GETTING THE DEAL THROUGH

Oil Regulation

in 33 jurisdictions worldwide

2014

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CMS Cameron McKenna

Getting the Deal Through is delighted to publish the fully revised and updated eleventh edition of *Oil Regulation*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 33 jurisdictions featured. New jurisdictions this year include Croatia, Ecuador, Egypt, India, Indonesia and Morocco.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.gettingthedealthrough.com.

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United States

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1 Describe, in general terms, the key commercial aspects of the oil sector in your country.

The US oil industry is divided into three sectors: upstream (exploration and production), midstream (processing, storage and transportation) and downstream (refining, distribution and marketing).

Industry participants are categorised as 'supermajors', 'majors' and 'independents'. 'Supermajors' are the handful of very large companies that account for most of the US oil industry revenues. US-based supermajors include ExxonMobil, Chevron and ConocoPhillips, whereas the overseas-based supermajors, BP and Shell, have substantial US operations. Smaller-scale integrated firms include Marathon, Hess and Murphy Oil.

A larger number of companies specialise in particular sectors. The 'independents' engage predominantly in upstream activities and include Occidental, Devon, Anadarko and Apache. Midstream specialists include Kinder Morgan. Refining and marketing operations are conducted by Valero, Sunoco, Tesoro and Western. The industry is supported by oil service companies led by Schlumberger, Halliburton and Baker Hughes, and by a variety of trade associations including the American Petroleum Institute (API).

US subsidiaries of national oil companies owned or controlled by foreign governments are important participants in the US oil industry. For example, Venezuelan-based Petróleos de Venezuela SA (PDVSA) owns Citgo, which supplies gasoline to nearly 6,000 retail outlets and owns interests in three refineries in the US.

'Proved reserves' are estimates of the amount of oil that is reasonably certain to be recoverable from known reservoirs under present economic and operating conditions. The US Energy Information Administration (the EIA) estimated US-proved reserves at 33.4 billion barrels for December 2012, an increase of 15.4 per cent from 2011, the largest annual increase since 1970. While US-proved reserves peaked in 1970 and have since declined by 40 per cent, proved reserves of crude oil and lease condensate have now risen for four consecutive years. According to the CIA World Factbook, in January 2013 the United States ranked 13th among nations in proved oil reserves. About one-fifth of US-proved reserves are located offshore.

In 2009, the Securities and Exchange Commission changed its reporting guidelines to permit companies to report probable and possible reserves, as well as proved reserves.

2 What percentage of your country's energy needs is covered, directly or indirectly, by oil as opposed to gas, electricity, nuclear or non-conventional sources? What percentage of the petroleum product needs of your country is supplied with domestic production? What are your country's energy demand and supply trends, especially as they affect crude oil usage?

In 2012, oil provided an estimated 36 per cent of total US energy needs, along with coal (20 per cent), natural gas (25 per cent), nuclear (8 per cent) and renewables (8 per cent). The transport sector accounted for 71 per cent of oil consumption, primarily in the form of gasoline. The industrial sector consumed another 23 per cent for heating, diesel engines and as petrochemical feedstock. Only 1 per cent of US power generation is fuelled by oil. Regarding non-conventional sources, EIA projects renewables used for electricity and heat generation to grow by 3.7 per cent in 2014, with wind power capacity increasing by 8.9 per cent. While EIA expects continued growth in solar electricity generation, present projections show utility-scale generation growing to no more than 0.5 per cent of total US generation by 2015.

In 2013, the US consumed 18.9 million bbl/d of petroleum products. The domestic production of the US represents approximately 60 per cent of the total petroleum it consumes. In 2012, over 50 per cent of US crude oil and petroleum products imports came from countries in the Western Hemisphere (North, South and Central America, the Caribbean and US territories), while 29 per cent of imports originated from the Persian Gulf (Bahrain, Iraq, Kuwait, Qatar, Saudi Arabia and United Arab Emirates).

The EIA projects US liquid fuels and other petroleum consumption to increase by less than 1 per cent annually until 2019 and to remain stagnant thereafter. US crude oil production peaked in 1970 and has declined 33 per cent since then; however, domestic production has increased each year since 2005. Domestic production is projected to continue to increase in the near term due to enhanced recovery from tight oil formations.

Although US energy consumption is projected to continue to increase over the next 25 years, crude oil as a share of overall energy is projected by the EIA to decrease as a result of federal and state renewable energy programmes and the rising cost of fossil fuels.

3 Does your country have an overarching policy regarding oil-related activities or a general energy policy?

There is no single source of law that can be considered a United States energy policy. At the federal level, the Department of the Interior (the DOI), the Department of Transportation (the DOT), the Department of Energy (the DOE) and the Environmental Protection Agency (the EPA) play important roles in the development and maintenance of a national energy policy. At the state level, their counterpart agencies, which are often delegated authority by federal legislation, play a similar role.

Over the years, there have been several legislative efforts by the United States Congress to develop a general energy policy that promotes the domestic production of oil and gas and other sources of energy, while also responding to environmental concerns. For instance, after many years of debate, the Congress passed the Energy Policy Act of 2005. The Act is intended to facilitate the increased domestic production of oil and gas as well as electric and other forms of energy. The law also clarified the reach of the Safe Drinking Water Act in hydraulic fracturing matters and the application of EPA's storm water rules to the construction of oil and gas production sites.

On the heels of the 2005 Energy Policy Act, the Congress enacted the Energy Independence and Security Act of 2007 (the EISA). The EISA expanded the renewable fuel programme established by the Energy Policy Act, which required volumes of renewable fuel to be incorporated into gasoline sold in the United States. The EISA, and subsequent regulatory revisions implemented by the EPA in 2010, increased the volumes established for renewable fuel and added new specific volume requirements for advanced biofuels, biomass-based diesel and cellulosic biofuel. The EISA articulated a national policy aimed at reducing the country's carbon footprint and dependence on foreign oil through the use of renewable fuels.

President Obama has endorsed regulatory and legislative initiatives aimed at enhancing energy independence and the reduction of greenhouse gases, such as the increase of the fuel efficiency standards for motor vehicles, the development of renewable energy technology and 'green' jobs. The Obama Administration has proposed the toughest fuel economy standards for passenger vehicles in US history, requiring an average performance equivalent to 54.5 miles per gallon by 2025.

4 Is there an official, publicly available register for licences and licensees?

Oil and gas leases on public property are generally on record with the relevant federal and state agencies, and in many cases are available for review on public websites. Depending on local regulations, leases on public lands may also be filed locally. Oil and gas leases on private property are typically found or summarised in the public land records (generally at a local level such as a county or parish), but other agreements affecting the lease and interests under the lease may not be filed in public records. Generally, access to these records is without cost, however, there is usually a charge for obtaining copies of the documents.

5 Describe the general legal system in your country.

The United States is a common law jurisdiction, organised on a federal system with a federal government and state and local government entities. There are constitutions at each of the federal and state levels allocating powers among executive, legislative and judicial branches and reserving civil and governmental rights, and at federal, state and local levels there are extensive forms of legislation and comprehensive systems of administrative regulation and rule-making. Subject to these sources of law, judges apply common law reasoning and precedents including respect for the rule of law. Contract and property rights are enforced by causes of action in state or federal courts or by agreement in court-administered or private arbitration. The US is party to the New York Convention on recognition of arbitral awards and other conventions for recognitions of foreign judgments, subject to specified exceptions.

Federal and state law criminalise both corrupt payments to government officials and commercial bribery, and regulate expenditures on political campaigns and other aspects of participation by oil companies, as well as other entities, in the political process. Such anti-corruption and political laws generally apply to foreign as well as domestic entities.

Regulation overview

6 Describe the key laws and regulations that make up the principal legal framework regulating oil activities.

The determination of which laws apply to oil activities at a given surface location depends on whether the underlying resources and location are owned by a federal or state government or by private parties, and whether the location is onshore or offshore.

The Mineral Leasing Act of 1920 and the Mineral Leasing Act for Acquired Lands of 1947 govern upstream activities on federal onshore property, while the Outer Continental Shelf Lands Act (OCSLA) governs development of federal offshore property. Additional industry-specific federal statutes include the Oil and Gas Royalty Management Act, which governs lease and royalty agreements, and the Petroleum Marketing Practices Act, which regulates supply agreements and leases held by retailers and wholesalers of trademarked motor fuels. Other state laws relating to regulatory agency authority and state contract law pertain to oil activities on both public and private lands.

State laws, such as the Texas Natural Resources Code and the California Public Resources Code, govern exploration and production on state-owned land, including state offshore property and privately-owned land.

7 Are there any legislative provisions that allow for expropriation of a licensee's interest and, if so, under what conditions?

While there are no express legislative provisions for expropriation, there are provisions in the federal and state constitutions and codes that allow governments to 'condemn' or take property for public use upon payment of just compensation. However, condemnation of properties involved in oil activities is rare due to the requirement of providing just compensation for the property taken. Private parties may also bring actions for 'inverse condemnation' where they believe a public entity has taken such property without providing just compensation or otherwise complying with the relevant law.

8 Identify and describe the government regulatory and oversight bodies principally responsible for regulating oil exploration and production activities in your country.

Within the DOI, the Bureau of Land Management (the BLM) regulates oil exploration and production on federal onshore property; the Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSEE) manage federal offshore oil production activities; the Office of Natural Resources Revenue collects royalties for both onshore and offshore oil production; and the Bureau of Indian Affairs (BIA) regulates American Indian land development along with the BLM. The Federal Energy Regulatory Commission (FERC) has jurisdiction over interstate oil pipelines. The DOE administers the Strategic Petroleum Reserve, collects industry data and funds and conducts other energy research and production programmes.

Each of the major oil-producing states has an agency tasked with regulating certain upstream activities, such as the issuance of drilling permits and intrastate pipeline transportation. These agencies include the Railroad Commission of Texas; the California Department of Conservation's division of oil, gas and geothermal resources; the Louisiana Office of Conservation; and the Alaska Department of Natural Resources' division of oil and gas. Some state public utility commissions oversee aspects of intra-state oil pipelines.

Many other agencies enforce police power laws and regulations regarding environmental, health, safety and work conditions (see question 31).

9 What government body maintains oil production, export and import statistics?

Official statistics on oil production, imports and exports are collected by the EIA of the DOE. The EIA also provides forecasts and analysis of oil consumption, production, reserves, refining and trade. State agencies maintain data on local oil production.

Natural resources

10 Who holds title over oil reservoirs? To what extent are mineral rights on private and public lands involved? Is there a legal distinction between surface rights and subsurface mineral rights?

In the US, title to oil, gas and minerals is generally held by the owner of the surface until and unless that right is severed and granted to others. This title to the mineral estate may be separated from the surface estate by a grant or a reservation. When the mineral estate has been severed from the surface estate, the mineral estate owner holds what is referred to as the 'dominant estate', and the surface estate owner holds the 'servient estate'. In general terms, this means that the mineral estate owner has the right of reasonable access to and use of the surface estate in order to exploit the minerals.

In Louisiana, the only civil law state in the US, mineral rights do not exist as a separate, perpetual estate in land, but rather can only be held separately from the surface in the form of a 'mineral servitude'. The servitude gives its holder the right to enter the property and extract the minerals, but it may expire, or prescribe, after 10 years of non-use.

Both the federal government and many states own oil, gas and mineral rights both onshore and offshore.

Government and private transfers frequently reserve to the grantor all or a portion of the mineral rights, so the land title records must be carefully reviewed.

11 What is the general character of oil exploration and production activity conducted in your country? Are areas off-limits to exploration and production?

In 2013, five states and the Gulf of Mexico supplied more than 80 per cent (6 million barrels per day) of US crude oil production. Oil production was predominantly concentrated in Texas (35 per cent), federal offshore waters (20 per cent), North Dakota (12 per cent), Alaska (7 per cent), California (7 per cent) and Oklahoma (4 per cent). Total US crude production grew 15 per cent in 2013, with Texas and North Dakota leading this growth, each increasing crude oil outputs by 29 per cent from 2012. Since 2010, North Dakota and Texas have increased crude oil output by 177 per cent and 119 per cent, respectively.

Almost all existing offshore leasing is in the Central and Western Gulf of Mexico. Included in the Obama administration's Outer Continental Shelf Oil and Gas Leasing Program for 2012–2017 are 15 potential lease sales in six Outer Continental Shelf planning areas: the Western and Central Gulf of Mexico, the portion of the Eastern Gulf of Mexico not under Congressional moratorium and the Chukchi Sea, Beaufort Sea and Cook Inlet planning areas offshore Alaska.

A total of five sales have been held under the programme to April 2014, covering approximately 60 million acres. An additional sale has been proposed to take place in August 2014, which will include areas in the Western Gulf of Mexico Planning Area totalling approximately 21 million acres.

In addition, the programme provides for potential lease sales in the Chukchi and Beaufort seas off Alaska to take place in 2016 and 2017, respectively, as well as a special interest sale in Cook Inlet scheduled for 2016. Although the present programme does not reinstate lease sales off the coast of Virginia, it does contemplate increased seismic activity in the mid-Atlantic and south-Atlantic to collect data about the oil and gas potential in the region. In addition to the restrictions noted above, a portion of the Central Gulf of Mexico and Eastern Gulf of Mexico are under a Congressional moratorium until 2022 as part of the Gulf of Mexico Energy Security Act of 2006. Further, on 31 March 2010, the president withdrew Bristol Bay in Alaska from leasing consideration up to June 2017.

Onshore, the Arctic National Wildlife Refuge in Alaska remains off limits to drilling despite many years of intense debate in Congress. Apart from national parks and wilderness areas, federal lands outside Alaska are largely available for exploration and production. However, federal and state agencies can also impose drilling restrictions on particular lands on environmental, military or other grounds.

12 How are rights to explore and produce granted? What is the procedure for applying to the government for such rights?

US practices do not feature concessions or production-sharing agreements typically associated with a state oil company. The right to conduct exploration and production on the lands of another is obtained through an oil and gas lease granting the right to explore for and extract oil from the leased premises, and the ownership of oil actually produced. The terms of the lease and applicable law limit leaseholder activities.

Processes established by the BLM (onshore), BOEM (offshore) and BIA (American Indian land) govern the awarding of leases for land subject to federal jurisdiction. These processes set forth the administrative costs and timing for submitting bids for leases on federal lands. The bid amount itself is determined by the bidder. Analogous state agencies award leases for state-owned land. Private owners of subsurface mineral rights negotiate or invite tenders for leases, which may follow trade association formats or contain terms and conditions specific to the particular lease.

13 Does the government have any right to participate in a licence? If so, is there a maximum participating interest it can obtain and are there any mandatory carry requirements for its interest? What cost-recovery mechanism is in place to recover such carry? Does the government have any right to participate in the operatorship of a licence?

The federal and state governments do not have a general right to participate in working interests or operatorship, or other rights beyond the royalty interests reserved to them. Various states and local governments do, however, collect fees and taxes associated with exploration and production activities pursuant to local law.

14 If royalties are paid, what are the royalty rates? Are they fixed? Do they differ between onshore and offshore production? Aside from tax, are there any other payments due to the government? Are there any tax stabilisation measures in place?

Federal leases impose a fixed royalty of a defined fraction of the amount or value of the oil or gas removed or sold from each lease. A royalty rate of one-eighth was common up until the 1970s, although now rates such as three-16ths or one-sixth are more common. For onshore operations, the federal rate must be no less than one-eighth, whereas offshore rates tend to be higher subject to the various statutory requirements.

Statutes fix most federal royalty rates, but both the DOI and special legislation (such as the Deep Water Royalty Relief Act) can modify standard terms, usually by reducing the stated royalty rate or suspending payment of royalties, to make frontier development more attractive. State and private leases have more variability in their royalty terms and rates, and may include a basis for payment other than proceeds or market value. States reap varying portions of the royalty for federal leases of land within or adjacent to their borders.

Payments to the government are generally in the form of royalties. Bonuses paid to secure a lease either through the bidding or negotiation process are a significant part of the cost of obtaining exploration and production rights. Where the royalty is set by statute, the amount of the bonus will determine the winning bidder. In recent years the amount of the bonus has been increasingly significant in private leasing activities. There may be rentals due in certain

situations, but generally they are not collected in the absence of particular triggering events. For example, there may be provisions for delay rentals to be paid to the government in the event that production is shut down and there are no proceeds or market value (and hence, no royalties). There are no standard stabilisation provisions in the most common leases for new taxes or other impositions.

15 What is the customary duration of oil leases, concessions or licences?

Private and public oil and gas leases usually feature a fixed primary term and a conditional secondary term. The number of years in the primary term ranges from one year in mature fields to 10 years for frontier regions; private and American Indian leases tend to have short primary terms. Even though no production may be required during the primary term, the lease may be subject to termination if the leaseholder fails to drill test wells or undertake specified actions or, in lieu thereof, pay an additional rental fee. In private leases the primary term may be extended by agreement of the parties, while leases with governmental entities are subject to processes that generally do not provide for extension by agreement.

The secondary term continues indefinitely beyond the primary term so long as either the leased area produces oil or gas in paying quantities or the lessee performs other specified activities on the leased premises. The lease often excuses brief interruptions in production and longer interruptions due to force majeure.

16 For offshore production, how far seaward does the regulatory regime extend?

The Submerged Lands Act establishes state jurisdiction over submerged lands extending three nautical miles – 3.5 statutory miles, or 5.6km offshore (except Texas and Florida on the Gulf of Mexico, whose jurisdiction extends three leagues (approximately 10 statutory miles, or 16km)). The OCSLA establishes federal jurisdiction beyond the state limit, and a 1983 presidential proclamation declared that jurisdiction to extend to the boundary of the US Exclusive Economic Zone, 200 nautical miles (about 230 statutory miles, or 370km) from the coastline (in practice, oil development is active only to the edge of the OCS).

17 Is there a difference between the onshore and offshore regimes? Is there a difference between the regimes governing rights to explore for or produce different hydrocarbons?

Upstream activities on onshore federal property are governed by the Mineral Leasing Act of 1920 and the Mineral Leasing Act for Acquired Lands of 1947, while the OCSLA governs development of federal offshore property; see question 7. There are a variety of differences and similarities between the two regimes; see questions 14, 18, 24, 27 and 31.

Generally, there is no difference in regimes governing the rights to explore for or produce different types of hydrocarbons. On the state level, however, regulations will occasionally specifically apply to exploration and production activities at specific geologic intervals, usually aimed at shale formations. Various states have passed regulations governing oil and gas drilling as a result of hydraulic fracturing, a widely used technique in shale oil and gas drilling.

On 18 April 2012, the EPA issued rules aimed at reducing pollutants that may result from hydraulic fracturing, but such rules will be phased in over several years and compliance will not be required until January 2015. One rule, which came into effect on 15 October 2012, requires operators to notify the EPA by e-mail two days before a well is completed using hydraulic fracturing.

On 24 May 2013, the BLM issued a proposed rule that would require the disclosure of chemicals used in hydraulic fracturing conducted on public and tribal lands, confirmation that wells used in hydraulic fracturing operations meet certain construction standards and the operator of such hydraulic fracturing to put certain plans in place for managing flowback waters from hydraulic fracturing operations. The public comment period for the proposed rule ended on 13 August 2013, and the BLM has not yet issued a final rule.

Several other federal regulatory agencies are considering issuing new rules regulating oil and gas drilling, mainly as a result of shale oil and gas drilling.

18 Which entities may perform exploration and production activities? Describe any registration requirements. What criteria and procedures apply in selecting such entities?

Pursuant to the OCSLA and in accordance with a five-year plan, BOEM grants offshore oil leases on the OCS to the highest qualified responsible bidder on the basis of sealed competitive bids. Auctions are based not on variable royalty rates but rather on the 'signature bonus' offered.

Pursuant to the Mineral Leasing Act, BLM has responsibility for oil leasing on federal lands onshore, as well as state and private surface lands where mineral rights have been retained by the federal government. Lands cannot be leased until they are first offered competitively at an auction, which is conducted by oral bidding; no sealed or mailed bids are accepted. Leases are awarded to the highest qualified responsible bidder. Lands that have been offered competitively and received no bids are then made available non-competitively for leasing for two years.

On privately held lands, any person or entity capable of legally contracting with the lessor can do so, subject to state regulatory requirements.

See question 39 regarding restrictions on foreign holdings.

19 What is the legal regime for joint ventures?

The US does not specify a particular kind of agreement for collaborative development of an oil production project owned by multiple parties. Collaborative development or joint ownership is not considered a 'joint venture' under some applicable laws and often the agreement for collaborative operations negates the existence of a 'joint venture'. Operations by one or more parties come in two main categories. The first is a contract to share costs and benefits from a joint undertaking, often conducted by one mineral rights owner or lessee on behalf of others with interests in the same land or in lands embracing a particular reservoir. An example is the joint operating agreement, often entered into on Association of International Petroleum Negotiators or Association of American Landmen forms. The accounting procedure under a joint operating agreement is often that specified by the Council of Petroleum Accounting Societies. The second category consists of separate legal entities, which are typically encountered in processing, midstream and downstream applications. These entities include general or limited partnerships, corporations and limited liability companies. The particular terms of both types of agreements may substantially differ from those for a joint venture outside the US.

20 How does reservoir unitisation apply to domestic and cross-border reservoirs?

Unitisation is the consolidation of exploration and production activities affecting several parcels of land, or several interest holders in a given parcel. The consolidated activities are usually conducted by a unit operator. The goal is the efficient development of a common reservoir and equitable distribution of the costs, risks and benefits of production. Unitisation may be consensual or, in several jurisdictions, may be mandated when statutory requirements are triggered or agency determinations are made. Unitisation of federal lands

requires DOI approval. Pooling can be voluntary or compulsory under certain state statutes.

21 Is there any limit on a party's liability under a licence, contract or concession?

While there are limits under some statutes for certain categories of liability, there is no overall external law limiting liability of a party involved in oil and gas operations. To the extent multiple parties engage in such operations, such parties' liabilities are generally joint and several, subject to any contractual indemnities that may allocate such liabilities.

22 Are parental guarantees or other forms of economic support common practice? Are security deposits required in respect of any work commitment or otherwise?

BOEM typically requires surety bonds from the operator of offshore operations, and may also require supplemental surety bonds from other present or former owners or operators. BLM regulations for onshore operations require surety or personal bonds to ensure compliance with requirements (see question 28). Private parties may require a variety of surety bonds, standby letters of credit or other forms of collateral to secure performance of operation, abandonment and decommissioning obligations. State regulations also require security for various types of oil operations. While parental guarantees are not required by external law, they may be required under contractual terms between parties.

Local content requirements

23 Must companies operating in your country prefer, or use a minimum amount of, locally sourced goods, services and capital?

The United States maintains several different 'buy American' type laws, which apply in different contexts, but which normally are limited in application to procurements by governmental entities. The imposition of local content requirements as a condition of investment would be inconsistent with obligations under the World Trade Organization agreements and free trade agreements. There have recently been calls for authorisation of increased crude exports, partly as a result of increased unconventional domestic crude production.

Transfers to third parties

24 Is government consent required for a company to transfer its interest in a licence, concession or production-sharing agreement? Does a change of control require similar approval? What is the process for obtaining approval? Are there any pre-emptive rights reserved for the government?

The transfer process differs for federal, state and private agreements, and also differs between onshore and offshore for federal properties. For example, assignments of record title interests and operating rights interests in federal OCS oil and gas leases, as well as offshore pipeline right-of-way grants, require the approval of BOEM. The time frame for BOEM processing of assignment applications is not specified. The assignment application requires payment of a nominal fee.

For onshore leasing and operational activities on federal lands, similar assignments are approved by BLM. BLM charges a nominal fee for assignment applications, and, likewise, does not specify a time frame for approval. Approval of state or local agencies, or both, may also be required for transfers of interests in assets under their jurisdiction. Transfer or assignment does not generally give rise to pre-emptive rights reserved to the government.

25 Is government consent required for a change of operator?

The new operator on a lease must notify and obtain approval from BOEM or BLM of the change in operator. Approval is contingent on the new operator's furnishing of any relevant bonding or equivalent financial collateral to secure performance of its operations and cover liabilities. Leases of state onshore and offshore lands contain notification provisions and may also contain consent provisions.

26 Are there any specific fees or taxes levied by the government on a transfer or change of control?

When there is a change in control, such as an assignment or transfer, BLM (for onshore leases and rights-of-way), BSEE (for assignments of pipeline rights-of-way), or BOEM (for offshore leases) will subject the relevant application to a processing fee, similar to any initial application for a lease or grant.

BLM, BSEE and BOEM regulations relating to assignments and transfers do not contain provisions regarding any applicable taxes.

Decommissioning

27 What laws or regulations govern abandonment and decommissioning of oil and gas facilities and pipelines? In summary, what is the obligation and liability regime for decommissioning? Are there any other relevant issues concerning decommissioning?

Regulations, conditions of approval and lease terms establish the applicable requirements, procedure and time frames for decommissioning of wells, structures and pipelines on terminated leases and decommissioning of pipelines on terminated pipeline rights-of-way.

BLM regulations govern abandonment of oil and gas facilities on federal lands. A plan for plugging and abandoning of wells must be approved by BLM in advance. In addition, any pipelines or other facilities must be removed within a reasonable time after the expiration of lease or right-of-way grant and the area must be remediated and restored as determined by BLM. As an alternative, BLM may allow certain facilities to remain if harm will be caused by removal. Failure to remove facilities may result in BLM claiming the property for the United States or charging the operator for any removal and restoration conducted by the agency.

On federal outer continental shelf lands, decommissioning is governed by BSEE regulations. When facilities cease to be useful for production or a lease or grant terminates, the lessee must obtain BSEE approval to decommission wells and pipelines, platforms and other facilities, permanently plug wells, remove platforms and other facilities (with specified exceptions), and decommission pipelines and remove obstructions on the seafloor created by the lease and pipeline right-of-way operations. Post-production removal of oil and gas facilities may be deferred if they are converted to renewable energy generation or alternate use. Lessees or operators of a right-of-use and easement for renewable energy or alternate use generally must also meet the decommissioning obligations when their projects cease operation. BSEE may also approve conversion of a platform to an artificial reef, if a state agency accepts title and liability for the structure. Lessees, owners of operating rights and holders of a right-of-way are jointly and severally liable for decommissioning obligations.

28 Are security deposits required in respect of future decommissioning liabilities? If so, how are such deposits calculated and when does their payment become due?

For onshore leases on federal lands, BLM regulations require lessees or operators to submit a surety or personal bond in an amount sufficient to ensure compliance with applicable requirements including plugging of wells, reclamation of the lease area and the restoration of land and surface waters adversely affected by lease operations

upon abandonment or cessation of oil and gas operations. Bond coverage is required prior to BLM approval of any lease development activities.

For offshore leases of federal outer continental shelf lands, BOEM requires general bonding and supplemental bonding that varies based on an annual review conducted by BSEE of the lessee's decommissioning liability and an assessment by BOEM of the lessee's financial resources.

States and private lessors generally address offshore and onshore decommissioning through lease terms. Typical provisions require the lessee to maintain a bond in favour of the state and to either surrender or remove all improvements, at the option of the state, upon lease termination. The lessee may retain the right to remove equipment with reuse or salvage value.

Transportation

29 How is transportation of crude oil and crude oil products regulated within the country and across national boundaries? Do different government bodies and authorities regulate pipeline, marine vessel and tanker truck transportation?

Rates and other terms for oil transportation via interstate pipelines are regulated by FERC, and pipeline operators must file tariffs with FERC. FERC generally allows carriers to charge market-based rates up to a ceiling. FERC regulations also require interstate carriers to provide non-discriminatory service to all shippers. The Pipeline and Hazardous Materials Safety Administration of the DOT regulates the safety of interstate oil pipelines. States regulate intrastate oil pipelines, and may regulate gathering lines and other transportation activities. Some states have adopted variations of FERC's market-based rates policy.

At present, trucking and marine vessel transportation prices are not regulated, although safety, health and environmental regulations apply generally to pipelines, vessels and trucks (see question 31). With the increasing use of rail for shipping crude oil, the US Department of Transportation (US DOT) has focused on the safety of oil shipments by rail. On 25 February 2014 (as amended on 6 March 2014) the US DOT issued an emergency order requiring persons who ship crude oil by rail in rail tank cars to ensure that the material is properly tested with respect to flash point and boiling point to ensure it meets the standards to be transported by rail safely. This was the seventh emergency order or safety advisory issued by US DOT, concerning crude oil rail shipments, that has been issued in the past four months.

30 What are the requisites for obtaining a permit or licence for transporting crude oil and crude oil products?

Construction of a new interstate oil pipeline does not require approval from the federal government unless the pipeline will cross federal lands, but the operator must file a tariff with FERC. Pipeline construction projects require permits from state or local agencies, although some states no longer require public utility approval to construct new pipelines. Other forms of transportation are not generally subject to public utility regulation, but are subject to the Federal Motor Carrier Safety Act and other health, safety and environmental law. Rail transport of crude oil is subject to regulation by US DOT.

Pipelines across national boundaries require a presidential permit for construction. Pursuant to Executive Order 13337, this authority has been delegated to the State Department. The State Department must determine whether the proposed pipeline is in the 'national interest,' taking into account the project's potential effects on the environment, economy, energy security, foreign policy and other factors, and must consult with relevant state and federal agencies and solicit public comments.

Health, safety and environment

31 What health, safety and environment requirements apply to oil-related facility operations? What government body is responsible for this regulation; what enforcement authority does it wield? Are permits or other approvals required? What kind of record-keeping is required? What are the penalties for non-compliance?

The legal regime for energy production and development

A new or modified exploration or development operation will usually need a local land use development permit as well as drilling and operating permits. Many projects must undergo a thorough environmental impact review under the federal National Environmental Policy Act or a state analogue. The process includes substantial public involvement and can be quite contentious. Failure to complete the process or comply with permits can lead to significant delays, penalties and injunctions.

Discharge restrictions

The federal laws applicable to the discharge of pollutants into the environment are generally not industry-specific. They are instead based on a particular impact. The Resource Conservation and Recovery Act (RCRA) regulates the management of solid and hazardous waste; the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) governs the clean-up of contaminated sites; the Clean Air Act (the CAA) regulates air emissions from mobile and stationary sources; and the Clean Water Act (the CWA) and Safe Drinking Water Act protect surface water and underground sources of drinking water. The principal federal enforcement agency is the EPA, but state agencies enforce similar state laws and can also be delegated authority by EPA to implement and enforce certain federal statutes such as the CAA, the CWA and RCRA.

While the foregoing environmental laws are applicable throughout the economy, there are some statutes that are focused on the oil and gas sector. For example, under the CWA, the EPA has issued effluent guidelines specific to both upstream and downstream oil operations, as well as rules applicable to the discharge of oil into navigable waters. The Oil Pollution Act of 1990 (OPA) addresses clean-up and damage assessments relating to oil spills into the navigable waters of the US, the adjoining shorelines or the exclusive economic zone. Another example is the Pipeline Safety Improvement Act of 2002, which governs the way in which the natural gas industry ensures the safety and integrity of its pipelines. By way of contrast, state regulatory agencies protect 'state waters', which are usually intrastate bodies of water and groundwater. Virtually all oil and gas facilities are subject to the requirements of the CWA, which generally protects the waters of the US from sources of pollution by prohibiting the discharge of pollutants without a permit. The CWA establishes and protects water quality standards, prohibits the oil pollution of these waters and exacts stringent penalties if such pollution takes place, establishes a comprehensive system of water discharge permits and authorises the US Army Corps of Engineers to issue permits for the discharge of dredged and fill material into waters of the United States. The scope of the federal government's jurisdiction over these waters is often controversial, and the EPA and the Corps of Engineers are proposing new rules to define the scope of this authority. As is the case with most federal environmental statutes, many CWA powers have been delegated to state environmental agencies, subject to EPA oversight.

OPA is a 1990 amendment to the CWA, which increased the federal government's authority to respond to large spills of oil into the waters of the United States. It applies to the owners and operators of onshore and offshore oil handling facilities, including oil cargo vessels, and imposes a CERCLA-like regime of joint and several and strict liability for these spills.

In 1980, CERCLA gave funding and enforcement authority to the EPA for the clean-up of sites contaminated by the spill or release

of hazardous substances into the environment. Those persons or business entities determined to be 'responsible parties' can be held jointly and severally liable for the payment of clean-up costs on a strict liability basis; negligence need not be proven. CERCLA contains a 'petroleum exclusion', which excludes petroleum, crude oil and many petroleum products from the list of hazardous substances.

In addition to penalties and enforcement, CERCLA and OPA provide for the assessment of natural resource damages resulting from such spills or releases. Specific to the oil industry, OPA provides that responsible parties under the Act are liable for certain damages caused by an oil spill, which include damages to natural resources, real or personal property, subsistence use, lost government revenues, lost profits and earning capacity, and lost public services.

Both CERCLA and OPA designate state and federal governments and Indian tribes as trustees over the natural resources with the obligation to act on behalf of the public to recover damages. Therefore, when natural resources are damaged due to a discharge or release, one or more trustees will be responsible for ensuring that the resources are restored to their baseline condition and that the public is compensated for the interim loss of use. For example, the National Oceanic and Atmospheric Administration has primary responsibility to ensure that coastal resources are restored to their original condition and use.

Air pollution discharge or emission limits that are enforced under the CAA may apply to all sources of a particular type (eg, refinery heaters and boilers), or may be facility-specific. The CAA utilises permits to control the emission of air pollutants into the environment from industry and commercial activities. The oil and gas sector is subject to stringent regulations in the exploration and production, transportation, petroleum refining and distribution phases of operations. Federal and state environmental laws regulate both new and existing sources of air pollution. New sources, including existing sources undergoing major modifications, must often comply with more stringent emissions or technology standards.

Regulations and permit conditions may include detailed record-keeping and reporting requirements. Each statute and agency has considerable penalty, injunction and criminal law remedies for non-compliance (eg, maximum of $37,500 per day fines and imprisonment for CAA violations), and in some cases private parties may also recover damages or enforce public interests via citizen suits.

Following the Supreme Court's decision in *Massachusetts v EPA*, the mandates of the CAA are being extended to the generation of greenhouse gases, principally carbon dioxide. Recently, the EPA has enacted regulations under the CAA requiring certain facilities to monitor and record greenhouse gas emissions pursuant to the Mandatory Reporting Rule. Depending on the facility, the monitoring and record-keeping requirements can be substantial. Facilities covered by the rules include both upstream and downstream oil and gas operations.

Waste management

The federal Solid Waste Disposal Act and its 1976 amendment known as RCRA regulate the management and disposal of solid waste and especially hazardous waste. With respect to oil and gas operations, a number of production wastes are specifically excluded from hazardous waste regulation, and states also generally consider these wastes to be non-hazardous solid wastes. On the other hand, several petroleum refinery wastes are listed as hazardous wastes, and are subject to much more extensive regulation. The RCRA waste management system has been described as a 'cradle to grave system', requiring the observance of comprehensive permitting, record-keeping and reporting obligations. Under RCRA, many regulatory powers have been delegated to state agencies for permitting and enforcement.

Navigation

Activities affecting the waters of the United States are regulated by the EPA, the Army Corps of Engineers, the US Coast Guard and various other agencies such as port authorities, each of which enforce laws such as the CWA and the River and Harbors Act.

Ecology

The Endangered Species Act can prohibit or strictly regulate activities that might materially impair the habitats of threatened and endangered species. For example, a new facility might be prohibited in an area with an endangered plant species, or particular mitigation measures (such as habitat replacement or augmentation) might be required to minimise adverse impacts to an animal species. For offshore exploration, the Fishery Conservation and Management Act governs the effects on the fishing industry, and the Marine Mammal Protection Act does the same for affected mammals. In addition, the Migratory Bird Treaty Act (the MBTA) prohibits the taking or injuring of migratory birds, including nests and eggs, and the National Marine Sanctuaries Act authorises the secretary of commerce to designate and protect areas of the marine environment having special national significance. The prohibitions enforced by the MBTA have been applied to oil and gas production pits and other facilities, which can present a threat to migratory birds.

Cultural resources

A number of mandates deal with projects that may disturb or uncover property of cultural significance, including the National Historic Preservation Act of 1966, the American Antiquities Act of 1906, the Archaeological Resources Protection Act of 1979 and the Abandoned Shipwreck Act of 1987.

Health and safety

The OCSLA authorises the DOI to lease offshore tracts for oil and gas exploration and development, and to regulate that development through permitting, inspections and enforcement actions (see question 12). The OCSLA permitting scheme involves extensive health and safety requirements.

The Occupational Safety and Health Administration (OSHA) and state and local governments all enforce rules protecting employees and contractors from workplace injuries. BSEE regulates and enforces safety rules at offshore facilities such as drilling rigs and oil platforms. Record-keeping requirements can be very significant; for example, records of occupational injury must be kept for the duration of the employee's service plus 30 years.

In addition to record-keeping requirements, OSHA imposes certain inspection and safety programme requirements involving mechanical integrity of equipment, hazards analysis and process safety. OSHA has recently revised and strengthened the Hazard Communication Rule, which requires that workers be advised of the presence and threats of chemical products in the workplace. OSHA inspects facilities and has the power to issue citations for violations. See question 33 for additional information on OSHA.

The Chemical Safety Board (the CSB), an independent federal agency, has authority under the CAA to investigate accidental releases resulting in a fatality, serious injury or substantial property damages. This authority includes releases occurring at oil-related facilities such as refineries. Although the CSB does not possess enforcement powers under its enabling statute, the board does issue public recommendations and reports that can influence other agency decisions. See question 33 for additional information on the CSB.

Homeland security

The Department of Homeland Security implements requirements relating to safety and security under the Maritime Transportation Security Act of 2002 (the MTSA) and the Chemical Facility Anti-Terrorism Standards (the CFATS). The MTSA requirements include development of site security plans, designation and management of

certain information as sensitive security information and security clearances for personnel. The CFATS interim final rule issued in 2007 requires covered chemical facilities to prepare security vulnerability assessments, which identify facility security vulnerabilities, and to develop and implement site security plans, which include measures that satisfy the identified risk-based performance standards.

32 What health, safety and environmental requirements apply to oil and oil product composition? What government body is responsible for this regulation; what enforcement authority does it wield? Is certification or other approval required? What kind of record-keeping is required? What are the penalties for non-compliance?

The EPA regulates the composition of mobile source fuels and fuel additives at the federal level, although substantial additional regulation of oil and oil products occurs at the state level. Sales of imported oil products that do not comply with EPA standards are prohibited. Uniquely, federal law authorises California to adopt its own fuel standards, which may then be adopted verbatim by other states. California's regulations specify many required elements of fuel composition, such as volatility and aromatics, oxygenate and sulphur content.

Recently, there have been several major federal fuel specification changes. Among these changes are the 2014 'Tier 3' motor vehicle emission and fuel standards (which require a further reduction in the sulphur content of gasoline and include an averaging, banking and trading (ABT) programme to provide further flexibility), the elimination of the 2 per cent oxygen content requirement under the CAA for reformulated gasoline and the 2012 revisions to the renewable fuels standard programme (RFS2) under the Energy Independence and Security Act of 2007 (the EISA) (see question 3). Under the Clean Air Act section 211(o), as amended by the EISA, the EPA is required to annually establish specific annual volume standards for cellulosic biofuel, biomass-based diesel, advanced biofuel and total renewable fuel that must be used in transportation fuel for the following year based on projections from the EIA. In mid-2014, EPA also plans to adopt revisions to the RFS2 annual percentage production standards for various renewable fuels for 2014 and 2015.

On the state level, California regulators adopted the Low Carbon Fuel Standard (the LCFS) in 2009, which regulates the carbon intensity of transportation fuels sold in California in order to reduce the amount of greenhouse gas emissions. In 2011, the US District Court for the Eastern District of California held that the LCFS regulations discriminated against non-California fuels by assigning them a higher 'carbon intensity' (due to the need to transport such fuels into California) and thus were an unconstitutional restriction on commerce between California and other states. However, in September 2013, the Ninth Circuit Court of Appeals reversed that decision and upheld the LCFS as not discriminatory against out-of-state fuels on the face of it. In March 2014, a writ of certiorari was filed with the US Supreme Court seeking appeal of the Ninth Circuit ruling, which is still pending at the time of this publication. In addition, 11 other states (Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island and Vermont) signed a memorandum of understanding to work toward adopting a regional low carbon fuel standard and issued a draft programme framework in 2011.

In most cases, fuel composition must be certified by the EPA or the state air authority. These agencies may impose substantial penalties for sale of non-complying fuels and for failure to maintain accurate composition and manufacturing records. The EPA incentivises self-evaluation, self-disclosure and correction of violations by not recommending civil or criminal penalties for entities that promptly address their non-compliance.

Other oil-based products, such as lubricants and solvents, are regulated by the EPA pursuant to the Toxic Substances Control Act (the TSCA). The TSCA authorises the EPA to require pre-manufacture notifications (PMNs) for any new chemical substance prior to its being imported to, or manufactured in, the US above a certain threshold amount. In most cases, PMNs must be supported by adequate health and safety data, and the TSCA imposes reporting and record-keeping obligations on manufacturers and distributors of subject chemical substances. Violations of the TSCA can result in civil and criminal penalties, as well as seizure of products manufactured or distributed in violation of the TSCA.

Labour

33 What government standards apply to oil industry labour? How is foreign labour regulated and restricted? Must a minimum amount of local labour be employed? Are there anti-discrimination requirements? What are the penalties for non-compliance?

Foreign workers

All employers in the United States, including oil companies, must confirm each newly hired employee's identity and lawful right to work for that specific employer in the intended position. The federal laws requiring this action were established in November 1986 as part of the Immigration Reform and Control Act (IRCA) and apply equally to US citizen and permanent resident workers and foreign national personnel. Recently, certain states, cities and municipalities have enacted additional compliance requirements that businesses must follow to hold business licences within those regions of the country. Failure to properly document the review of appropriate employment verification paperwork can result in substantial fines most often calculated based on the number of personnel employed.

When choosing to hire personnel who are not US citizens nor lawful permanent residents ('green card holders'), it is critical for an employer to understand the rules established by IRCA and the nature of documentation that can be presented by foreign nationals to evidence their lawful right to work in the US for that specific business. Non-immigrant visas, which are temporary in nature and not intended to result in green card issuance, can include visitors, students, trainees and employment categories. Commonly used employment-based non-immigrant visas include:

- the L-1 classification used for executive, managerial or personnel with specialised skills and knowledge who are transferred within a corporate group from a location abroad to a related US subsidiary, affiliate or branch location;
- the H-1b classification used for positions classifiable as 'specialty-occupations', which require college-level degrees in a specific field of study to perform the duties and responsibilities of the position;
- the specialised visas created by treaty for citizens of Canada, Mexico, Singapore, Chile and Australia with similar standards to the H-1b classification; and
- the E classification for executive, managerial or personnel with essential skills and knowledge who are of the same nationality as the intended employer and are nationals of one of 82 countries with whom the US maintains specialised treaties.

In some cases, a foreign national who lacks employment authorisation in the United States can enter in the B-1 (business visitor classification) to represent the interests of a foreign employer. However, that foreign national cannot provide local productive employment while in the United States, but rather can only further the goals of the company abroad.

It is also important to note many recent changes in the law regarding the use of contracted personnel. Although much of the risks and liabilities associated with contract workers are maintained by the company assigning the worker, in recent years the government has increased the responsibilities, notice requirements and many of the liabilities of the company accepting the contract personnel as well.

Labour relations

Employers in oil, as well as other sectors, must comply with a wide range of federal statutes and regulations, including the National Labor Relations Act (the NLRA), the Fair Labor Standards Act (the FLSA), the Family and Medical Leave Act (the FMLA) and the Occupational Safety and Health Act (the OSH Act). State and local laws and agencies supplement the federal workplace rules.

The NLRA confers on private sector employees a variety of rights to form unions; to engage in union organisation campaigns; to bargain collectively; and to strike and take other concerted activity. The NLRA also imposes limitations on those rights, and empowers employers to conduct labour relations alone or in concert with similarly situated firms, and is enforced by the National Labor Relations Board. Important labour unions in the US oil industry include the Oil, Chemical and Atomic Workers Union.

The FLSA imposes overtime and minimum wage requirements for certain employees, unless the employee falls within a category of workers who are 'exempt' from these requirements, such as employees that perform certain executive, administrative or professional duties and are paid a designated minimum salary. Specific wage or overtime rules are provided for some particular oil industry employers, such as certain wholesale distributors of refined products. The FLSA is enforced by the Department of Labor (the DOL). Many states have their own specific wage and hour requirements, and employers must comply with the requirements that are most protective of the employee.

The FMLA requires larger employers to provide up to 12 weeks of unpaid annual leave for certain employees who have serious health conditions or who desire to care for dependants. An employee who exercises the FMLA right enjoys certain assurances of post-leave employment and protection from retaliation. This statute is also enforced by the DOL.

In addition to federal laws, some states have also passed laws regulating workforce issues. For example, a California law effective in 2014 (Senate Bill 54) requires oil refineries generally to use contractor workforces that are paid union-level wages and that include large proportions of graduates of apprenticeship or equivalent programmes.

The OSH Act created OSHA to set and enforce workplace health and safety standards. OSHA and similar state agencies remain committed to rigorous enforcement of process safety in the aftermath of high-profile refinery accidents, including the 2005 explosion and fire at the BP refinery in Texas City, Texas that killed 15 employees and injured 170 others and the August 2012 explosion at Chevron's Richmond Oil Refinery in Richmond California. Another federal agency, the CSB, focuses on safety within the energy industry and champions what the agency considers inherently safer technologies and the use of 'leading' and 'lagging' process safety indicators to measure operators' safety performance. Several refinery incidents involving the release of hydrogen fluoride, for example, may lead the CSB to recommend the use of alternate alkylation catalysts. The CSB's investigation of the Deepwater Horizon incident also will likely lead the agency to re-emphasise the importance of safety culture and oversight in upstream oil and gas exploration and production activities, much the way the agency did in downstream operations after the Texas City disaster. The CSB may also make recommendations to sister federal agencies regarding the offshore safety regulatory scheme. Many observers anticipate that the CSB may recommend the implementation of a 'safety case' common in other countries such as the United Kingdom and Australia. In fact, during a public hearing held in July 2012 to discuss the Deepwater Horizon incident, the CSB identified what it perceives to be shortcomings in industry standards and recommended practices developed by API relating to process safety indicators. In separate testimony to the CSB during this hearing, representatives of OSHA and the United Steelworkers indicated their willingness to work with API and other stakeholders to improve safety performance indicators. The CSB continues to investigate the incident and as at April 2014 had not released its recommendations.

Anti-discrimination

Many federal, state and local laws prohibit discrimination in employment on the basis of a 'protected classification' such as race, colour, sex, religion, national origin, disability (mental or physical, including pregnancy), age, Vietnam-era veteran status, sexual orientation, medical condition or genetic information. There may be additional protected categories under state or local law. Even an ostensibly neutral policy that results in a 'disparate impact' on a race, sex or other protected classification can be the basis for a claim, unless the employer can demonstrate the policy is justified by 'bona fide occupational qualifications'. Disparate impact claims can be asserted under federal laws prohibiting age discrimination unless the employee can show that the challenged policy or practice was based on reasonable factors other than age. Statutes prohibiting discrimination based on religion and disability require employers to provide reasonable accommodations so that a qualified employee who falls within the protection of these statutes is able to work. The federal laws include title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, 42 USC section 1981 (prohibiting racial discrimination in employment), the Equal Pay Act, the Rehabilitation Act and the Americans with Disabilities Act. These statutes are generally enforced by the Equal Employment Opportunity Commission.

The remedies for a discrimination claim can be significant. They can include orders of reinstatement, back and front pay, compensatory damages such as pecuniary losses and emotional distress, and punitive or exemplary damages. Only a few of the anti-discrimination laws have maximum penalties, such as the $300,000 per employee limitation under title VII for compensatory and punitive damages, and applicable state statutes may have no such limitation. Oil industry employers have faced significant claims, both by individuals and by collections of similarly situated employees bringing class actions. For instance, in 1996 Texaco paid over $170 million to settle racial discrimination lawsuits. At the time, it was the largest racial discrimination settlement in the United States.

Taxation

34 What is the tax regime applicable to oil exploration, production, transportation, and marketing and distribution activities? What government body wields tax authority?

The income tax regime for exploration and production has numerous special features, whereas transportation, marketing and distribution are generally subject to the same rules facing other industrial businesses. A host of industry-specific deductions apply to upstream expenditures, including pre-drilling exploration costs, intangible drilling costs, accelerated depreciation of oilfield equipment and depletion of subsurface resources. Tax planning is required for optimal acquisition and divestiture of leases and other production interests, such as production payments and farm-ins. State income tax laws supplement these provisions and incentives (though not all states impose an income tax). Some states also impose severance taxes on production.

Federal and state excise taxes are collected on the retail sale of motor fuels. Oil companies are subject to state property tax on holdings of real property and certain personal property; state sales and use tax on certain acquisitions of personal property, and in some cases, services; withholding requirements on distributions to certain foreign shareholders, partners and other payees; and transfer taxes on sales of real property.

The Oil Spill Liability Trust Fund, authorised under OPA, is funded in part through a tax levied on oil companies for barrels of oil produced in or imported into the US.

The principal tax agency is the Internal Revenue Service at the federal level, with customs duties being handled by the US Customs Service, both part of the Department of the Treasury, and state taxes being administered by a variety of agencies.

Commodity price controls

35 Is there a mandatory price-setting regime for crude oil or crude oil products? If so, what are the requirements and penalties for non-compliance?

Crude oil is an international commodity, and as such, its price is determined by international supply and demand factors. Neither the US federal government nor the states regulate the price of crude oil or refined products. More than half of the states have laws or regulations that seek to regulate 'price gouging', particularly during times of declared emergency.

Competition, trade and merger control

36 What government bodies have the authority to prevent or punish anti-competitive practices in connection with the extraction, transportation, refining or marketing of crude oil or crude oil products?

Two agencies have principal responsibility for enforcing federal competition laws (called 'antitrust laws' in the US): the Antitrust Division of the Department of Justice (the DOJ) and the Federal Trade Commission (the FTC). Each agency has civil authority to enforce statutes of general application, including the Sherman Act's prohibition against a wide array of restraints of trade, and monopolisation, attempts and conspiracies to monopolise; the Clayton Act's prohibition against mergers and acquisitions, which is likely to substantially lessen competition, as well as exclusive dealing and tying arrangements that unreasonably restrain trade (also prohibited by the Sherman Act); and the Robinson-Patman Act amendments to the Clayton Act, which prohibit price discrimination and related practices resulting in competitive injury. Traditionally, however, only the FTC has enforced the Robinson-Patman Act, and in recent years only on rare occasions. Only the DOJ, however, has authority to pursue criminal investigations for cartel behaviour. The FTC also enforces the Federal Trade Commission Act prohibiting 'unfair methods of competition' and similar offences, and has the option of challenging anti-competitive behaviour before either an administrative tribunal or a federal court.

Many states and some subdivisions also have antitrust and unfair competition acts or a common law antitrust jurisprudence. Under federal antitrust laws (except the FTC Act) and some state regimes, private parties may bring civil lawsuits seeking relief for antitrust violations. Prevailing plaintiffs under federal law may obtain, in appropriate cases, both injunctive relief and compensatory damages, which are automatically trebled, as well as attorneys' fees and costs.

Regulations on concentration of oil lease holdings include BOEM's List of Restricted Joint Bidders, which limits joint bids by two or more companies with high daily average production and the review of winning OCS lease bids by the FTC and DOJ before any bid is formally accepted.

37 What is the process for procuring a government determination that a proposed action does not violate any anti-competitive standards? How long does the process generally take?

The DOJ's business review letter programme and the FTC's advisory opinion programmes are sometimes used for comfort on proposed joint ventures, information exchanges and similar concerted activities. The review period can extend many weeks, months, or even longer, from the submission of all supporting data, and the agencies only describe their present enforcement intentions without definitively approving the conduct.

Certain joint ventures, mergers and business purchases are subject to mandatory reporting under the Hart-Scott-Rodino Antitrust Improvements Act (the HSR Act). Reports are made to both the DOJ and the FTC, but the FTC usually takes the more active role for oil industry matters. The parties are prohibited from closing the transaction until expiration of a waiting period for the government to decide whether to seek an injunction. The waiting period is usually 30 days after filing, or 15 days in the case of a cash tender offer, but is extended significantly when an agency issues a request for additional information, commonly known as a 'second request', for data, documents and interrogatory answers. The issuance of such a request suspends the HSR waiting period until 30 days after the parties comply with the request for additional information (10 days in the case of a cash tender offer), although it has become common practice for the FTC to negotiate a 'timing agreement' with the parties providing the government with additional time to review the submission. Unlike in many other jurisdictions, however, neither the DOJ nor the FTC has the ability itself to block a proposed merger at the expiration of the HSR waiting period. Rather, it is necessary for the agencies to seek a preliminary injunction from a federal court pending a trial on the merits of the deal. When the DOJ acts, that trial is typically held in the same federal court as the preliminary injunction challenge. When the FTC acts, however, the trial on the merits is held before a hearing officer, typically an FTC administrative law judge (ALJ), and the ALJ's initial decision is thereafter reviewed by the Commissioners themselves. Companies may appeal against adverse decisions of the Commission to a US court of appeals.

The FTC and DOJ may also challenge transactions that are not required to be notified under the HSR Act or that are reported but that, for one reason or another, the agencies permit to be consummated without challenge in the first instance. While these challenges are the exceptions, not the rule, the agencies have shown an increasing interest in such post-consummation challenges in recent years.

International

38 To what extent is regulatory policy or activity affected by international treaties or other multinational agreements?

Although the United States is not a signatory to the Law of the Sea Treaty, federal laws and executive orders have established US offshore territorial zones and economic exclusion zones that are comparable to those under the Treaty.

The 1978 protocol to the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL) has spawned several US statutes pertaining to oil tankers, including OPA, the Port and Tanker Safety Act and the Act to Prevent Pollution from Ships.

The US is a member of the World Trade Organization (WTO) and a party to various WTO agreements. These instruments generally prevent member states from discriminating against imported products and services or between products and services of different member states. There is an exception for free trade agreements such as the North American Free Trade Agreement, which created a zero-duty regime for imports and exports of products among Canada, the US and Mexico. The United States has free trade agreements with a number of other countries.

39 Are there special requirements or limitations on the acquisition of oil-related interests by foreign companies or individuals? Must foreign investors have a local presence (eg, local subsidiary or branch)?

The presence of BP, Shell and PDVSA/Citgo demonstrates that foreign investment in oil resources has been welcomed and successful. However, some restrictions exist or may emerge.

Update and trends

On 17 March 2014, the American Petroleum Institute celebrated the 65th anniversary of commercial hydraulic fracturing in the United States – an issue that remains at the forefront of US oil regulation.

In past years, various states took the lead in drafting legislation to regulate hydraulic fracturing, given the lack of federal oversight on the issue. Today, the trend is a shift away from centralised control at the state level, with individual municipalities taking the reins to either restrict or promote hydraulic fracturing at the local level – the strategy (moratorium, regulation or an outright ban) and results vary.

In March 2014, Carson City, California became the first city in the state to place a moratorium on all new oil and gas drilling, citing a need to study the safety of various drilling techniques (hydraulic fracturing requiring the most extensive study). The city of Santa Cruz, California passed a moratorium on hydraulic fracturing in September 2013 and, in February 2014, the Los Angeles City Council voted unanimously to move forward in drafting regulations to restrict hydraulic fracturing. While an additional vote is necessary to effectuate this moratorium, Los Angeles could become the largest city in the US to approve a moratorium on hydraulic fracturing.

Local governments in New York and Pennsylvania have attempted to regulate hydraulic fracturing using a variety of techniques, including local land use ordinances, zoning laws, permitting regulations and drafting new provisions for local operating agreements.

Municipalities in Colorado have taken a different approach, working on a 2014 ballot-initiative to give towns, cities and counties the authority to pass measures that supersede both state and federal laws. If successful, this initiative will allow localities to outright ban hydraulic fracturing within their borders as soon as the end of this year.

While several municipalities have focused on restriction, others have taken to promoting hydraulic fracturing, citing the continued local job growth and movement away from foreign oil. Residents of Johnson County, Illinois voted against a referendum in March 2014 that would have banned hydraulic fracturing altogether. Johnson County sits atop the 'New Albany Shale' of the Illinois Basin, which projections suggest may contain up to 300 billion barrels of oil.

At the federal level, much is still to be determined. In March 2014, the Environmental Protection Agency (the EPA) sent a 'pre-rulemaking' notice to the White House Office of Management and Budget, evidence that the EPA is moving towards potential federal oversight on reporting requirements regarding chemicals used in hydraulic fracturing. Additionally, the EPA continues its study on the possible impacts of hydraulic fracturing on drinking water. Though originally scheduled for release this year, the EPA has pushed back the final release date to 2016 and instead will issue a draft report for public comment and peer review this year.

The rapid proliferation of technology surrounding hydraulic fracturing has caused the Energy Information Administration to project an increase of US involvement in the global petroleum marketplace through 2040 and beyond. With this, foreign investors should closely follow local efforts to restrict or promote hydraulic fracturing, as the issue promises to influence the US and global petroleum industry in the years to come.

Under the Mineral Leasing Act, aliens may hold interests in federal onshore leases only by stock ownership in US corporations holding leases and only if the laws of their country of citizenship do not deny similar privileges to United States citizens. Aliens may not hold a lease interest through units in a publicly traded limited partnership. Foreign-owned and foreign-flagged oil tankers may call at US ports en route to and from foreign destinations. The combination of statutes known as the Jones Act requires that 'coastwise' trade between US ports generally must be conducted by vessels built and flagged in the US and staffed with US crews.

The OCSLA limits foreign staffing of many OCS facilities. Foreign investors must comply with record-keeping requirements of the International Investment and Trade in Services Survey Act.

Section 721 of the Defense Production Act of 1950 empowers a committee of executive branch agencies (collectively known as the Committee on Foreign Investment in the United States (CFIUS)) to investigate whether proposed foreign acquisitions of US businesses pose a risk to the national security of the United States. Upon receiving a recommendation from CFIUS, the president is authorised to determine whether to block the proposed transaction or require divestment if the transaction has already occurred.

Amendments to the statute in 2007 expanded the review factors to include the effects of the proposed transaction on national requirements for energy sources and physically critical infrastructure 'such as major energy assets'. The impact of the CFIUS review is fact-specific depending on the characteristics of the proposed acquisition, and CFIUS may impose conditions on its approval that require the acquiring party to submit to continuing obligations.

40 Do special rules apply to cross-border sales or deliveries of crude oil or crude oil products?

Imports

Imports of crude oil generally are subject to the regulations and standards of the FTC, US Customs and Border Protection, the DOE and the Federal Energy Regulatory Commission. Further, if the

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import is a consumer product or a hazardous material, the import is subject to regulations and standards of the Consumer Product Safety Commission in the first instance and regulations and standards of the DOT in the second. While in a few limited instances the DOE must authorise importation of petroleum products, generally, licences are no longer required to import petroleum products.

Exports

The Department of Commerce restricts exports of all domestically produced crude oil by requiring a licence for the export of crude oil to all countries, including Canada. Except for a few categories of transactions that are exempted or have a presumption of approval by the Bureau of Industry and Security (the BIS), the BIS reviews licence applications on a case-by-case basis. The BIS will analyse the application to determine if the transaction is in the national interest and consistent with the purposes of the Energy Policy and Conservation Act. Relevant criteria include whether the export will be to an 'adjacent' country and whether the United States will receive an equivalent amount in return. At present, exports of refined products are not limited in this manner.

Embargoes

The United States maintains economic embargoes on certain countries, including Cuba, Iran, North Korea, Sudan (but not South Sudan) and Syria pursuant to regulations administered by the Treasury Department's Office of Foreign Assets Control. These embargoes can prohibit US persons and foreign persons from engaging in transactions involving the embargoed countries or their companies or nationals, even when nothing will be imported into or exported from the United States. Embargoes also apply to entities and individuals on the List of Specially Designated Nationals, even when they are not operating from an embargoed country.

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