

Please Mr. Postman: Energy Trading Contract Notice Issues in the Time of COVID-19

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PRACTICES Finance, Energy, Power and Natural Resources, Commodities, Energy Finance, Project Finance and Development

COVID-19 and the sweeping government actions to curtail the effects of the virus have disrupted business activities across the globe, requiring businesses to carefully examine their existing contracts and in certain cases deliver important notices thereunder, such as notices of force majeure.

Given these developments, businesses should carefully consider steps they can take to ensure receipt of notices from contract counterparties, as well as the requirements for valid notice under any applicable contracts to the extent they need to deliver notices to contract counterparties.

Whether voluntarily or by government order, many companies have established mandatory work-from-home policies, and, while some firms have established skeleton teams of employees to address operational necessities, such as receiving mail, others may not have personnel in place to handle these critical activities. As a result, physical mail (including contract notices delivered thereby) may be delivered without anyone knowing about it for some time.

This article examines the default notice provisions under standardized contracts utilized in energy and commodities transactions, including the LSTA Model Credit Agreement, the 2002 ISDA Master Agreement, the 2006 NAESB Base Contract for Sale and Purchase of Natural Gas and the Edison Electric Institute Master Contract. Specifically, we examine whether notices by email or other electronic means are effective under the default provisions in these forms, and we offer recommendations parties may take to the extent their contracts require physical delivery of critical notices.

As reflected below, notice by electronic means may be effective in certain cases under the default notice provisions of these forms, but none of the default notice provisions require notice by electronic means. Hence, parties to contracts governed by the default notice provisions under these standardized agreements could receive critical notices by physical delivery in the coming weeks but be unaware of such notices to the extent their workforce is working remotely. Although the summary below should provide a helpful starting point, we note that this article examines only the default provisions and agreements documented under these standardized forms often include negotiated notice provisions. Parties should therefore carefully review their specific notice provisions.

Summary of Notice Provisions under Standardized Agreements

Agreement, Section	Summary of Notice Requirements
LSTA Model Credit Agreement (the " <u>LSTA Model</u> "), Section 9.01	Under the LSTA Model, notices may be delivered to lenders by electronic communications, including email and other electronic messaging systems, unless a lender has

	<p>notified the administrative agent that it is incapable of receiving notices by such electronic means.</p> <p>Administrative agents and borrowers, however, have discretion to agree to accept notices by electronic means or not.</p>
<p>2002 ISDA Master Agreement (the “<u>2002 ISDA Master</u>”), Section 12</p>	<p>The 2002 ISDA Master generally permits notices by email and other electronic messaging systems, but it disallows notice by such electronic means regarding events of default, termination events (including force majeure) and the termination of any transaction thereunder.</p>
<p>1992 ISDA Master Agreement (the “<u>1992 ISDA Master</u>”), Section 12</p>	<p>The 1992 ISDA Master permits notices by “electronic messaging systems” but, unlike the 2002 ISDA Master, it does not include an express reference to email notices, reflecting that email was not a common form of communication in 1992. For this reason, some courts and commentators have reasoned that email notices are not permitted under the 1992 ISDA Master’s default notice provision.</p> <p>Additionally, regardless of whether the reference to “electronic messaging systems” includes email or not, the 1992 ISDA Master, similar to the 2002 ISDA Master, disallows notice by such electronic means regarding events of default, termination events (including force majeure) and the termination of any transaction thereunder.</p>
<p>2006 NAESB Base Contract (“<u>NAESB</u>”), Section 9.2</p>	<p>The NAESB permits notices by “mutually acceptable electronic means.” The standard NAESB notice provision therefore presents some uncertainty about whether email notice is valid, although there is a colorable argument that contract parties have implicitly agreed to notice by electronic means if they have listed their email addresses in the appropriate lines on the NAESB cover sheet.</p>
<p>Edison Electric Institution Master Contract (“<u>EEl Master</u>”), Section 10.7</p>	<p>The EEI Master provides for notice by traditional means, including hand delivery, U.S. mail, overnight courier service or facsimile, but it does not provide for notice by email or other electronic means.</p>

Recommendations for Managing Notice Issues Under Existing Contracts

Many of the standard notice provisions above require physical delivery or fax for certain key notices or, in the case of the EEI, all notices. Accordingly, we recommend the following steps to mitigate delivery and receipt issues under contracts governed by the default notice provisions of such standardized forms and any other contracts that do not require notice by electronic means.

- Send email copies of all notices regardless of the notice provisions under your applicable contracts. While email notices may not be valid under your existing contracts, this should increase the likelihood that notices are received by counterparties in a timely manner.
- Related to the above, consider sending “blast” emails to contractual counterparties encouraging them to send email copies of all notices. While this is not legally enforceable, it may help practically speaking.
- To the extent a contract counterparty has provided or regularly uses a group email address (e.g., ), send any notices or other communications to the group email address, in addition to any individual email addresses listed in the counterparty’s notice information, in case the crisis worsens and more individuals become unavailable.
- Similarly, if your contract notice information provides for notices to the email addresses of individuals within your organization, consider delivering a unilateral address change notice in compliance with applicable contractual provisions, providing for notices to be delivered to a group email address (and your organization can then manage where these notices are forwarded internally). If the administrative burden associated with making these changes would be too great at this time, then consider sending a “blast” email similar to the above, requesting that contract counterparties send any notices to a group email address.

Recommendations for Negotiating Future Contracts

To avoid these issues in the case of future work disruptions like those resulting from COVID-19, we make the following suggestions.

- Require that all notices are copied to email and preferably to a group email address rather than to a particular individual. Even under normal operating conditions, usage of group email addresses should reduce the administrative burden of updating notice information in the case of personnel turnover.
- If a counterparty is not comfortable with email notices for operational or other reasons and insists on physical delivery of notices, then consider incorporating a fallback provision that any party may notify (by electronic means, including email) the other party or parties to an agreement that it is not able to receive or provide notice by physical delivery, and upon delivery of such notice, (a) physical delivery alone shall not constitute notice and (b) electronic delivery of notice shall constitute notice for all purposes. For such a fallback provision to work, each contract party must provide email notice information even if the default provides for notice by physical delivery.

For additional guidance navigating this evolving crisis, please visit our [Trending Issues COVID-19](#) web page.

If you have any questions about the article below or issues with respect to your business or commercial operations, please do not hesitate to contact the partners listed at the end of

this article.