

United States

Charles Caldwell, Cathy Lewis, Larry Nettles and William Vigdor

Vinson & Elkins LLP

General

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

The US is estimated to be the third-largest producing country of oil in the world and the first largest consumer and importer of oil in the world. The US oil industry is divided into three sectors: upstream (exploration and production); midstream (processing, storage, and transportation) and downstream (refining, distribution, and marketing). Companies in the oil industry may engage in one specific sector, such as Kinder Morgan or El Paso – which engage in only the midstream sector – or they may engage in all three sectors through integrated affiliates, such as ExxonMobil and ConocoPhillips.

The majority of onshore and offshore US crude oil production is supplied by Alaska and the Gulf Coast region. Oil shale – mainly found in Colorado, Wyoming, and Utah – and outer continental shelf reserves are projected to constitute an increasingly larger proportion of domestic oil production as technology develops to improve expected yields and conventional oil source prices increase. The US currently has over 200,000 miles of oil pipelines and an operable crude oil refining capacity, which is highly concentrated in the Gulf Coast region, of 17 million barrels per day – approximately one-quarter of worldwide crude oil distillation capacity. Downstream processing capacity is also highly concentrated in the Gulf Coast region. The East Coast region produces effectively no crude oil and has limited refining capacity, however it has the highest demand for refined products. To meet this demand, the East Coast region relies heavily upon shipments of refined products from the Gulf Coast and foreign products imports. The Midwest produces significant amounts of crude oil and also refines oil from outside the region, including domestic crude oil from the Gulf Coast and foreign crude oil transported via pipeline from Canada or shipped via the Gulf Coast. The Rocky Mountain region has low petroleum demand, but has experienced recent rapid growth in some areas. The West Coast region is characterised by the unique product quality requirements in California, the largest consuming state, and essentially all of that state's refined product demand is met by output from the state's refineries. Due to these significant differences, each region must maintain a balance of supply and demand through imports and trades among the various regions and abroad.

- 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?

About 40 per cent of the US's energy needs is provided by oil or petroleum products. About 72 per cent of the petroleum product needs of the US is supplied by foreign production and 28 per cent by domestic

production. The US produces about 10 per cent and consumes about 21 per cent of the world's oil.

The total consumption of liquid fuels in the US is expected to grow from 20.7 million barrels per day in 2007 to 21.7 million barrels per day in 2030. US crude oil production is projected to grow at an annual rate of 1.6 per cent, reaching a level of 7.37 million barrels per day in 2030, owing to near-term production increases offshore in the deep waters of the Gulf of Mexico, long-term production increases from onshore CO₂-enhanced oil recovery projects and increased production in the outer continental shelf. Total offshore production is projected to increase at an average annual rate of 2.8 per cent, from 1.4 million barrels per day in 2007 to 2.7 million barrels per day in 2030. The net import share of total liquids supply, including crude oil and refined products, is expected to drop from its current level of 60 per cent to about 40 per cent in 2030.

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

With rising energy commodity prices and a widening consensus on the climate effects of the use of fossil fuels, there is growing consensus within the US governmental and political spaces on the desirability of reducing reliance upon petroleum in the US economy, with continued pressure from some quarters to encourage increased domestic oil exploration to reduce dependence on foreign supply and mitigate price impacts on the economy. The new US administration is moving to translate its goals of increased energy efficiency, use of renewable energy sources, and reduction of GHG emissions into comprehensive energy legislation.

Regulation overview

- 4 Describe the key laws and regulations that make up the general legal framework regulating oil activities.

Regulation is differentiated between the federal and state levels and by segment. The regulation of upstream (exploration and production) depends on whether the land is federal-owned. On land owned by the federal government, the Mineral Leasing Act of 1920, as amended, governs exploration and production activities. Submerged lands located within specified distances of state coastlines are subject to state regulation. Oil activities on submerged lands on the Outer Continental Shelf (OCS) beyond state jurisdiction are governed by the Outer Continental Shelf Lands Act (OCSLA).

The Federal Oil and Gas Royalty Management Act 1982 authorises the US Department of the Interior to establish a comprehensive system to provide the capability to accurately determine and collect oil royalties and other payments.

Rates and terms of service of interstate transportation of oil by pipeline is regulated as pursuant to the Interstate Commerce Act 1887 and the Energy Policy Act 1992 (EPA92), as applied by the Federal Energy Regulatory Commission (FERC). Intrastate transportation of

oil by pipeline is regulated by certain state statutes. Transportation by pipeline on the OCS (if the movement onshore is solely to an adjacent state) is governed by the OCSLA and, under recent guidance from the federal courts, is to be implemented by the Minerals Management Service (MMS), a bureau of the Interior Department. Transportation by pipeline on the OCS that forms part of interstate commerce is governed by the Interstate Commerce Act 1887 and EPCA92 and subject to FERC jurisdiction.

- 5 Identify and describe the government regulatory and oversight bodies principally responsible for regulating oil activities.

The Department of the Interior regulates upstream activities through the Bureau of Land Management (BLM), the Bureau of Indian Affairs (BIA), and the MMS. The BLM regulates the granting and enforcement of leases for the exploration and production of oil on federal land. The BIA issues leases and the BLM handles certain approvals and supervises operations on Indian land. The MMS issues leases and oversees development and production on the Outer Continental Shelf to ensure compliance with environmental, safety and other regulations.

FERC has authority to establish the rates and terms of service for the interstate transportation of oil by pipeline. The Department of Transportation, through its Office of Pipeline Safety, establishes and enforces safety standards for such pipelines. Generally, each state has one or more agencies that have authority over pipeline regulation, siting or safety within its respective jurisdiction, or all of the above.

- 6 How does your country manage appeals of government regulatory decisions?

A person who suffers a legal wrong or is adversely affected or aggrieved by a federal agency action is entitled to judicial review. Appeals of final determinations by federal agencies are brought in the US Courts of Appeals. The courts generally show deference to the agency's expertise, but may set aside agency determinations that are arbitrary, capricious, an abuse of discretion, outside the agency's jurisdiction or authority, or otherwise not in accordance with law. State agency decisions may be appealed to state courts with jurisdiction over such agency decisions.

- 7 What standards are employed for oil measurement and oil facility equipment? Are these voluntary or involuntary? Are they established by a government body?

Private institutions promulgate standards for oil measurement and oil facility equipment. Although compliance with these standards is typically voluntary, many federal and state regulations incorporate these standards by reference. The American Petroleum Institute's (API) Manual of Petroleum Measurements Standards is one of the oldest and most widely recognised of these standards. Generally, API standards are reviewed and revised, reaffirmed, or withdrawn at least every five years.

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

The Energy Information Administration of the Department of Energy maintains oil production, export and import statistics.

Natural resources

- 9 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?

Title is held by the owner of the mineral estate. Unless the mineral estate has been severed from the surface estate and granted or

reserved to others, the owner of the surface holds the rights to both the minerals and the surface. In instances where the mineral estate has been severed from the surface estate, the mineral estate is the dominant estate and the holder of the mineral rights is entitled to use the surface to the extent reasonably needed to exploit any oil, gas or other minerals located in the mineral estate. Federal and state governments can also own oil, gas and mineral rights, on both onshore and offshore lands, resulting in a distinction between private and public lands.

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

Oil exploration and production activities are conducted onshore and offshore. Most offshore oil exploration and production in the US takes place in the western and central Gulf of Mexico.

Exploration and production activities have historically been prohibited or restricted in many areas in the US, especially along the Outer Continental Shelf (OCS). An executive withdrawal and a congressional moratorium have long been in place prohibiting leasing on the OCS. In 2008, however, President Bush lifted the executive withdrawal (except as to National Marine Sanctuaries) and the US Congress did not renew its annual moratorium that prohibited new oil and gas leasing along the OCS, allowing future lease sales to proceed in those areas. Currently, the only remaining portions of the OCS closed to potential leasing are that portion of the Eastern Gulf of Mexico protected through the Gulf of Mexico Energy Security Act of 2006 and the National Marine Sanctuaries covered by the executive withdrawal.

Onshore, areas such as national parks and wilderness areas continue to be protected from exploration and drilling.

- 11 What government body regulates oil exploration and production in your country? What is the character of that regulation?

The right to explore and develop oil on the lands of others (whether public or private) is obtained through oil and gas leases. The terms of these oil and gas leases control the activities of the lessees together with some federal and state regulations governing protection of the environment and other matters. Leases that are negotiated between private individuals and private owners may follow widely used forms or may contain terms and conditions specific to the given lease.

Separate state agencies control the exploration and production of oil from state-owned public lands. For federal lands, see question 5.

- 12 If royalties are paid, what are the royalty rates? Are they fixed? Do they differ between onshore and offshore production?

Royalty rates on private lands are not fixed and depend on the terms negotiated. Royalties on private leases may be based on market value or, in some cases, are taken in kind.

Royalty rates on public lands are more closely regulated. For onshore federal leases the Mineral Lands Leasing Act prescribes the royalty rate as no less than one-eighth of the value of production, and for federal offshore leases the OCSLA prescribes a one-sixth royalty rate. The US Congress, through special legislation, and the Department of the Interior can modify standard terms and royalty rates. Recently, draft legislation has been circulated through the House Natural Resources Committee that would raise the minimum royalty rates for onshore federal leases from one-eighth to one-sixth of the value of production.

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

Oil and gas leases are typically divided into a primary term for a specified number of years and a conditional secondary term that is tied to the production life of the properties covered by such leases. A typical US oil and gas lease reads, 'this Lease shall be for a term of [] years from this date and as long thereafter as oil and gas or other hydrocarbons are being produced from said land or land with which said land is pooled.' The primary term may last from one year for proven reserves to 10 years for undeveloped areas. In some cases, a lease may not require production to extend the lease into the secondary term, but in such event the lease may impose other requirements such as drilling test wells or the payment of a delay rental.

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

The federal Submerged Lands Act of 1953 established state jurisdiction of offshore oil production. Generally, jurisdiction of coastal states extends three nautical miles offshore. The US Congress granted the states of Texas and Florida extensions of their jurisdiction to three marine leagues extending from their coastlines into the Gulf of Mexico. Under the OCSLA, federal jurisdiction extends beyond state jurisdiction to the boundary of the US Exclusive Economic Zone, 200 nautical miles from the coastline.

15 Who may perform exploration and production activities? What criteria and procedures apply in selecting such entities?

There are no qualification requirements to perform exploration and production of privately held reserves. For reserves located on federal lands, an applicant for a lease or permit must follow the MMS and BLM procedural requirements. The MMS uses a bidding process for granting offshore leases.

16 What is the legal regime for joint ventures?

Joint ventures for the development of oil and gas resource can take a number of forms. It is common for parties to a joint venture or the owners of undivided interests in the lands to enter into a contractual relationship under a joint operating agreement (JOA). The Association of International Petroleum Negotiators and the Association of American Landmen provide forms of JOAs that are often used. In some cases, parties will form a separate legal entity to pursue a joint venture. These entities include general or limited partnerships, corporations or limited liability companies.

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

'Pooling' usually refers to the combining of enough land to form a single-well drilling or spacing unit, whereas 'unitisation' normally refers to the combining of a greater amount of land for the purpose of conducting field-wide or partially field-wide operations. Formation of a pooled unit or a unitised field may be voluntary, and in many jurisdictions, involuntary under statute or agency determinations. There are no cross-border reservoir unitisations involving the US.

Transportation**18** 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?

Transportation by pipeline solely within a state and not forming part of an interstate movement of oil is subject to state regulation, which is typically light-handed and complaint-driven.

Transportation by pipeline in interstate commerce is deemed to be in common carriage and is subject to regulation by FERC as to the rates charged and terms of service. These rates and terms must be just and reasonable, not unduly discriminatory or preferential, and filed with the FERC. Service must be provided upon reasonable request. All interstate rates that were in existence as of 24 October 1992 and not subject to challenge in the prior year were deemed just and reasonable under EPCRA92. Pursuant to EPCRA92 and FERC regulation, all interstate rates may be increased annually ('indexed') by an inflation escalator. As alternatives to indexed rate-setting, rates may be settlement-based, market-based, or cost-based (if indexed rates are not compensatory).

The Pipeline and Hazardous Materials Safety Administration (PHMSA) of the Department of Transportation regulates the safety of interstate oil pipelines. States regulate intrastate oil pipelines.

Trucking and marine vessel transportation prices are not currently regulated. However, safety, health and environmental regulations apply generally (see question 20).

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

There is no requirement to obtain a permit or licence from FERC to transport oil in interstate commerce or for the installation of an interstate oil pipeline. Intrastate transportation is generally handled likewise. Other forms of transportation are not generally subject to economic regulation, but are subject to other laws.

Health, safety and environment**20** 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?

Oil-related facility operations are subject to a variety of federal, state, and local health, safety, and environmental laws, regulations, and ordinances, depending on the type of operation. At the federal level, the Environmental Protection Agency (EPA) has primary responsibility for implementing and enforcing federal environmental laws, PHMSA has responsibility for implementing and enforcing federal laws regarding pipeline safety, the Occupational Safety and Health Administration (OSHA) has responsibility for implementing and enforcing federal laws regarding worker safety, and the US Coast Guard and the MMS implement and enforce environmental and safety laws related to offshore oil and gas production. In addition, states implement and enforce their own independent environmental requirements. Local governmental entities may also impose requirements.

Several laws regulate the discharge of substances from oil-related facility operations and the disposal of waste from these operations. The federal Clean Water Act (CWA) and analogous state laws prohibit any discharge of pollutants into regulated waters without a permit. The federal Oil Pollution Act 1990 (OPA) imposes a variety of requirements to prevent oil spills and establish liability for damages resulting from such spills. The federal Clean Air Act (CAA) and comparable state laws regulate emissions of various air pollutants. Oil and gas facilities may have to obtain air permits from the EPA or a state environmental agency.

The federal Resource Conservation and Recovery Act (RCRA) regulates the generation and handling of hazardous and non-hazardous wastes. Waste associated with the exploration and production of oil is regulated under RCRA's non-hazardous waste provisions. In addition, the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) imposes joint and several liability on classes of persons who are considered to be responsible for the release of a hazardous substance into the environment. Under CERCLA,

owners or operators of oil-related facilities may have to remediate or contribute to the cost of remediating historical contamination.

Regulated entities may be subject to administrative, civil and criminal penalties, as well as injunctive relief, for unauthorised discharges or disposal of regulated substances, or non-compliance with requirements. Civil penalties of up to US\$37,500 per day per violation may be imposed for certain violations of federal environmental laws.

Oil-related facilities also must comply with other state and federal environmental requirements relating to the development or operation of the facilities. The federal National Environmental Policy Act (NEPA) requires federal agencies to evaluate the environmental impact of all 'major federal actions' significantly affecting the environment. States also may impose similar environmental review requirements. Federal agencies granting permits must consider the impact on endangered and threatened species and on historic or archaeological resources. Offshore oil and gas facilities also must comply with the Marine Mammal Protection Act, and other similar laws.

OSHA and OSHA-approved state programmes regulate job safety and health conditions for private and public employers. OSHA requires employers to keep records of work-related injuries and illnesses. OSHA enforces the Occupational Safety and Health Act (OSH Act) through workplace inspections and investigations. Penalties for non-compliance include fines of US\$7,000 to US\$70,000 for each violation. In 2007, OSHA announced the Petroleum Refinery Process Safety Management National Emphasis Program (NEP) in response to a large number of fatal or catastrophic incidents in the petroleum-refining industry.

Oil-related facilities also may be subject to security requirements. The federal Department of Homeland Security (DHS) implements and enforces the Maritime Transportation Security Act as well as the Chemical Facility Anti-Terrorism Standards (CFATS). In 2007, DHS issued the CFATS Interim Final Rule, which requires facilities that possess threshold quantities of specified 'chemicals of interest' to submit to an initial screening process for DHS to determine if they present a high level of security risk and, if so, to prepare and submit Security Vulnerability Assessments and Site Security Plans.

21 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?

Pursuant to the CAA, the federal EPA sets national standards regarding the composition of mobile source fuels and fuel additives. Individual states, however, may set state-specific standards in order to address local air quality issues. Thus, the required composition of fuel or fuel additives may vary from state to state (and from region to region within a state), and state requirements may be stricter than federal requirements. The composition of fuels and fuel additives must be approved by EPA or the applicable state agency. Some of these requirements are imposed on the refiner or importer of a fuel, but other requirements are imposed on the wholesale fuel distributor. Penalties of up to US\$37,500 per violation per day and injunctive relief may be imposed.

Labour

22 What government standards apply to oil industry labour? How is foreign labour regulated? Are there anti-discrimination requirements? What are the penalties for non-compliance?

Foreign labour

The Immigration Reform and Control Act (IRCA) of 1986, as amended by the Immigration Act of 1990, requires employers to assure that their employees are legally authorised to work in the

United States. Employers who hire non-residents must petition for a non-immigrant visa on behalf of the worker, such as the H-1B for new employees hired in specialty or professional occupations, the L-1 for employees of an affiliated foreign entity who intend to work for the US company as an executive, manager or a person with specialised knowledge, or the B-1 for short-term business visitors.

IRCA imposes sanctions on employers who employ foreign workers without proper authorisation to work in the US. Employers who impose citizenship requirements or give preferences to US citizens in hiring and employment opportunities may also violate IRCA.

Labour regulation

Most federal labour statutes require employers in the oil industry to comply with the same laws as other employers. Thus, employers in the oil industry must comply with the Fair Labor Standards Act (FLSA), the Family Medical Leave Act (FMLA), the National Labor Relations Act (NLRA), and the OSH Act. State and local laws supplement the protections provided to employees by the federal laws.

The FLSA requires employers to pay 'non-exempt' employees a federal minimum wage and overtime pay. Under the FLSA, employees of 'independently owned and controlled local enterprises engaged in the wholesale or bulk distribution of petroleum products' are subject to a different overtime requirement. However, the employer must fall within this narrow exception to avoid the FLSA's general overtime requirements for non-exempt employees. The FLSA is enforced by the Department of Labor.

The FMLA requires larger employers to provide up to 12 weeks of unpaid leave for eligible employees who have serious health conditions or who desire to care for dependants. An employee who exercises rights under the FMLA is protected from retaliation for taking leave, and is generally entitled to return to his or her former position after returning to work. The FMLA is also enforced by the Department of Labor.

The NLRA regulates labour and management relationships and is enforced by the National Labor Relations Board. Under the NLRA, employees have the right to form unions, engage in union organisation campaigns, bargain collectively, and to strike and take other concerted activity.

The OSH Act, discussed in detail in question 20, imposes requirements on employers to ensure their workplaces are free from hazards to worker safety and health.

Anti-discrimination laws

Federal, state and local laws prohibit discrimination in employment on the basis of race, colour, sex, religion, national origin, disability (mental or physical), pregnancy, age, Vietnam-era veteran status, sexual orientation or medical condition. The federal laws prohibiting employment discrimination are: title VII of the Civil Rights Act (Title VII), which prohibits employment discrimination based on race, colour, religion, sex or national origin; the Equal Pay Act, which protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination; the Age Discrimination in Employment Act, which protects individuals who are 40 years of age or older; title I and title V of the Americans with Disabilities Act, which prohibit employment discrimination against qualified individuals with disabilities in the private sector, and in state and local governments; the Rehabilitation Act, which prohibits discrimination against qualified individuals with disabilities working for the federal government; and the Civil Rights Act of 1991, which, inter alia, provides monetary damages in cases of intentional employment discrimination. These statutes are generally enforced by the Equal Employment Opportunity Commission.

The remedies in a discrimination claim depend on each statute, but generally include injunctions, reinstatement, compensatory damages including lost pay, and punitive or exemplary damages. Though some statutes limit the amount of damages an employee may recover (eg, Title VII, which caps damages at US\$300,000), employer liabil-

ity can be significant if an employee was highly compensated, the discrimination was particularly egregious, or reinstatement is proper.

Taxation

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

Exploration and production activities are subject to the generally applicable federal income tax regime, but special incentives such as deductions for intangible drilling costs, accelerated depreciation of drilling and production equipment, and depletion of mineral deposits are available (subject to possible limitation by the application of the alternative minimum tax). However, many of such incentives would be eliminated should President Obama's 2010 budget proposals for energy tax reform be enacted. Transportation, marketing and distribution activities are generally subject to the same rules applicable to other businesses. Tax consequences should be analysed to ensure optimal structures for acquisition, ownership and divestiture of leasehold and other mineral interests.

State income tax laws, where applicable, supplement these provisions and incentives. Most states also impose severance taxes on production.

Excise taxes are collected at the federal and state level 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, withholding requirements on distributions to certain foreign shareholders and partners, and transfer taxes on sales of real property.

The Internal Revenue Service is the principal tax authority at the federal level. The US Customs Service of the Department of the Treasury regulates customs duties, and state taxes are administered by a variety of state-level agencies.

Commodity price controls

- 24** 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?

There is no mandatory price-setting regime for crude oil or crude oil products in the US. Hawaii is the only state to enact a cap to regulate the price of gasoline; however, that statute was repealed in 2006. There are 30 states that have laws that prohibit price gouging, excessive price increases, or unconscionable pricing. Most of these states prohibit selling gasoline at excessive prices in anticipation of or during a declared emergency.

Competition, trade and merger control

- 25** 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?

The federal government and almost every state have competition laws that prohibit cartel conduct, agreements between competitors that unreasonably restrain trade, distribution agreements that reduce competition, price discrimination that may substantially lessen competition, and mergers and acquisitions that substantially lessen competition. At the federal level, the US Department of Justice (DoJ) and the Federal Trade Commission (FTC) enforce the federal antitrust laws. The FTC plays the central role in investigating and prosecuting civil antitrust violations and mergers in the energy industry, and the Justice Department has responsibility over criminal violations and plays a substantial role in the electric generation and transmission industry. The attorneys general of the several states also have the authority to enforce state antitrust laws or to enforce the federal antitrust laws.

Update and trends

With the global economic downturn and its effects stretching through 2009 and likely well beyond, the US oil market has been roiled by dramatic swings in crude oil and products prices. Uncertainty is compounded by the increasing role of renewable fuels, such as the rising ethanol mandates, and the potential impacts of climate change legislation on petroleum usage and transportation. Indeed, leaders of two oil majors have recently observed that US gasoline demand has likely peaked. These trends signal uncertainty for the oil transportation projects planned or underway in the US. Meanwhile, US regulatory focus on oil and product markets continues unabated. The FTC continues to scope out its new role in monitoring futures and transportation or distribution markets for manipulation.

Federal and state courts also play a significant role because US law gives persons injured as a result of US antitrust law violations a right to collect treble damages and seek injunctive relief. Private actions also exist under certain state laws.

Also, the FERC, the Commodities Futures Trading Commission and the FTC have the authority to investigate and prosecute market manipulation in the petrochemical industry. The FTC is in the process of promulgating new rules that will prohibit manipulative or deceptive conduct in connection with the wholesale purchase or sale of certain petroleum products, including crude oil, gasoline, and petroleum distillates.

- 26** 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 Hart-Scott-Rodino Antitrust Improvements Act 1976, as amended (HSR Act), requires parties to notify transactions of certain sizes to the FTC and DoJ and observe a 30-day waiting period. Covered transaction structures include mergers, acquisitions, joint ventures and the acquisition of controlling interests in unincorporated entities, such as partnerships and limited liability companies. Exemptions are available for certain transactions, for example, certain acquisitions of oil and gas reserves and coal reserves and certain acquisitions of foreign assets and voting securities.

The FTC or DoJ may use the full 30-day waiting period, terminate it early, or issue a request for additional information and documentary material (second request). If a second request is issued, the parties may not close their transaction until 30 days after both parties have submitted all the requested information to the relevant agency. At the end of this 30-day period, the FTC or DoJ can decide to take no action, challenge the transaction in court (the agency has no authority to stop a transaction) or accept a consent order. The duration of merger review in connection with a second request is highly fact specific and can range from weeks to more than one year.

The DoJ has a business review letter programme and the FTC has an advisory opinion process in which parties can seek to obtain the current enforcement intention of the agency with respect to certain business conduct. The process generally requires the submission of documents and market data and can take many weeks.

International

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

The US is not a signatory to the Law of the Sea treaty; however, the US has established offshore territorial zones and economic exclusion zones comparable to those under the treaty. See question 20 for environmental regulations related to various international conventions.

As a World Trade Organization (WTO) member, the US is generally required not to discriminate against products and services of any other member state or between products and services of different member states. These requirements are excepted for free trade agreements such as the North American Free Trade Agreement, which creates zero-duty regimes among Canada, the US and Mexico, including oil and refined products.

28 Are there special requirements or limitations on the acquisition of oil-related interests by foreign companies or individuals?

While there are no requirements or limits on the acquisition of oil-related interests by foreign companies or individuals, the president of the United States has the authority to review and ultimately prohibit or suspend any foreign merger, acquisition, or takeover that threatens to impair the national security of the US. The statute's reach is broad and allows for review of joint ventures and the acquisitions of minority interests. Transactions are reviewed for their impact on national security, including sensitive military and export controlled technologies (eg, seismic collection) and 'critical infrastructure', which includes energy assets.

The president exercises his authority through the Committee on Foreign Investment in the United States (CFIUS). CFIUS may initiate an investigation on its own accord or parties may submit a voluntary notice. If CFIUS 'clears' the transaction after a voluntary filing is made, the president cannot take any action against the transaction using this provision of law.

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

Imports

Yes, with respect to imports, compliance with the US Federal Trade Commission, the Consumer Product Safety Commission (if a consumer product), US Customs, the US Department of Transportation (if the product is a hazardous material), the US Department of Energy, and the federal Energy Regulatory Commission regulations and standards, as applicable, is required. Generally, import licences are no longer needed to import petroleum products into the US but in certain situations an import authorisation from the Department of Energy may be required.

Exports

The Department of Commerce currently imposes export controls on domestically produced crude oil. A license is required for the export of crude oil to all destinations, including Canada. Only in limited circumstances will the Department of Commerce approve applications to export crude oil, consistent with the regulations of the Bureau of Industry and Security, which may require a presidential finding before the export can be authorised.

Vinson & Elkins LLP

Charles Caldwell

ccaldwell@velaw.com

2500 First City Tower
1001 Fannin Street
Houston, Texas 77002-6760
United States

Tel: +1 713 758 2222
Fax: +1 713 758 2346
www.velaw.com