

# Ten Questions to Ask When Thinking About Compliance

By Karen Redford and Catherine Krupka

Energy companies are subject to increasing oversight from a broad array of regulators. Part of the challenge of managing the legal and reputational risk that can arise from such oversight is ensuring that the company has built a culture of compliance. The other part of the challenge for corporate counsel is knowing what constitutes an appropriate culture of compliance. There is no single answer to this question because companies are different.

The following questions are intended to help corporate counsel assess what may or may not be missing at their own companies and to anticipate the kinds of questions regulators are asking on a more frequent basis.



## 1. Do You Really Have a Compliance Program?

This might seem like an odd question, but not all companies can answer “yes.” Taking into account that the details of a compliance program will vary based on company size, location, lines of business and other factors, an energy company compliance program should include:

- The conscious adoption of a formal program shaped around a company’s business that is intended to promote business activities that comport with the law.
- A statement from senior management that the company expects all employees to comply with the laws applicable to their business activities.
- The identification of compliance resources available to oversee and assist employees, including an independent senior compliance officer and legal resources.
- Policies and procedures that address the areas of law most applicable to the company and provide guidance on how to find additional help.
- Implementation of the compliance program in a way that ensures that all employees are aware of it.

Every company should undertake an honest assessment of whether its compliance program contains each of these elements. That will be the first step in ensuring that the company has developed and implemented a robust compliance program and thus can demonstrate that it has built a firm culture of compliance.

## 2. What Is Your Level of Commitment to Compliance?

Many companies have taken some steps to create a compliance program, such as preparing a compliance manual, but some stop there. Compliance programs work best when they are integrated into the corporate culture and are living programs. Factors that indicate a high level of commitment to compliance include:

- Senior management, business group heads and others in supervisory roles routinely set a tone that the company is committed to compliance.
- Ownership of the compliance obligation at the front office/operational level and acceptance of the compliance group as providing an integral, complementary oversight function.
- Independent compliance officers that have access to senior management and board members, including clear escalation paths that encourage compliance personnel to raise concerns without facing barriers or retaliation.
- A budget specifically for compliance and sufficient headcount to support the company’s program.
- Compliance staff members who are visible and approachable with excellent internal relationships.
- An open-door policy that encourages employees to ask questions or raise concerns about potential noncompliance involving company employees or other market participants.
- Regular and detailed training on core compliance areas, including agency and market rules, and ad hoc sessions as hot topics arise.
- Internal hotlines or other means for employees to report concerns.

In sum, compliance is not a “one shot” proposition. It requires an ongoing commitment by the company and its management.

### 3. Do You Know Your Regulators?

Most energy companies are aware of their primary federal and state energy regulators. For example, power and natural gas companies find it hard to forget about the Federal Energy Regulatory Commission, the North American Electric Reliability Corporation or local public utility commissions. However, other regulators may be interested in your energy activities. These can include:

- The Department of Energy for things like Energy Information Administration reporting requirements, efficiency standards and import and export licenses for natural gas and power.
- The Commodity Futures Trading Commission for energy futures and options trading on platforms like NYMEX and ICE, as well as manipulation and fraud arising from physical trading activities.
- The Environmental Protection Agency for facility permits, emissions reporting and trading, water protection and greenhouse gas regulation. States have comparable regulators.
- The Federal Trade Commission for fraud or deceptive conduct related to petroleum products.
- The Federal Communications Commission for telecommunications systems used to support dispatch, SCADA system management and other operations.
- Railroad and other commissions that oversee parts of the industry that use rights of way.
- The Treasury Department, the Commerce Department and the Customs Service, which oversee trade sanctions, anti-boycott rules and shipping requirements that can impact energy products like crude oil or liquefied natural gas.



Legal and Compliance should review the energy products the company makes or trades and in what jurisdictions to identify the key regulators for each. The company's compliance program should address the requirements of each material regulator, including authorizations/permits, fraud and manipulation rules, reporting, record keeping and other requirements.

### 4. Do You Know the Markets in Which Your Company Operates?

Companies also should be aware of the role that market operators, reliability coordinators or self-regulatory organizations might play in their business activities. For example, the power markets include independent system operators and regional transmission organizations that have rules and market monitors with oversight responsibility. The same is true for NYMEX and ICE. In addition, many agency investigations and enforcement actions are being initiated by referrals coming from these markets. Thus, a good compliance program will include procedures that direct employees to know the rules of the markets in which they operate. The company also should have an understanding of what the market rules require of the company, including compliance with price caps, reporting requirements, record keeping and position and accountability limits.

If the company uses third parties to manage its market activity (e.g., asset managers, schedulers, or operations and maintenance service providers), it should take reasonable steps to ensure that the agent also is meeting the compliance obligations it has assumed on the company's behalf.

### 5. What Are Your Competitors or Fellow Utilities Doing?

Every compliance program must be shaped to fit a specific company. There is no such thing as a "one size fits all" program. However, regulators do form impressions of what a compliance program should look like based on the experience they gain from their enforcement, auditing and other functions. A company's interaction with other businesses,

including through ACC, as well as regulators (e.g., through technical conferences), can help it stay abreast of what other companies are doing to improve their compliance efforts and can allow your company to keep up with the rest of the pack. Return the favor by sharing your own experience.

## 6. What Role Does Human Resources Play in Encouraging Compliance?

Good employees tend to mean reduced compliance risk. Yet companies can forget to use their Human Resources departments to help create a culture of compliance. For example, Human Resources can:

- Help assess whether a potential hire has a disciplinary history that raises compliance flags.
- Work with a new employee's supervisors to ensure that the employee completes all requisite training prior to engaging in business activity for the company. This would include ensuring that the employee agrees to comply with the company's compliance policies and procedures, understands the compliance resources available and agrees to comply with the laws applicable to his/her business activities.
- Help develop performance review forms and practices that ensure that a commitment to compliance is one of the factors considered.
- Maintain records of employee compliance, including annual attestations that the employee is aware of the laws applicable to his/her business activities and agrees to comply with them, training attendance sheets and disciplinary action summaries.

Some companies elect to have these functions performed by supervisors or compliance personnel. This is an acceptable approach. However, institutionalizing some aspects of these functions with Human Resources can improve the likelihood that the company will retain records of its actions and add another layer of support for achieving compliance.

## 7. What Message Does Your Compensation Plan Send?

Companies should be asking whether their compensation plans send the right message. It is important to emphasize that making a profit is perfectly legitimate and personnel should be rewarded for their success. However, when noncompliance is not penalized in an appropriate manner when it occurs, and when bonuses, raises and promotions are handed out without regard to the company's commitment to compliance with all applicable laws, some employees are bound to discount the importance of the requirement.

Companies can also look for hints of what may constitute an acceptable program by reviewing regulator decisions related to the programs of other utilities. A company can find out what is acceptable by what the regulators prescribe and what is not acceptable by what they correct or penalize.

## 8. What Is a Supervisor's Compliance Function?

Compliance should be the responsibility of every company employee. This mantra's primary goal is to make sure all employees keep themselves in line. However, the company also should convey the message that people in an official or unofficial supervisory role are accountable for keeping their teams in line. For example, a mid-level person responsible for gas nominations needs to watch out for junior personnel performing related tasks. This includes making sure that employees feel free to ask questions; reviewing reports for signs of potentially problematic behavior (e.g., trade reports showing unusual profits or losses, changes in trading patterns, etc.); or investing time in on-the-job training. A good compliance plan makes certain that employees understand and "own" the program, including by committing to oversee the work of others, even informally, and encouraging employees to step in if compliance commitments are in jeopardy.



## 9. Does Your Training Program Do the Job?

No employee can achieve the level of compliance that the company expects unless he/she has been provided the tools to succeed. These tools can be provided through a robust training program. Training will help employees understand the requirements applicable to the company and how to achieve compliance. Thus, a robust training program will help avoid violations in the first place. However, should a violation occur, the training program will help demonstrate to regulators that the violation is an isolated event, not one indicative of a lax compliance culture. Accordingly, all relevant employees—front, mid and back office—should receive appropriate training.

Like compliance programs in general, there is no “off the shelf” training program that is appropriate for all companies, and each company must develop a training program appropriate for its size and business activities. But at a minimum, the training program should include the following elements:

- Initial training in the relevant subject matter areas upon the employee’s hiring or transfer to a new position.
- Periodic updates or refreshers; these should include annual training sessions (or at other appropriate intervals), plus additional sessions covering important developments in the law as they arise.
- Use of training exercises, such as hypotheticals, so that the employee can understand the application of the law and other compliance principles in practical, “day to day” scenarios.
- Documentation of the training sessions and who attended.
- Participation by management, legal and compliance personnel, both to ensure that they all receive the substantive training, but also to visibly demonstrate to other employees the company’s commitment to compliance.
- Attendance at training as a requirement of each employee’s job. The company should have systems for following up with employees who missed training and offering makeup sessions to get 100% attendance.

## 10. Do You Know Whether You Are Succeeding?

Companies should follow a written plan that ensures they undergo regular, honest assessments of their compliance efforts and that the compliance program remains up to date. Such assessments should include:

- An annual internal review of the company’s compliance plan and manuals.
- Periodic internal audits of specific compliance practices. Depending on the practice, the company might want to involve outside experts.
- An annual review of the company’s compliance staffing and budget to ensure it is right-sized to reflect changes in the business and that the company has the right expertise for its business.
- Review of regulatory agency audit and investigation orders related to other companies to see if your company might have issues comparable to those addressed in the orders.
- “Post-mortem” reviews on compliance issues to determine what worked well, what could have been prevented, how processes can be improved and other ways to learn from good and bad compliance experiences.
- An annual review of surveillance tools, including whether they target the right areas and are calibrated properly, whether reports are circulated to the right people, whether the company is generating the right reports and whether supervisors and compliance personnel are using the reports.
- An annual review of training programs to ensure that the right topics are being covered, that the programs are up to date and that the applicable employees are attending the right training sessions.

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*Karen Redford is Vice President of Legal and Regulatory Affairs for Bangor Hydro Electric Company. Catherine Krupka is a member of Sutherland’s Energy and Environmental Practice Group and is on the Coordinating Committee for the firm’s Climate Change Team.*