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Editorial Office  
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# Now. Normal. Next. Effective Compliance Oversight of Energy Commodity Trading in a Remote Trading Environment

*By Levi McAllister, Katherine Dobson Buckley, Sarah V. Riddell, and  
Pamela Tsang Wu\**

*The authors discuss various issues facing the energy trading industry in light  
of the COVID-19 pandemic.*

In mid-March, much of the world abruptly ceased functioning as usual, with millions of people suddenly working from home—or not working at all—due to the onset of the coronavirus COVID-19 pandemic. The world of energy trading, however, did not stop, and in fact, arguably grew in importance commensurate with the need to keep the lights on, maintain the flow of natural gas, and assure that generating plants continue to receive adequate supplies of fuel. In other words, to keep things as “normal” as possible in these anything-but-normal times.

Something else that did not stop was the regulation of that all-important trading sector. In fact, such bodies as the Federal Energy Regulatory Commission (“FERC”) and the Commodity Futures Trading Commission (“CFTC”) issued statements explicitly noting that they would continue their investigation and enforcement activities regarding trading of both physical and derivative products, despite the changed circumstances brought about by the global health crisis.

This set of conditions poses new challenges for energy companies. They spent years and significant resources developing robust compliance programs, premised on most personnel working in an office on a company campus while connected to secure technology and IT networks. Further, these plans generally contemplated frequent in-person meetings between compliance personnel and trading staff.

With all those assumptions now overturned, companies need to address proactively new compliance paradigms accounting for widely scattered personnel operating via in-home technology that may not offer the same state-of-the-

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\* Morgan, Lewis & Bockius LLP partners Levi McAllister and Katherine Dobson Buckley and associates Sarah V. Riddell and Pamela Tsang Wu advise clients throughout the energy industry. The authors may be contacted at [levi.mcallister@morganlewis.com](mailto:levi.mcallister@morganlewis.com), [katherine.buckley@morganlewis.com](mailto:katherine.buckley@morganlewis.com), [sarah.riddell@morganlewis.com](mailto:sarah.riddell@morganlewis.com), and [pamela.wu@morganlewis.com](mailto:pamela.wu@morganlewis.com), respectively.

art security available on the corporate premises. These changed factors may also affect how companies respond to regulators' inquiries or investigations. There are several overarching areas of concern for energy companies in this environment, which may continue for some time, including companies' need to maintain an effective compliance program; elements to consider regarding the trading process itself (i.e., putting out bids, as well as settling, recording, and monitoring transactions, etc.); and responding to a regulatory inquiry.

### **RE-THINKING COMPLIANCE PROGRAMS**

Many companies need to re-think their COVID-era compliance programs in light of the cultural and physical shifts that have occurred. They should also keep in mind that regulatory agencies generally take the position that no "one-size-fits-all" approach defines compliance programs or assures effective compliance oversight. While this may give companies the flexibility to design programs that make sense for them, it also means they must design robust programs that take into account regulators' perspectives.

Companies need to consider a number of issues in building a compliance program that fits the current situation:

- Make sure that compliance and legal personnel interface regularly with commodity traders, risk management committees, and back office personnel. Try to establish an environment in which informal "water cooler" interactions can occur, a process that may be as simple as allowing some time for personnel to talk informally before a formal Webex or Zoom meeting agenda kicks in.
- Assess existing "hotline" technology allowing personnel to raise questions or concerns. Considerations include making sure communications are forwarded to the appropriate personnel and that confidentiality is maintained. Furthermore, all personnel should receive adequate notice that these hotlines continue, and they should get updates on any changes.
- If companies update policies to facilitate working-from-home trading or transaction execution, they thoroughly document these revisions.
- In order to demonstrate robust compliance programs, organizations may want to implement and maintain interactive and effective training modules/programs for front office personnel. Companies should analyze the effectiveness of remote programs, such as Webex presentations, whether internal options are available, and if personnel are receiving the correct information in an understandable and accessible format.
- Companies need to make continual adjustments to ensure that when

people reach out to the legal department regarding instances of potential noncompliance the information receives appropriate attention, and action, if required.

### **EFFECTIVELY SUPERVISING TRADING PERSONNEL**

To ensure the success of their existing or revamped compliance programs, companies need to supervise trading personnel adequately, despite the challenges of a work-from-home environment. This also may require more frequent testing of supervisory protocols to make sure they work effectively in this circumstance, and to identify potential gaps.

Other complicating factors deserve consideration as well, including the availability of sufficient numbers of supervisors. Some may fall sick, while others may confront issues such as childcare demands resulting from closed schools, meaning that companies should anticipate making available and training new personnel to fill in as back-up support. In all cases, these supervisors need to be on top of regulatory developments, such as newly imposed bans on short-selling, position limits, and changed reporting requirements. As always, management must thoroughly document any changes.

In order for this all to work, companies must make sure that traders continue to receive proper training, utilizing available technologies, including Webex presentations and video conferencing. As part of their duty to monitor emerging risks, supervisors should maintain regular contact with traders to keep a finger on the pulse of what is going on in the market. Since it is difficult to walk the trading floor to keep in constant touch with traders, when that trading floor is the trader's living room, regular check-ins, video calls, frequent reviews of emails and instant messages may be required. It also is best practice for supervisors to ask for traders' current phone and IM contact information.

These conversations should also address the issue of securing confidential materials to avoid the possibility of insider trading in an environment in which documents or laptops might be left out and available to family members or visitors. Companies may want to consider using enhanced technological surveillance of traders' activities, and to think about whether to allow traders to use Zoom or Skype and if so under what circumstances.

In all instances, supervisors need to remind traders to keep records of cash market trades and futures and swaps especially where you are not able to record phone lines. Again, any new protocols should be subject to testing to identify potential gaps in the compliance program.

### **RECORDKEEPING AND AUDIT TRAIL SECURITY**

A running theme of ours is an emphasis on recordkeeping. We stress this area because recordkeeping issues can produce regulatory liability in a number of

ways. The CFTC has imposed significant penalties for violations in this area, sometimes arising from unrelated investigations. Similarly, FERC investigations can generate recordkeeping allegations, and FERC often includes recordkeeping as an audit component.

Companies therefore should consider how to ensure compliance, including whether they require additional protocols in the unusual circumstances imposed by the pandemic. For instance, traders could be generating records on their cell phones and laptops outside of the company's file management system. In light of this, companies should consider the proper maintenance of these records, perhaps by increasing controls to make sure traders properly transfer records to the organization's servers or networks.

These considerations also come into play in assuring the integrity of an audit trail, and in allowing personnel to respond to inquiries timely and effectively. Companies may want to consider whether traders can use personal cell phones for trade negotiation and execution; whether they can use non-company IM platforms; or whether they can remotely access voice recording or IM chats. Establishing proper procedures can ensure that a company's response to FERC inquiries, regarding both physical documents and electronic data, are as complete and accurate as possible.

## **OTHER ISSUES**

There is often concern about the nature of or absence of security in a work-from-home scenario. Technology designed for at-home consumer use often may be less secure than what personnel encounter in the workplace, including modems, hardware, and other equipment.

Even if traders connect to the company via VPN, the router they use from home may be less secure than the company's on-site hardware. This means compliance officials should consider whether software patches in use by traders are up to date, for instance.

In addition, family members may be using the same at-home technology serving the trader, meaning that a phishing attack that succeeds against the trader's family members may be used to compromise the trader's own data.

This also raises confidentiality issues, which should prompt companies to ensure that traders have access to secure electronic file management systems and to require that personnel access confidential information only on secure company networks.

It is important that employers take steps to protect secure confidential information because even inadvertent breaches could increase the organization's

exposure to the release of data under such laws as the Freedom of Information Act. Lax handling of data could also raise the potential of insider trading, as previously mentioned.

### **RESPONDING TO A REGULATORY INQUIRY**

Finally, companies that must respond to a regulatory inquiry must consider how to coordinate preparing the data response among personnel working remotely in widely dispersed locations.

Compliance personnel should identify the steps required to identify all of the appropriate custodians of the material, and identify means of collecting it. They also must realistically assess how long this will take, as well such practical considerations as how to facilitate the appearance of individuals, and legal counsel, in depositions, while protecting everyone's safety.