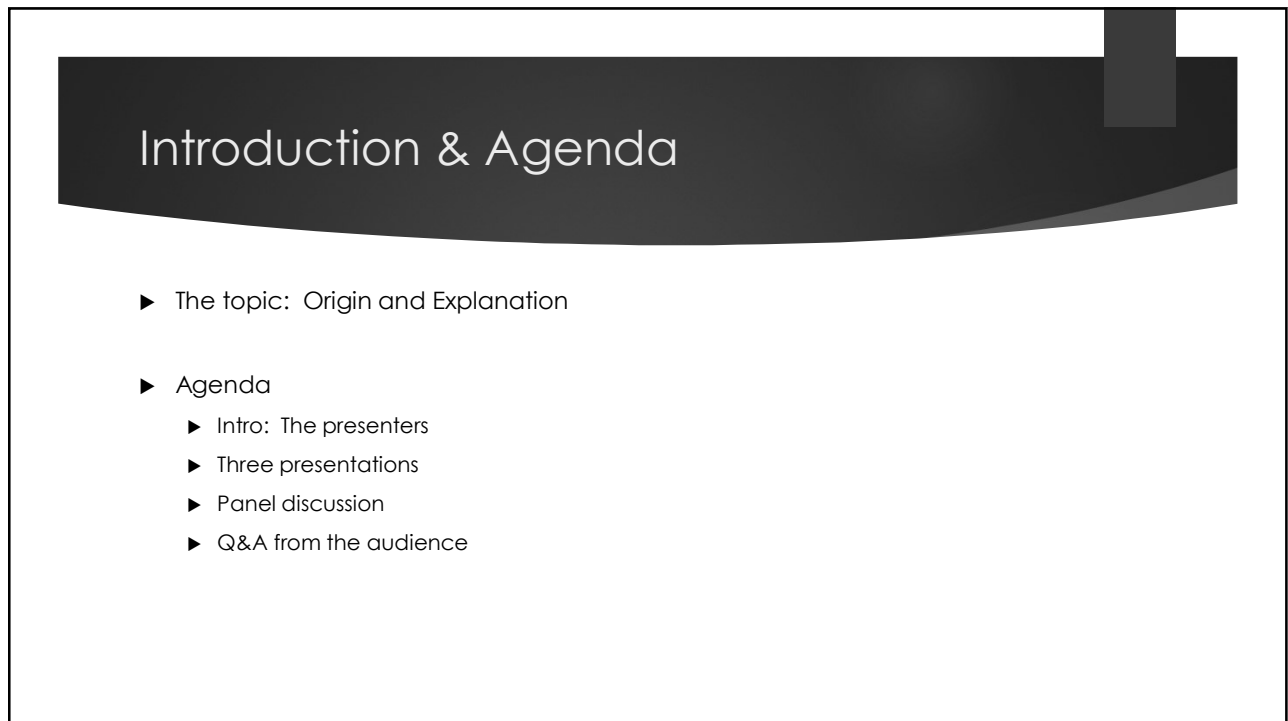




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Our Speakers & Their Backgrounds

- ▶ Mike Henry, Sr. Compliance Counsel, Boston Energy Trading and Marketing
 - ▶ Inside: FERC Chairman's office(1 yr), FERC General Counsel's Office (10 yrs)
 - ▶ Out: Emera Energy (5 yrs), BETM / Mitsubishi (0 yrs)
- ▶ David Applebaum, Partner, Jones Day
 - ▶ Inside: FERC Office of Enforcement (6 yrs)
 - ▶ Out: Akin Gump (3 yrs), Jones Day (0 years)

3

Our Speakers & Their Backgrounds

- ▶ Christine Roth, VP Employee Relations & Assoc. GC, Vista Outdoor Inc
 - ▶ Inside: DOJ (4 yrs), U.S. House Cmte Staff (3 yrs)
 - ▶ Out: Vista Outdoor (3 yrs), BAE (5yrs), Marriott (4 yrs)
- ▶ Nadira Clarke, Partner, Katten
 - ▶ Insider: DOJ (ENRD & OPR) (7 yrs), US Attorney's Office District of MD (7 yrs)
 - ▶ Out: Beveridge & Diamond (7 yrs), Katten (5 yrs)
 - ▶ Serve on Two DOJ Monitorships (3 yrs)

4

David Applebaum

- ▶ David Applebaum, Partner, Jones Day
 - ▶ Inside: FERC Office of Enforcement (6 yrs)
 - ▶ Out: Akin Gump (3 yrs), Jones Day (0 years)

5

What is FERC?

- ▶ Independent federal government agency
 - ▶ existed in some form since 1920
- ▶ Core regulatory mission:
 - ▶ natural gas pipelines
 - ▶ electric transmission lines
 - ▶ reliability of the electric grid
 - ▶ conduct in power markets
- ▶ Core enforcement mission: **preventing market manipulation**

6

Compliance is Key for Energy Markets

- ▶ Very complex regulations
 - ▶ need well-designed program to ensure compliance
- ▶ Civil (and criminal) penalties for market manipulation are significant
- ▶ Benefits of strong compliance:
 - ▶ reduces civil penalties
 - ▶ **helps weather enforcement investigations**
 - ▶ burnishes reputation of company for other regulatory needs
- ▶ Key source: FERC White Paper on Energy Trading Compliance, at <https://ferc.gov/legal/staff-reports/2016/tradecompliancewhitepaper.pdf>

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Compliance Program Features That Help Establish Credibility with Regulators

- ▶ **Compliance staff** – personnel should be capable of understanding conduct creating compliance risks
- ▶ **Training/education** – not just formal, annual training but ongoing, practical education/notification of new developments
- ▶ **Monitoring and auditing** – compliance program can't be on autopilot
- ▶ **Follow-up** – companies should take action when they identify compliance concern
- ▶ **Senior-level involvement** – top corporate officials need to set culture, be in the loop as questions surface, take action—and be seen to take action

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Demonstrating Culture of Compliance to Regulators

- ▶ **Document everything important**
 - ▶ training/education
 - ▶ new business strategies that create additional risk
 - ▶ resolution of compliance failures
- ▶ **Who represents the company at Enforcement meetings?**
 - ▶ approach of counsel matters
 - ▶ attendance and approach of corporate representatives matters
- ▶ **What will witnesses say about compliance program?**

9

Practices for Establishing Credibility During an Enforcement Investigation

- ▶ **Never lie**
 - ▶ and own up when you make a mistake
- ▶ In negotiating investigative demands, **have reasonable alternatives**
 - ▶ and know when fighting over documents is no longer worth it
- ▶ Make sure representatives and witnesses are **knowledgeable**
- ▶ **Educate** enforcement staff on substance
 - ▶ in most cases, merely reacting is not enough
- ▶ You can and should push back when staff is wrong
 - ▶ but be **courteous and professional**

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Managing Criminal Investigations

- ▶ **Criminal Investigations are Unique**
 - ▶ Understand the mindset of a prosecutor
 - ▶ Always involve counsel with appropriate background and training
- ▶ **Always Involve Counsel with Appropriate Background and Training**
 - ▶ There is a significant difference between an administrative subpoena and a grand jury subpoena
- ▶ **Upjohn Warnings Are Critical**
 - ▶ Employees will be far more likely to misunderstand who you represent
 - ▶ Employees may need their own individual counsel
- ▶ **Criminal Investigations Are Not Always Visible**

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Christine Roth

- ▶ Christine Roth, VP Employee Relations & Assoc. GC, Vista Outdoor Inc
 - ▶ Inside: DOJ (4 yrs), U.S. House Cmte Staff (3 yrs)
 - ▶ Out: Vista Outdoor (3 yrs), BAE (5yrs), Marriott (4 yrs)

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Department of Justice, Civil Rights

- ▶ Charged with enforcing Title VII against state and local governments
 - ▶ Pattern and practice cases
 - ▶ Typically entry or promotional exams in civil service
 - ▶ Often target practices that result from inappropriate or too vague policies
 - ▶ Guidelines for uniforms
 - ▶ Scheduling policies
 - ▶ USERRA enforcement
 - ▶ DOJ works directly with DOL
 - ▶ DOJ may directly represent uniformed service members against both public and private employers
- ▶ DOJ, DOL, and EEOC have overlapping jurisdictions

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DOJ Compliance Guidance

- ▶ Evaluation of Corporate Compliance Programs
 - ▶ Intended to provide assessment of potential criminal liability, but useful in other contexts
- ▶ Three Main Standards
 - ▶ Is the compliance program well designed?
 - ▶ Is the program being applied earnestly and in good faith?
 - ▶ Does the program work in practice?

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Is Your Program Well Designed?

- ▶ DOJ standard: is the program adequately designed to prevent and detect wrongdoing by employees?
- ▶ Is corporate management enforcing the program or tacitly encouraging or pressuring employees to engage in misconduct?
- ▶ Risk Assessment
 - ▶ Has the company identified, assessed, and defined its risk profile?
- ▶ Policies and Procedure
 - ▶ Do policies exist and are they communicated to employees?
- ▶ Training and Communications
 - ▶ Regular, periodic training that is understood by employees and managers

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Compliance Program Features that Help Establish Credibility with Regulators

- ▶ **Well written policies** with a verifiable receipt method for employees
 - ▶ Reporting mechanism for employees
- ▶ **Compliance Staff (HR)**
 - ▶ Well-acquainted with employees
 - ▶ Understanding of employment laws
- ▶ **Regular communication with employees**
- ▶ **Well-justified documented business reason for decisions**
- ▶ **Seek expert help when required**
 - ▶ Industrial Organizational Psychologists

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Demonstrating Culture of Compliance to Regulators

- ▶ Systems that allow employees to report problems
 - ▶ Ethics cases with documented actions taken
 - ▶ Alternatives outside reporting through management chain
 - ▶ Demonstrated record keeping and actions
- ▶ Regular communication to employees
 - ▶ How often are employees trained?
 - ▶ How often are managers trained?
 - ▶ Are the methods effective?
- ▶ Expert reports
 - ▶ Validation studies of any hiring or promotion tests
 - ▶ Direction on wage and hour systems
 - ▶ Affirmative action

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Practices for Establishing Credibility During an Enforcement Investigation

- ▶ Provide general policies and processes up front
- ▶ Focus on Scope of Information Requests
 - ▶ Aggregation vs. Fragmentation
- ▶ Regulators expect protection of Personally Identifiable Information
 - ▶ When possible, respond with anonymized information
 - ▶ Differentiation of data is ok when there is a rational basis
 - ▶ When you must provide personal data, protect with non-disclosure agreement
- ▶ Good well-trained compliance staff
 - ▶ Able to summarize compliance efforts
 - ▶ Demonstrate concern for employees *and* compliance standards
 - ▶ Disagree without being disagreeable

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Nadira Clarke

- ▶ Nadira Clarke, Partner, Katten
 - ▶ Insider: DOJ (ENRD & OPR) (7 yrs), US Attorney's Office District of MD (7 yrs)
 - ▶ Out: Beveridge & Diamond (7 yrs), Katten (5 yrs)

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The Role of DOJ and US Attorney Offices?

- ▶ Department of Justice
 - ▶ Cabinet-level agency responsible for enforcing the laws of the U.S. federal government
 - ▶ Ensures public safety against foreign and domestic threats, including terrorism and crime
 - ▶ Includes law enforcement investigatory agencies including FBI, U.S. Marshals, ATF, and DEA
 - ▶ Lead by U.S. Attorney General, the nation's top law enforcement official
 - ▶ Main office, Washington D.C. handles matters of national policy significance
- ▶ United States Attorneys' Offices
 - ▶ 93 U.S. Attorney Offices (1 for each of the federal judicial districts, except Guam and Northern Marianas)
 - ▶ Represents U.S. government in federal district court and U.S. Court of Appeals
 - ▶ Lead by the United States Attorney for the district (presidentially appointed for 4 year terms)
 - ▶ Oversight and supervision by the Executive Office for U.S. Attorneys (EOUSA)
 - ▶ Focus on local federal crime

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DOJ/U.S. Attorneys' Offices Approach to Compliance

- ▶ Compliance Inside DOJ/U.S. Attorneys' Offices
 - ▶ Limited understanding/appreciation of the realities of business and industry
 - ▶ Presumption that crime is ubiquitous
 - ▶ Limited background/training regarding industry compliance programs
- ▶ Compliance Outside of DOJ/U.S. Attorneys' Offices
 - ▶ Vast power and charging discretion of DOJ/U.S. Attorneys' Offices
 - ▶ Predominate focus on prosecution, jail time and fines
 - ▶ Inconsistent approach and views regarding industry compliance programs
 - ▶ In highly regulated industries, the regulatory agency may play a significant role

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Successful Compliance Programs

- ▶ **Relevance** – compliance programs should be responsive to current enforcement trends and policy goals of DOJ/U.S. Attorneys' Offices
- ▶ **Achievable** – compliance programs must be clear, straightforward and capable of successful implementation
- ▶ **Excellence** – compliance team must include experienced, well compensated people with quality training
- ▶ **CEO/Board Oversight** – chief compliance officer should report to the highest level of the company
- ▶ **Culture is Key** – It important to have an awareness of the compliance culture through implementation of culture surveys and use of other analytical tools

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