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Potential Claims and Policy Changes Resulting from the *Deepwater Horizon* Incident

New Development

On April 20, 2010, a fire and explosion occurred onboard the *Deepwater Horizon*, a mobile offshore drilling unit owned by Transocean Ltd. and, at the time, operated for BP Exploration & Production, Inc. ("BP"). On April 22, 2010, the *Deepwater Horizon* sank, resulting in an uncontrolled flow of hydrocarbons from the wellhead into the Gulf of Mexico. Following the incident, many questions and concerns have arisen regarding liability for damages arising from the oil spill and claim rights and procedures. If you have incurred losses, including economic losses, as a result of the *Deepwater Horizon* incident, you may be entitled to compensation under the Oil Pollution Act of 1990 ("OPA 90"). In addition, Congress has scheduled a series of oversight hearings to look into this spill incident and many Members of Congress have already responded by introducing legislation to address perceived problems.

Background

In 1990, Congress enacted OPA 90 to increase pollution prevention, ensure better spill response capability, increase liability for spills, and facilitate prompt compensation for cleanup and pollution damage. OPA 90 created the Oil Spill Liability Trust Fund (the "Fund") to provide funds for oil spill

cleanup, assessment and restoration of natural resources, and compensation to claimants for removal costs and damages. The Fund is managed by the U.S. Coast Guard's National Pollution Funds Center (the "NPFC"), which is charged with evaluating and determining whether to accept claims made against the Fund. Currently, there is approximately \$1.6 billion available in the Fund and there is a \$1 billion limit per incident. The Coast Guard has designated BP as the "Responsible Party" ("RP") ultimately responsible for payment of both removal costs and damages due to the incident. The limits of liability for an offshore facility are \$75 million and all removal costs, however, the limits of liability can be broken under various scenarios. In the meantime, in a fact sheet published by BP, it takes responsibility for responding to and cleaning up the spill and indicates it has established a robust process to manage claims from the incident.

Claims Procedures

Before filing a claim with the NPFC, the claimant must have submitted its claim to the RP for resolution unless otherwise directed by the NPFC to file directly against the Fund. If the RP denies the claim or fails to pay it within 90 days, the claim may

be submitted to the NPFC. Upon receipt of a claim, the NPFC reviews it for completeness and may request additional information from the claimant. Once the NPFC makes a determination with regard to the claim, the claimant must accept or reject the determination within 60 days. More details concerning claims procedures may be found under the NPFC's website at: <http://www.uscg.mil/npfc/claims/>.

Claims for Economic Damages

Among the compensable damages specified in OPA 90 are damages arising from economic loss. Specifically, RPs are liable for "[d]amages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources. . . ." One of the major concerns arising out of this incident is whether parties will be able to seek compensation and reimbursement for such things as vessel delays, diverting from original plans, chartering alternative vessels, and other similar actions resulting in lost profits or earning capacity. Although the Coast Guard will not pay claims for demurrage or contractual charter party disputes *per se*, once the dispute has been settled between the subject parties, the party suffering an economic loss due to lost profits or earning capacity may have a viable claim under OPA 90.

Congressional Oversight and Legislation

In response to the *Deepwater Horizon* incident, no less than six oversight hearings have been scheduled with a focus on the economic and environmental effects of the spill as well as the impact of the oil rig explosion on offshore oil and gas development policy. Members of Congress have already introduced legislation to address various aspects of the spill, and no doubt additional proposals will emanate from the oversight hearings to amend existing law. Expected are such proposals as increasing the limits of liability, oil rig safety and security measures, tax rate for the Oil Spill Liability Trust Fund, and restrictions, if not a moratorium, on offshore oil and gas development activities.

Conclusion and Recommendation

If you have suffered damages as discussed above as a result of the *Deepwater Horizon* incident, you may be entitled to compensation. BP has established a 24-hour, toll-free claims hotline at (800) 440-0858, and the *Deepwater Horizon* Unified Command has established a website providing detailed information about the incident at <http://www.deepwaterhorizonresponse.com>.

We recommend you contact your counsel with regard to claims to fully understand your rights in this regard. Similarly, we recommend you monitor proposed legislation and consider possible action to protect your interests. ■

For Additional Information

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