BOIES SCHILLER FLEXNER

Insights: Issue Spotting for Energy, Oil, and Gas Clients in the Era of COVID-19

The expanding scope and spread of COVID-19 has created uncertainty and anxiety on a global scale, creating a plethora of public health, financial, and legal consequences. The Energy Industry is facing trying times. While the exact length and severity of the pandemic remains uncertain, what is certain is that Boies Schiller Flexner can help your business tackle a host of issues it may be facing.

1. **Contract performance:** An issue widely expected to permeate the business world in the wake of the pandemic is the ability—or willingness—of parties at all industry levels to perform on contracts. This could manifest itself in a variety of ways: a subcontractor could not be able to deliver on its promises because its offices have been closed by a government order, or an acquirer could want out of a deal because the target is no longer profitable due to a recent decrease in industry demand. Energy firms should assess the risks that contracts may not be performed and should carefully assess options if they no longer believe it is feasible to perform.

   Many energy firms are highly leveraged, and the recent decrease in energy demands may cause pressure as firms try to meet obligations. Firms should carefully assess each of their contracts and assess their legal options with respect to each contract in light of their changing business goals.

   While there is a dearth of authority specifically addressing contract issues during a pandemic, general contract principles provide guidance.

   Contract language is key. In general, the language in each individual contract will be the most important consideration in whether a contract is voidable. Many contracts contain "force majeure" clauses that govern whether performance is avoidable due to an unexpected outside event, and some such clauses specifically list pandemics, epidemics, or certain government action as a triggering or non-triggering event. While courts typically construe force majeure clauses in favor of performance, the effect of the clause will ultimately be determined based on the language and specific circumstances impacting the business. In addition, many merger agreements and similar contracts contain "material adverse affect" ("MAE") clauses that allow a party, typically the acquirer, to avoid the deal if industry circumstances have sufficiently changed. Again, the language will govern. Courts typically construe these clauses in favor of performance and require a very significant change, including over a prolonged period, in order to constitute an MAE.

   Impact of Common Law Doctrines. Even absent an "out" in the contract, parties may attempt to rely on common law doctrines such as impossibility of performance or frustration of purpose to avoid contractual obligations.

   - **Impossibility of Performance:** In general, the impossibility of performance doctrine excuses performance of a contract when the subject matter of performance becomes objectively impossible due to an unforeseen, uncontrollable event.

- **Frustration of Purpose:** The frustration of purpose doctrine will excuse performance where the underlying reason for performance of the contract has been destroyed by an unforeseen, uncontrollable event.

While courts typically interpret these doctrines very narrowly and performance is rarely excused under them, courts across different states may expand their application to the COVID-19 pandemic.

2. **Defense Production Act:** The Defense Production Act ("DPA") gives the President broad powers to direct production of essential services and material during emergencies. President Trump recently utilized the DPA with respect to the production of medical equipment. Although there is no official indication that the President will utilize the DPA with respect to energy firms, companies should be aware of the risks and obligations of the Act if economic conditions continue to worsen. There has been speculation, for example, that the President may invoke the DPA in order to buy oil for the Strategic Petroleum Reserve since funding for such a purchase was not included in recent stimulus legislation.

3. **SEC Reporting Obligations and Public Disclosure Issues:** The outbreak of COVID-19 creates fertile ground for the latest wave of event-driven securities litigation. In particular, two purported class actions were recently filed, marking the first securities fraud lawsuits arising from COVID-19. The lawsuits underscore the care companies must exercise when issuing public statements regarding COVID-19, as well as the need for companies to carefully evaluate and assess how the potential financial and business impact of COVID-19 might affect their disclosures and performance guidance.

4. **Government Relief:** Congress recently passed a roughly $2 trillion economic aid package, the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), that will impact all sectors of the economy. Energy firms should carefully review the legislation and put themselves in a position to take advantage of any available tax benefits, loans, business opportunities, or other incentives. The legislation will provide loans to businesses that have been designated as "critical to maintaining national security," which could include businesses involved in electricity, oil, and gas operations. In addition, the Act will provide opportunities for additional loans to small, medium, and large businesses.

5. **Ensuring safety of employees and customers**: Many energy firms have had pandemic response plans in place for years and are among the most well-prepared firms in the business world, but those firms must remain vigilant about meeting the circumstances of this ever-changing situation.

First and foremost, companies should enact plans to comply with constantly changing federal, state, and local regulations on business operations and workplace safety, including U.S. Occupational Safety and Health Administration ("OSHA") guidelines. But companies, even where not required to do so by law, should institute work from home policies where feasible, institute aggressive social distancing and sanitation requirements if employees cannot work from home, and ensure social distancing between employees and customers. Many energy firms have instituted policies to keep critical employees on-site full time and thus isolated from potentially-infected individuals; firms should continue to creatively implement procedures to maximize the physical and mental wellbeing of their employees.

Not only will minimizing exposure minimize lost productivity and revenue, it could minimize liability from lawsuits. A customer exposed to and impacted by the virus during a cruise recently sued a cruise line for negligence; many more such lawsuits may follow. Employees who believe they contracted COVID-19 at work may also attempt to file claims for workers' compensation, and companies with aggressive safety measures in place would be in a stronger position to defend such claims.

6. **Labor and Employment Issues:** In the wake of decreased industry demand and falling oil prices, companies may find it necessary to cut costs by reducing employee pay or hours, furloughing employees, or laying off employees. In evaluating these actions, companies should take special care to comply with applicable state and federal employment laws, especially antidiscrimination laws and laws requiring notice to laid-off employees (such as the WARN Act). Companies should also evaluate any union contracts that may be implicated. Further, employees with disabilities may need accommodations in order to maintain safety and social distancing.

7. **Delayed Judicial and Regulatory Proceedings:** Across the country, courts and regulatory bodies, including FERC, are shutting doors, postponing hearings or conducting them telephonically, moving to work from home arrangements for judges and employees. As a result, companies should expect substantial delays in any pending judicial and regulatory proceedings. Companies needing rapid relief from courts or regulatory bodies should clearly communicate that fact, but should make alternative arrangements in case the courts are slow to act.

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