SEPTEMBER 2019
VOL. 19-8

PRATT'S

# ENERGY LAW REPORT

LexisNexis

**EDITOR'S NOTE: NUCLEAR WASTE**
Victoria Prussen Spears

**DOE'S LATEST EFFORT TO EXPEDITE CLEANUP OF COLD WAR SITES WILL SHAVE CLEANUP COSTS–AND COULD HIT COMMERCIAL NUCLEAR UTILITIES IN THE WALLET**
Jeffrey S. Merrifield, Sheila McCafferty Harvey, Jay E. Silberg, and Robert B. Ross

**PENNSYLVANIA'S NEW REVISED STATUTORY ARBITRATION ACT: WHAT THE OIL AND GAS INDUSTRY NEEDS TO KNOW**
Kenneth J. Witzel

**FERC AND NERC ADVANCE DRAMATICALLY EXPANDED MANDATORY CYBERSECURITY REPORTING STANDARDS**
Norma M. Krayem

**GAO ISSUES RECOMMENDATIONS FOR IMPROVING TRIBAL CONSULTATION ON INFRASTRUCTURE PROJECTS**
Jody A. Cummings

**FERC CONSIDERING MAJOR UPDATE TO ENERGY INFRASTRUCTURE INVESTMENT POLICIES**
Robert S. Fleishman, Brooksany Barrowes, and Brett Nuttall

**REMIT ENFORCEMENT INTENSIFIES**
Leigh Hancher, Matthew Levitt, and Paul Lugard

# Pratt's Energy Law Report

**VOLUME 19 NUMBER 8 September 2019**

**Editor's Note: Nuclear Waste**
Victoria Prussen Spears 255

**DOE's Latest Effort to Expedite Cleanup of Cold War Sites Will Shave Cleanup Costs–and Could Hit Commercial Nuclear Utilities in the Wallet**
Jeffrey S. Merrifield, Sheila McCafferty Harvey, Jay E. Silberg, and Robert B. Ross 257

**Pennsylvania's New Revised Statutory Arbitration Act: What the Oil and Gas Industry Needs to Know**
Kenneth J. Witzel 262

**FERC and NERC Advance Dramatically Expanded Mandatory Cybersecurity Reporting Standards**
Norma M. Krayem 271

**GAO Issues Recommendations for Improving Tribal Consultation on Infrastructure Projects**
Jody A. Cummings 276

**FERC Considering Major Update to Energy Infrastructure Investment Policies**
Robert S. Fleishman, Brooksany Barrowes, and Brett Nuttall 284

**REMIT Enforcement Intensifies**
Leigh Hancher, Matthew Levitt, and Paul Lugard 287

LexisNexis®

**QUESTIONS ABOUT THIS PUBLICATION?**

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please email:
Jacqueline M. Morris at ........ (908) 673-1528
Email: ........ jacqueline.m.morris@lexisnexis.com
Outside the United States and Canada, please call ........ (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:
Customer Services Department at ........ (800) 833-9844
Outside the United States and Canada, please call ........ (518) 487-3385
Fax Number ........ (800) 828-8341
Customer Service Website ........ http://www.lexisnexis.com/custserv/

For information on other Matthew Bender publications, please call
Your account manager or ........ (800) 223-1940
Outside the United States and Canada, please call ........ (937) 247-0293

ISBN: 978-1-6328-0836-3 (print)
ISBN: 978-1-6328-0837-0 (ebook)
ISSN: 2374-3395 (print)
ISSN: 2374-3409 (online)

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT'S ENERGY LAW REPORT [page number] (LexisNexis A.S. Pratt);

Ian Coles, *Rare Earth Elements: Deep Sea Mining and the Law of the Sea*, 14 PRATT'S ENERGY LAW REPORT 4 (LexisNexis A.S. Pratt)

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2019 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

(2019–Pub.1898)

# Editor-in-Chief, Editor & Board of Editors


**EDITOR-IN-CHIEF**
**Steven A. Meyerowitz**
*President, Meyerowitz Communications Inc.*

**EDITOR**
**Victoria Prussen Spears**
*Senior Vice President, Meyerowitz Communications Inc.*

**BOARD OF EDITORS**

**Samuel B. Boxerman**
*Partner, Sidley Austin LLP*

**Andrew Calder**
*Partner, Kirkland & Ellis LLP*

**M. Seth Ginther**
*Partner, Hirschler Fleischer, P.C.*

**Stephen J. Humes**
*Partner, Holland & Knight LLP*

**R. Todd Johnson**
*Partner, Jones Day*

**Barclay Nicholson**
*Partner, Norton Rose Fulbright*

**Bradley A. Walker**
*Counsel, Buchanan Ingersoll & Rooney PC*

**Elaine M. Walsh**
*Partner, Baker Botts L.L.P.*

**Sean T. Wheeler**
*Partner, Latham & Watkins LLP*

---

**Hydraulic Fracturing Developments**
**Eric Rothenberg**
*Partner, O'Melveny & Myers LLP*

Pratt's Energy Law Report is published 10 times a year by Matthew Bender & Company, Inc. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices. Copyright 2019 Reed Elsevier Properties SA, used under license by Matthew Bender & Company, Inc. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204 or e-mail Customer.Support@lexisnexis.com. Direct any editorial inquires and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 646.539.8300. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house energy counsel, government lawyers, senior business executives, and anyone interested in energy-related environmental preservation, the laws governing cutting-edge alternative energy technologies, and legal developments affecting traditional and new energy providers. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to Pratt's Energy Law Report, LexisNexis Matthew Bender, 121 Chanlon Road, North Building, New Providence, NJ 07974.

# REMIT Enforcement Intensifies

***By Leigh Hancher, Matthew Levitt, and Paul Lugard****

*EU Regulation on Wholesale Energy Market Integrity and Transparency ("REMIT") is an EU-level framework for identifying and penalizing insider trading and market manipulation in wholesale electricity and gas markets in the European Union. Regulators have investigated and fined a variety of market participants, including energy exchanges, gas and electricity suppliers, and traders. Despite the uptick in enforcement, there remains considerable uncertainty over, for example, the scope of certain provisions of REMIT, and the boundaries between REMIT and competition law. The authors of this article provide background on the topic, explain the latest developments, and recommend that companies implement comprehensive, tailored compliance programs.*

The EU Regulation on Wholesale Energy Market Integrity and Transparency ("REMIT") has introduced a sector-specific legal framework for identifying and penalizing insider trading and market manipulation in wholesale electricity and gas markets in the European Union ("EU") This broad framework applies to any person/entity that participates in, or whose conduct affects, EU wholesale energy markets, irrespective of whether the person/entity resides or is based in the EU.

There recently has been a clear increase in the number of investigations into violations of REMIT, as well as the scale of sanctions for non-compliance. However, there remains significant uncertainty regarding the precise scope and application of certain key provisions. This article summarizes the latest developments in the REMIT sphere and shares best practices, as notably discussed at the recent intensive training session by the Florence School of Regulation,[1] which brought together representatives from the energy industry and from EU and national energy agencies, as well as lawyers, economists, and academics.

---

* Dr. Leigh Hancher is a senior advisor at Baker Botts L.L.P. skilled in European competition and regulatory law. Matthew Levitt is a partner at the firm helping clients navigate the international antitrust environment. Paul Lugard is a partner at the firm focusing his practice on EU and international competition law. The authors may be reached at leigh.hancher@bakerbotts.com, matthew.levitt@bakerbotts.com, and paul.lugard@bakerbotts.com, respectively. Ella Adler, a legal intern at the firm, assisted in the writing of this article.

[1] Baker Botts LLP is a sponsor of the Florence School of Regulation.

## BACKGROUND

REMIT[2] prohibits abusive practices in wholesale energy markets. Specifically, REMIT prohibits insider trading, and requires market participants ("MPs") to publicly disclose inside information. REMIT also prohibits "market manipulation," which includes false/misleading transactions, price positioning, transactions involving fictitious devices/deception, and disseminating false or misleading information.

MPs are required—under pain of fines—to register with the relevant national agency.[3] The requirement applies to all MPs who participate in wholesale energy markets within the EU, or whose conduct has an effect on these markets, and includes MPs residing outside the EU. To date, over 14,000 MPs have registered.

MPs are also required to report suspected violations of REMIT to the relevant national authority. All wholesale energy market transactions, including orders to trade, must be reported at EU-level to the Agency for the Cooperation of Energy Regulators ("ACER"). ACER then screens this information to identify possible market abuses, and where necessary alerts and coordinates with national agencies, which are responsible for enforcing compliance and imposing sanctions.

## LATEST DEVELOPMENTS

2018 represented the first full year of market monitoring by ACER, during which it received approximately three million data records per day. ACER has cited improving the quality of this data as a key priority. ACER has now also been given legal powers to introduce registration fees for MPs, to ensure that it has sufficient resources to undertake its market monitoring role.

National agencies, including the Spanish Commission for Markets and Competition (*Comisión Nacional de los Mercados y la Competencia*), and the German energy regulator (*Bundesnetzagentur*), have issued six decisions regarding market manipulations in violation of REMIT in the past 12 months. This demonstrates a clear trend towards more active enforcement by national agencies. The German regulator notably fined two individual traders €1,500 and €2,000 respectively for gas market manipulation. To date, the highest fine

---

[2] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011R1227.

[3] The relevant agency is typically the national energy regulator, such as the Office of Gas and Electricity Markets ("Ofgem") in the United Kingdom. However, in certain Member States, a single agency is responsible for both competition law and REMIT. Examples include Estonia, the Netherlands, and Spain.

issued to a company for non-compliance is €25 million, although sanctions are typically more modest.[4] REMIT violations are also widely publicized.

This enforcement trend includes investigating certain practices, particularly those involving high prices and unusual price spikes, as violations of REMIT, rather than as violations of competition law (as was traditionally the case). That said, there are no clear redlines between the two regimes, and abuses such as capacity withholding may violate both competition law and REMIT. Dawn raids under REMIT have also become more common, but it is not always clear to what extent the rights of defense under REMIT are the same as the rights of defense under competition law.

Given the lack of precedents, the boundaries between legitimate and illegitimate market behavior may also be unclear. An example is legitimate arbitrage between markets, which in certain circumstances may be captured by REMIT's broad prohibition of "manipulation."[5]

The broad and arguably vague definition of "inside information" is also problematic, as it can be unclear to MPs when the obligation to disclose such information comes into play. To facilitate compliance, there is debate regarding the introduction of thresholds for the disclosure of inside information (e.g., information concerning greater than 50,000 m3 of LNG or 100MW of electricity would have to be disclosed). However, there are significant practical difficulties to introducing a threshold, such as determining the territorial scope of the threshold (e.g., per country or per bidding zone), and its legal effect (e.g., whether a soft law guideline or a strict legal safe harbor would be more effective).

ACER advises companies to report transactions even in cases where there is doubt that the transaction is reportable under REMIT.[6] MPs have noted that companies are also erring on the side of caution regarding the publication of insider information, and are arguably over-publishing, with the effect that the utility of such information is greatly diminished. Processing the sheer volume of information available, be it inside information or reported transactions, is likely to be a continuous challenge for both regulators and those they regulate.

The recent increase in enforcement by national regulators may also pave the way for private actions for damages before national courts for breaches of

[4] In 2015, Iberdrola was fined €25 million by the Spanish Competition and Markets Authority for raising the prices for its hydroelectric plants by reducing the quantity it dispatched in the day-ahead market. Iberdrola has appealed this decision.

[5] Article 5.

[6] For advice regarding LNG contracts, see ACER FAQ II.3.1.49: https://kb.acer-remit.eu/faqs-on-transaction-reporting-question-ii-3-1-49/.

REMIT. Both ACER and national agencies collect large amounts of data from MPs, which would be very useful to a party bringing a private action. However, these agencies are generally bound by strict confidentiality provisions which prevent them from releasing certain information to third parties. The European courts have set out criteria for determining whether the regulator can disclose information to a third party. However, the case-law and relevant regulations have not been harmonized, with the effect that different European agencies may be subject to different EU rules.

ACER is expressly authorized to share information with other national and European regulators, including financial regulators and competition authorities. MPs should be aware that the information ACER collects may therefore open the door to liability under these other bodies of law.

## PRACTICAL IMPLICATIONS

The most effective way for a company to limit the risk of REMIT infringement is through a comprehensive, tailored compliance program. Companies may also look to competition law compliance and enforcement for guidance, in light of the similarities between the two regimes described above.

In designing the right compliance program, companies may wish to consider the following points. First, the market for wholesale energy products is a multilevel environment in which European and national legal rules interact. REMIT notably operates in parallel with other European regulatory regimes, including competition law, financial regulations, and the EU market abuse regulation ("MAR"), each of which carries sanctions for non-compliance. The impact of these parallel European regimes should be included in any REMIT compliance program. Second, although certain technologies can generate alerts regarding suspicious market activity, it is key to have an internal operative manual on how to deal with these alerts. This can simplify compliance with REMIT's reporting obligations under EU law, and (for example) market monitoring under the MAR. Third, it is important to designate clear internal procedures and communication channels to ensure inside information is acted upon rapidly and handled appropriately.

Finally, given the extensive market monitoring under REMIT, there is a risk of investigations of both "false positives" (market activity that appears suspicious but is in fact legitimate), as well as investigations of actual violations. In light of this risk, it is important that companies proactively train their staff to increase the culture of compliance, and to ensure staff are prepared in the event of a dawn raid.