Inside Out

WHAT DO REGULATORS AND ENFORCEMENT STAFF UNDERSTAND AND MISUNDERSTAND ABOUT COMPLIANCE PROGRAMS AND COMPLIANCE CULTURE

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Introduction & Agenda

- The topic: Origin and Explanation

- Agenda
  - Intro: The presenters
  - Three presentations
  - Panel discussion
  - Q&A from the audience
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)

- 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 (5 yrs), 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)
David Applebaum

- David Applebaum, Partner, Jones Day
  - Inside: FERC Office of Enforcement (6 yrs)
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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
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

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
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?

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**
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**

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 (5 yrs), Marriott (4 yrs)
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

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?
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

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
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

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
Nadira Clarke

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  - Insider: DOJ (ENRD & OPR) (7 yrs), US Attorney’s Office District of MD (7 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
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 prime 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

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 is important to have an awareness of the compliance culture through implementation of culture surveys and use of other analytical tools