



2020 Energy and Commodities CONFERENCE

Post-Conference Report

Insights on litigation, regulatory trends, COVID-19 impacts,
and transformation in the energy industry

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Driving progress
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Welcome from the conference chairs

Dear friend, client, colleague,

On October 12-15, 2020, we took to cyberspace to bring you the 6th annual Energy and Commodities Conference in virtual format. We appreciate how busy everyone is, especially in 2020, so wanted to share this post-conference report to give you both an outline of its eight sessions, and links to the online recordings so you can watch at your leisure.

At this event, our energy and commodities lawyers made timely, industry-specific presentations that covered topics you have told us are important. They were joined by guest speakers from Mercuria Energy Group, Tilden Resources, Energy Transfer, Jefferies LLC, Exterran Corporation, EQT Corporation, The Williams Companies, and Cargill Trade & Capital Markets. Over four days of events, our panelists covered current and emerging trends across the transactional, regulatory and disputes spaces, with a view to sharing insights on what is happening next.

The advent of COVID-19 introduced a number of new considerations, including ethical risks surrounding remote work; increased risk of litigation in areas involving workers' compensation and collections – against the backdrop of a new world of remote proceedings; added uncertainty as to where the markets are headed post-COVID; and no shortage of guidance and cases from federal regulators and enforcers at FERC and CFTC.

Robert J. (RJ) Johnston, managing director at Eurasia Group, provided our keynote. RJ, a renowned speaker on geopolitical issues, said that while the bearish outlook for oil and gas triggered by COVID could last well into 2021, there's no dearth of opportunities for energy companies throughout the Americas. A positive takeaway for us all!

We want to thank everyone who shared their experiences at the sessions and took the time to help us conclude another successful and, we hope, insightful conference.

Yours truly,

Michael H. Bernick and Craig R. Enochs
2020 Energy & Commodities Conference Co-Chairs



Michael H. Bernick
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The future of the commodities market across the Americas

Takeaways

- The 2020 election and COVID-19 pandemic will impact all segments of the energy market.
- The outlook for the oil and gas market will remain bearish until 2021-22.
- Firms need to prepare now for the coming energy transition.

The current economic and political climate poses challenges but offers opportunities for energy companies throughout the Americas. Energy firms will need to prepare in order to withstand short-term crunches and take advantage of long-term developments in the market. While both supply and demand will be impacted by the pandemic and changing consumer and regulatory expectations, long-run trends presage promising prospects for companies willing to innovate.

This year's keynote was presented by **Robert J. (RJ) Johnston**, managing director of energy, climate, and resources and executive advisor for Eurasia Group. RJ is the former CEO of Eurasia Group and has vast experience in providing strategic and political advice to institutional investors. Prior to joining Eurasia Group, he served as a leading researcher on global energy equities. In this session, he gives his considerations on:

- How the U.S. election outcome might affect the markets
- The global oil market
- Energy transition dynamics

The damage to the energy market wrought by COVID-19, potential mass conversion to low-carbon energy, and reduced appetite for CapEx are working together to impact strategic considerations for the energy sector.

Firms need to prepare for increased financial pressure and reduced investor appetite while positioning themselves to seize new opportunities in reduced-carbon fields.

**Access the live recording here:
Future of the commodities market
across the Americas**

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2020 trends in the oil and gas industry

Takeaways

- The collapse of oil prices is triggering consolidation within the industry.
- Given today's price environment, asset deals are focused on the acquisition and divestiture of proved developed producing (PDP) assets.
- Pricing constraints are presenting additional difficulties for operators in the midstream space.
- Traditional sources of capital are not as readily accessible, causing E&Ps to turn to alternative forms of financing, including through joint development.

Although 2020 has presented many challenges to the oil and gas industry, it has also led to new opportunities for well-positioned players in the space.

The panel discussion was led by Reed Smith partner **Ryan T. Purpura** and featured an interactive Q&A with guest speakers **Jamie Elsen** (Tilden Resources LLC; Rockdale Marcellus, LLC), **Boris Bystrov** (Mercuria Energy Trading), and **Travis Bugey** (Energy Transfer). The session ran the gamut of legal and commercial issues shaping today's oil and gas sector. Key discussion points included:

- Companies with stronger balance sheets are driving the consolidation of publicly owned companies. Conversely, pricing constraints on cash flow and balance sheets have created a wave of industry bankruptcies. This wave of bankruptcies presents an opportunity for cash-flush E&Ps and private equity groups to acquire assets at discounted prices by way of section 363 transactions.

- Because of pricing stresses, the principal driver behind many oil and gas transactions is stable cash flow. Accordingly, nearly all transaction value tends to be allocated to PDP assets (i.e., those assets that have been drilled and completed and are currently producing, or capable of producing, immediate revenue). Conversely, little or no value is being allocated to proved undeveloped (PUD) assets (i.e., those reserves that are proved by geological reserve reports, but will require significant capital expenditures before hydrocarbons can be extracted). The devaluation of PUD assets, however, represents upside potential for well-positioned E&Ps to acquire proved reserves at a significant discount.
- Private equity firms have filled the financing void left by many traditional lenders. Joint development agreements between private equity funds and E&P operators have become more prevalent, directly infusing operators with development capital, while allowing them to maintain operational control.

**Access the live recording here:
Challenges, risks and new developments
in the oil and gas industry**

About our oil and gas practice: When it comes to assisting with oil and gas, we have it covered. For more than 140 years, oil and gas clients have looked to Reed Smith to provide legal counsel as they grow and evolve their businesses. From forging complex domestic and international deals to getting the base documents and commercial agreements in place, we have the experience to ensure the smooth running and delivery of oil and gas transactions. We do this through advice which is commercially aware – informed by an in-depth analysis of the legal issues, and careful negotiation and preparation of agreements.

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Chapter 11 asset sales in the age of COVID-19

Takeaways

- Asset sales in bankruptcy are picking up after initial market uncertainty following the double whammy of COVID-19 and the Russian-Saudi price wars.
- The Southern District of Texas (Houston) has become a filing hotspot this year, and is leading the charge in technology during the pandemic, which has streamlined court hearings, mediations, and asset sales while lowering costs.
- Secured creditors are more likely to take control of oil and gas assets in anticipation of a market rebound. Litigation over midstream contract rejection, lien perfection and priority, credit bid rights, and adequate protection is likely to increase among stakeholders fighting for value.

Asset sales under the Bankruptcy Code are becoming increasingly common as more debt is held by secured creditors.

The restructuring and insolvency focused panel was led by Reed Smith partners **Omar J. Alaniz** and **Keith M. Aurzada**, with **Rob White** from Jefferies LLC lending his investment bank insights. With complex Chapter 11 energy cases at an all-time high, with investor and creditor groups battling for value, the panel's discussion spanned the latest trends and hottest topics in complex energy restructuring transactions and explored where the market is headed post-pandemic. Highlights include:

- Secured lenders increasingly are willing to take control over oil and gas collateral. Credit bidding allows a secured creditor to bid its debt in lieu of a cash purchase price in a Section 363 sale. Lenders can use credit bidding defensively to protect the value of their assets, and investors can use credit bidding offensively to acquire assets below market price.

- The vast majority of large oil and gas Chapter 11 cases are filed in the Southern District of Texas (Houston) and Delaware. The bankruptcy courts and restructuring professionals are adapting to the remote environment by utilization platforms such as Zoom to continue a Chapter 11's momentum while at the same time lowering costs,
- Rejection of midstream contracts is one of the hottest topics in E&P bankruptcies. A New York and Delaware court held that gas gathering agreements could be rejected, while courts in Colorado and Texas held that the agreements created real property rights that could not be rejected in bankruptcy. The differences in outcome could be attributed to application of differing state laws and contract language. However, some of the analysis appears to be a disagreement on interpretation of the privity and touch and concern requirements to create a real property covenant that runs with the land.

**Access the live recording here:
Chapter 11 transactions in the COVID
world and their impact on future
distressed asset sales**

About our restructuring and insolvency practice:
We combine our premier restructuring and insolvency practice with our depth of experience in advising oil and gas clients across the value chain, to provide legal counsel in any financial restructurings, workouts, bankruptcy cases, and cross-border insolvencies impacting your business. Our Houston team also knows the intricacies of the U.S. District Court for the Southern District of Texas (Houston), which has become a filing hotspot this year.

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Energy transactions in a pandemic world

Takeaways

- While the impact of the pandemic has been widely felt across the energy industry, it has been particularly pronounced for the oil and natural gas sector.
- The U.S. elections in November may lead to significant changes in the energy industry.
- While global markets have been surprisingly resilient, the pandemic's full effects are yet to be seen.

Lenders and energy companies are facing uncertain times. Energy is not yet clearly rebounding since demand plummeted under COVID-19. The U.S. election outcome could cause renewed regulation and neutralize deregulatory moves made by the Trump administration.

The panel was moderated by Reed Smith partner **Kirsten S. Polyansky**. Guest speaker **Mitchel Fowler**, ICBC Standard Bank's director for energy origination and structuring, weighed in on the condition of energy companies and lenders mid-pandemic; **Gregory Cortez**, BHP's lead for credit and market risk, discussed how service companies have been affected; **David Polyansky**, president of Clout, a communications company, discussed how the election will play into market confidence and how it might affect sector recovery; and **Jorge I. Gutierrez**, Reed Smith partner, discussed the view from producers, pipeline companies and energy lenders.

The panel made the following observations:

- Some well-positioned companies are actively looking into acquisitions, but they are extremely selective in the targeted companies. Public companies will use their stock as acquisition currency rather than cash or debt. Many other companies, however, are overleveraged and focused on paying down debt and surviving. These overleveraged energy companies are finding it harder to access debt or equity capital.
- In the face of the U.S. elections, the number of battleground states has expanded and many issues are at play, including rising hospitalizations due to COVID-19, and economic pressures from small businesses seeking funds to keep their doors open.
- Global markets have been surprisingly resilient. For example, while the global shipping industry suffered during the pandemic, shippers are bouncing back, positioned to emerge post-pandemic in a good place.
- Energy market volatility declined in Q3, but it is starting to creep back up. The effects of the pandemic on aggregate demand were showing signs of tapering off, but now, with the potential for new lockdowns in Europe and the rising number of cases in the U.S., there is increased uncertainty as to when industrial and consumer demand will return.
- While banks were initially reactive in Q2 when their clients were dealing with the immediate fallout from the pandemic, Q3 and the start of Q4 have seen banks being less accommodating. When activity in the energy space picks up, banks will need to be more flexible or companies will need to find alternative sources of capital.

**Access the live recording here:
Current state and the near-term
outlook for energy transactions
in a pandemic world**

About our energy transactions practice: From forging complex domestic and international deals to getting the base documents and commercial agreements in place, we have the experience to ensure the smooth running and delivery of oil and gas transactions. We do this through advice which is commercially aware – informed by an in-depth analysis of the legal issues, and careful negotiation and preparation of agreements.

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Legal perspectives on construction and deployment of FSRUs

Takeaways

- FSRUs offer geographic mobility and flexibility to adapt to economic, legal and political exigencies.
- The shipbuilding contract must be heavily negotiated if the developer will own the FSRU.
- Termination triggers and key payment milestones are described.

The floating storage and regasification unit (FSRU) has emerged in the last 20 years as one of the best ways to transport liquefied natural gas (LNG), and the amount of LNG transported by FSRUs is expected to double between now and 2024.

Reed Smith lawyers **Kevin D. Keenan**, **Todd Culwell** and **Antoine K.F. Smiley** explained the benefits and detriments of owning or leasing FSRUs, and the risks (including litigation) associated with lease or purchase. Select highlights include:

- **Flexibility:** FSRUs make excellent terminal options because of their ability to be relocated in case of legal changes in a deployed jurisdiction, and also in case of economic changes.

- **Developer protections:** Developers contracting for the manufacture of an FSRU can protect rights and specify remedies from both a contractual and practical perspective. All developers should consider a refund guarantee, backed by a guarantee bond. This bonded guarantee provides a critical cash remedy in case the manufacturing process goes awry and also can be very attractive to a developer's lenders or other providers of financing.
- **Predictability:** The manufacturing of FSRUs provides a more stable, predictable and less risky alternative to the construction of fixed onshore or offshore terminals because of the greater controls offered by the shipyard environment.

Access the live recording here:
FSRU Deployment – structuring and optimizing acquisition and operation

About our LNG practice: Our large and well-respected international shipping practice is a key source of knowledge and support for businesses trading LNG products – those that rely heavily on carriage by sea. We have a strong technical understanding of the specific characteristics that distinguish LNG from general shipping, which we use for our clients' benefit. Whether you need help doing due diligence for investments in shipping and energy transportation, analysis to help determine the structure, or input into governance and operation of companies – we are on hand in jurisdictions around the globe.

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Litigation trends in the oil and gas industry

Takeaways

- Plaintiffs and their attorneys are bringing a spate of royalty litigation.
- Wage and hour class actions are on the rise in the energy sector.
- The pandemic has given rise to never-seen-before disputes over insurance, coverage and collection.

Royalty litigation remains a persistent issue in the oil and gas industry. The fluctuation of crude prices creates an increase in the amount of claims filed by landowners who are displeased with their lesser royalty statements. These claims often focus on reducing costs and eliminating deductions taken by the oil and gas company so as to increase the amount the landowners receive.

Stefanie Burt, in-house counsel for EQT Production Company, described how industry participants can protect themselves from royalty litigation by working with land, accounting, and marketing departments to understand the deductions taken on leases and using clear, consistent royalty clauses in leases and addendums.

Stephan Selinidis, in-house counsel for Exterran Corp., discussed the benefits of following CDC guidelines and implementing recommended precautions; he also explained the pitfalls of business interruption insurance for oil and gas companies, and brought up important points about the pandemic's effect on contracts.

The panel – which included **Nicolle R. Snyder Bagnell**, co-vice chair of Reed Smith's Energy and Natural Resources Group, and partner **Michael H. Bernick** – covered these main points:

- The COVID-19 pandemic has exacerbated oil and gas companies' personnel and collection issues.
- Personnel issues are spurring a rise in lawsuits against production and midstream companies.
- Wage and hour class actions concerning disputes over the status of contractor pay and benefits are on the rise in the energy sector.
- Adding specific provisions to a master services agreement can help prevent class certification.
- Remote proceedings can be more productive than in-person proceedings.

**Access the live recording here:
Current and anticipated litigation trends
and risks for the oil and gas industry**

About our energy disputes practice: When it comes to assisting with oil and gas transactions, disputes and regulation, we have it covered. For more than 140 years, oil and gas clients have looked to Reed Smith to provide legal counsel as they grow and evolve their businesses. We have helped our clients through times of volatile commodity prices, preparing them for the now and the next. We have built a global platform in the major oil- and gas-producing regions, and developed a keen understanding of the needs and ambitions of clients across the upstream, midstream and downstream energy markets.

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2020 at the CFTC and FERC

Takeaways

- Active year at FERC: Rehearing process overhauled.
- Active year at the CFTC: Completed last set of Dodd-Frank rulemakings.
- An administration change will likely lead to significant agency policy changes.

The regulatory agencies overseeing energy services and markets have had a very active year with rulemakings and significant agency action. In spite of being short two commissioners, in 2020, FERC issued rulemakings regarding the use of eminent domain with interstate natural gas pipeline projects, rehearings in NGA Section 7 certification dockets, rulings regarding distributed energy resources, net metering, and held a well-attended technical conference on carbon pricing.

The CFTC, finally operating with a full quorum of commissioners, has been highly active in a broad range of proposed and final rulemakings, and recently completed several rulemakings required under the 2010 Dodd-Frank Act. Just this fall, the CFTC issued new final regulations on physical commodity position limits, regulation of cross-border swap transactions, and swap data reporting requirements. The CFTC also settled its single largest enforcement action against a firm for widespread spoofing and manipulation, with combined penalties and fines totaling \$920 million.

Assistant General Counsels **Stephen Hatridge** from Williams Companies and **David Robertson** from Cargill joined Reed Smith partners **Colette D. Honorable** and **Christine T. Parker**, to identify and explain significant regulatory topics and issues affecting the energy and commodities markets, wrapping up what has turned out to be an active year. Select highlights:

- The FERC has only three commissioners and two nominees wait in the wings to be confirmed by the U.S. Senate.
- FERC overhauled its rehearing procedures in NGA Section 7 certification proceedings and also addressed the federal government's eminent domain authority under NGA Section 7(h) concerning state lands.
- FERC claimed concurrent jurisdiction with U.S. bankruptcy courts over FERC-regulated gas transportation contracts.
- The CFTC concluded several of its long-awaited rulemakings as required under the 2010 Dodd-Frank Act, including position limits on physical commodities, margin and capital rules for CFTC-regulated swap dealers, and cross-border swap rules, and updated some of its prior Dodd-Frank rulemakings around swap data reporting.

- The CFTC also issued proposed and final rules addressing bankruptcy under Part 190 of the CFTC rules, electronic risk trading principles for exchanges, and updated risk management and default rules for clearinghouses.
- The CFTC's Enforcement Division remained highly active during the past year, filing more cases involving manipulative conduct and spoofing than any prior year but one (which was last year). Approximately 65 percent of all cases filed during FY 2019 involved charges of commodities fraud, manipulative conduct, or spoofing, key areas of focus of the Division.

**Access the live recording here:
2020 at the CFTC and FERC: What a year!**

About our energy regulatory practice: Increasingly, regulatory approaches are shared across state and national borders, and what happens in one jurisdiction can directly impact our clients' business in another. We help energy industry participants address complying with changing markets and regulations, unraveling evolving compliance obligations, and mitigating any potential enforcement actions. Whether you need help with the provision of complex services, interpretation of regulatory terms, fraud or fiduciary duty issues, or claims concerning the structure, governance or operation of companies, we are on hand in jurisdictions around the globe to give you experienced regulatory advice.

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Professional ethics issues for in-house counsel

Takeaways

- Remote working creates ethical risks around competence, confidentiality and supervision.
- Non-lawyer ownership of law firms may help increase access to justice.

CCOVID-19 has forced trials and other legal proceedings to take place via videoconference instead of in person. This has unleashed efficiencies and economies, so lawyers have an interest in staying abreast of new and yet-to-come technology. The new forums also create new risks of breach-of-confidentiality, conflict-of-interest or incompetence allegations, so lawyers must also address the risks that come with remote legal work.

During his ethics panel, **Thomas L. Allen**, Reed Smith's general counsel, identified ethics issues for in-house counsel that arise out of remote working. He also discussed the eroding barrier to non-lawyer ownership of law firms, and risks posed by multiple representation. Key topics covered include:

- Remote working is here to stay even after the COVID-19 pandemic. New web conferencing technology is creating a new remote working environment, and lawyers will have to keep learning and addressing associated, potential ethical risks as more technology comes out. Data breaches are one of the biggest legal risks of dependence on conferencing technology. Remote working also implicates professional competence, confidentiality of information, and supervision.
- Research indicates that in 74 percent of civil cases in state courts, where the vast majority of matters affecting low income people are litigated, one or both parties lack a lawyer. Non-lawyer ownership of law firms may increase access to justice by alleviating this issue.
- The representation of both a corporation and the corporation's individual employees can become ethically fraught. In one such instance, the Pennsylvania Supreme Court recently imposed a public reprimand on a university's general counsel for their handling of their clients' grand jury testimony.

**Access the live recording here:
Round-up of professional ethics
issues for in-house counsel**

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